In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **TUPOUTOE MATAELE,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S138052

Orange County Superior Court Case No. 00NF1347
The Honorable James A. Stotler, Judge

RESPONDENT'S BRIEF

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANNIE FEATHERMAN FRASER
Deputy Attorney General
KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
State Bar No. 225152
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 525-4232
Fax: (619) 645-2271
Email: Kristen.Chenelia@doj.ca.gov
Attorneys for Plaintiff and Respondent

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STATEMENT OF THE CASE

On September 12, 2002, the Orange County District Attorney filed an information charging Appellant Tupoutoe "T-Strong" Mataele and codefendant Minh Nghia Lee in count 1, with the murder of Danell Johnson by means of lying in wait (Pen. Code, §§ 187, subd. (a) & 190.2, subd. (a)(15)), in count 2, with conspiracy to commit murder (Pen. Code, §§ 182, subd. (1) & 187, subd. (a)), and in count 3, with the willful, deliberate and premeditated attempted murder of John Masubayashi (Pen. Code, §§ 664/187, subd. (a) & 664, subd. (a)). It was further alleged that Appellant Mataele was personally armed with a firearm in the commission of all three counts (Pen. Code, §12022.5, subd. (a)), had a prior strike conviction (Pen. Code, §§ 667, subds. (d) & (e)(1), & 1170, subds. (b) & (c)(1)), and a prior serious felony conviction (Pen. Code, §§ 667, subd. (a)(1) & 1192.7, subd. (c)). It was also alleged that codefendant Lee was armed with a firearm in the commission of all three counts (Pen. Code, § 12022, subd. (a)(1)). (1 CT 19-23.)

Appellant Mataele and codefendant Lee were jointly tried. (4 CT 934.) On August 3, 2005, the jury found Appellant Mataele and codefendant Lee guilty on all counts as charged, and found the special circumstance and enhancement allegations were true. (5 CT 1379-1386.) The trial court subsequently found Appellant Mataele's prior allegations true. (6 CT 1443.)

After the presentation of penalty phase witnesses, on September 12, 2005, the jury returned a verdict of death. (6 CT 1480, 1483.) The trial court sentenced Mataele to death for the murder of Danell Johnson (count 1), stayed sentence on conspiracy to commit murder (count 2), and imposed an additional sentence of life imprisonment plus nine years for the attempted murder of Masubayashi (count 3), the gun enhancements and prior convictions. (7 RT 1705.)

STATEMENT OF FACTS

A. Prosecution Case-In-Chief

Mataele and codefendants James Chung, Minh Lee and Ryan Carrillo decided to kill John Masubayashi and Danell Johnson after there was a falling out over bank fraud activity. Lee, Chung, Mataele and Carrillo drove to the apartment complex in Anaheim where Masubayashi and Johnson were staying. Mataele and Carrillo went upstairs to the apartment and lured Masubayashi and Johnson out of the apartment and to Masubayashi's car under the pretense of going out to a bar or to shoot pool. Mataele then directed Masubayashi to drive to the car where Chung and Lee were hiding. Mataele got out of the backseat of Masubayashi's car and shot Johnson in the head, killing him. Mataele then shot Masubayashi in the chest and continued to fire at him. Masubayashi ran and collapsed in the street, but survived.

1. Illegal Activities

Beginning in the spring of 1997, Peter Song ("Peter") managed a crew of guys involved in identity theft and bank fraud out of Takahisa Suzuki's apartment in Anaheim. (14 RT 3483, 3514, 3540-3541; 15 RT 3604; 17 RT 3992-3393.) Peter was the brains behind the operation and paid individuals for use of their identities or bank accounts to process fraudulent checks. (14 RT 3540-3542; 15 RT 3591, 3604; 17 RT 4003, 4007-4012.) David Song ("David," Peter's brother), John Masubayashi[1], Ryan Carrillo[2],

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[1] At the time of trial, John Masubayashi, the surviving victim, was living in Japan and had an outstanding warrant for his arrest concerning charges unrelated to this case. (15 RT 3582-3586.) Masubayashi returned to the United States and testified under subpoena with immunity from arrest or process under Penal Code section 1334.4. (15 RT 3587.)

[2] Ryan Carrillo was initially charged as a codefendant in this case. He pled guilty to the reduced charges of voluntary manslaughter and

(continued...)

James Chung[3] and Tweeney Mataele ("Baby," Mataele's brother), were also living in Suzuki's apartment and involved in the fraudulent activity. (15 RT 3589-3590, 3592-3594.)

After living at Suzuki's apartment for about three months, Peter, Masubayashi, Chung, Carrillo and Baby moved into an apartment on Kingsley Street in Los Angeles, referred to as the "Penthouse." (15 RT 3595-3597.) Around October 1997, Danell Johnson and Mataele also moved in. (13 RT 3303; 15 RT 3597, 3600.) Minh Lee[4], a good friend of Chung's, lived a few blocks away, was also involved in the fraud, and spent time at the Penthouse. (15 RT 3603; 21 RT 4951, 4957.) The group continued the bank fraud, and also began purchasing methamphetamine, which they cooked into a more potent substance called "glass," and then sold. (15 RT 3605; 17 RT 4017, 4019-4021.)

Although the entire group lived and worked together, there were cliques among them. For instance, Baby, Carrillo, and Chung were all members of the Pinoy Real criminal street gang. (13 RT 3194; 15 RT 3600.) Mataele was a member of the Sons of Samoa gang, but spent most of his time with Pinoy Real gang members, and the group trusted Mataele with their gang-related activity. (21 RT 4950; 23 RT 5356.) Lee was Chung's closest friend, but a member of the Asian Mob Assassins (AMA)

(...continued)
attempted murder and received a six-year prison sentence in exchange for his testimony. (21 RT 2942; 22 RT 5011-5012.)

[3] James Chung was charged separately from the other defendants and tried alone. A jury found Chung guilty of first degree murder with a special circumstance, conspiracy to commit murder, and attempted murder. He was sentenced to life in prison without the possibility of parole. (21 RT 4824.) His conviction was affirmed in case number G031964.

[4] Minh Lee was tried with Mataele, convicted, and sentenced to life in prison without the possibility of parole. His conviction was affirmed in case number G036136.

criminal street gang. (2 CT 384; 15 RT 3602; 21 RT 4951; 23 RT 5353.) On the other hand, Masubayashi and Johnson were close friends and members of the Tiny Rascals Gang (TRG) criminal street gang. (15 RT 3588, 3599; 17 RT 3968; 22 RT 5117.)

2. Masubayashi and Chung Have a Falling Out

Over time, tension mounted between Masubayashi and Chung. (15 RT 3606.) Chung, a parolee, was almost caught committing fraud at a bank and blamed Masubayashi. (15 RT 3606-3607; 17 RT 4023-4027.) Back at the Penthouse, Chung threatened Masubayashi with a knife and told him that he had jeopardized his freedom, and to watch his back. (15 RT 3608-3609; 17 RT 4028-4029; 22 RT 5154.)

Meanwhile, Chung's mother had a white Jeep Cherokee that Chung let others drive. (15 RT 3953, 3609; 21 RT 4952.) On September 29, 1997, Johnson was pulled over in the Jeep and issued a speeding ticket. (15 RT 3611; 20 RT 4776-4779.) Johnson gave the officer identification belonging to Gerald Allen, whose identity Johnson used for fraudulent bank activity. (15 RT 3612; 20 RT 4777.) Neither Johnson nor Allen paid for the ticket, and since the Jeep was registered to Chung's mother, officers went to Chung's mother's home. Chung was there and they questioned him. (15 RT 3611.) Chung was angry at both Masubayashi and Johnson and called them "snitches." (15 RT 3614; 22 RT 5154.)

Masubayashi testified the atmosphere at the Penthouse was getting out of control with the methamphetamine use. (15 RT 3615.) Chung was "losing it," and taking too many unnecessary risks, such as bringing too many people back to the apartment, including women he would pick up at clubs. (15 RT 3615; 17 RT 4022.) Carrillo testified Chung wanted Masubayashi out of the Penthouse so he could be second in command to Peter in their financial crime ring. Chung was also angry at Masubayashi for not making more money off of the bank fraud because they were having

trouble paying bills such as the rent. (21 RT 4954; 22 RT 5135, 5137-5138.) Masubayashi moved out of the Penthouse and back into Suzuki's apartment. (15 RT 3616; 17 RT 4030, 4064; 21 RT 4955.) In late October 1997, Johnson joined Masubayashi and moved into Suzuki's apartment. (15 RT 3616; 21 RT 4955.) The two of them continued the bank fraud but stopped using methamphetamine. (17 RT 4067, 4069.)

3. Chung, Mataele, Lee and Carrillo Decide to Kill Masubayashi and Johnson

Carrillo testified that on November 11, 1997, about 8:00 p.m., Chung, Mataele, Carrillo, and Lee were in a bedroom at the Penthouse. (21 RT 4959-4960, 4964.) Chung complained about Masubayashi and Johnson, and the fact that Carrillo still talked to them. (21 RT 4959-4960.) Mataele said, "We're going to go handle them." He volunteered to kill them, saying, "Let's go smoke those mother-fuckers." (21 RT 4960-4961.) Mataele, Chung, Carrillo and Lee all agreed to do it. (21 RT 4963.)

About a month earlier, Masubayashi and Carrillo had driven Baby to purchase a gun for $300. (15 RT 3625; 22 RT 5109-5114.) Thereafter, Mataele carried the black .357 magnum revolver[5] with a brown handle in his waistband or in a holster all the time. (15 RT 3624-3627; 21 RT 4961-4962.)

After deciding to kill Masubayashi and Johnson, Mataele made a phone call and Lee drove the four of them in the Jeep to Allan Quiambao's house. (13 RT 3154; 21 RT 4966.) Quiambao, a fellow Pinoy Real gang member, lived in Norwalk, and grew up down the street from Mataele and

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[5] Carrillo testified the gun was a Smith and Wesson. (22 RT 5114) Laurie Crutchfield with the Orange County crime lab collected the bullet from Johnson and opined it was likely fired from a .38 Special or .357 magnum revolver or handgun, but not a Smith and Wesson. (20 RT 4789-4790, 4795-4796.)

Baby. (13 RT 3144-3145, 3191.) Quiambao spoke with Chung, Lee, Carrillo and Mataele, and they said they were headed to Anaheim to "do those two guys," meaning kill Masubayashi and Johnson.[6] (13 RT 3151-3154, 3159, 3177, 3242; 21 RT 4969.) They stayed for about 15 to 30 minutes and continued on their way to Anaheim. (13 RT 3177; 21 RT 4970.) Carrillo testified that during the car ride Mataele said he was going to kill Masubayashi and Johnson, but did not provide details. (21 RT 4975; 23 RT 5377.)

At about 11:10 p.m., Officer Joseph Corey stopped the Jeep as it proceeded southbound on Interstate 5. Officer Corey issued Carrillo a citation for tossing a cigarette butt out of the window. (20 RT 4802, 4804, 4806; 21 RT 4973.) Mataele hid his gun in the seat crack when they were pulled over. (21 RT 4972, 4976.)

4. Mataele Kills Johnson and Shoots Masubayashi

Lee parked the Jeep in the Red Lobster parking lot, near Suzuki's apartment complex. (21 RT 4974.) They sat in the Jeep for a few minutes and then it was decided that Carrillo and Mataele would go to the apartment because they were still on good terms with Masubayashi and Johnson. (21 RT 4977.) Mataele and Carrillo walked to the gated entrance of the

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[6] Quiambao's name was disclosed by Carrillo to the prosecution during Chung's criminal proceedings. (16 RT 3767.) In 2001, Quiambao had joined the Navy. (13 RT 3142.) Quiambao was interviewed by the prosecution in Norfolk, Virginia on January 6, 2003, the day before leaving for deployment to Kuwait. His interview was played for the jury as both prior inconsistent statements and prior consistent statements. (4 CT 1115; 13 RT 3156-3157; 18 RT 4328; 24 RT 5543.) At trial Quiambao testified that his statement to the prosecution in January 2003 was a mistake, and in fact, Lee, Chung, Mataele and Carrillo said they were going bowling or to shoot pool. (13 RT 3159-3160, 3172-3176.) Quiambao also testified that Chung said they were going to talk to Johnson about the traffic ticket, and Carrillo had made the statement about killing Masubayashi and Johnson a few weeks earlier. (13 RT 3281-3282, 3288.)

apartment complex and called Suzuki' apartment, but no one answered. (21 RT 4979, 4981.) They reached Johnson on a cellular phone; he was returning from the grocery store with his girlfriend, Sia Her (aka "Molly"). (14 RT 3481; 17 RT 4017; 21 RT 4981.) Johnson was driving Masubayashi's car and parked it across the street from Suzuki's apartment. (14 RT 3501-3502; 15 RT 3618.) Mataele and Carrillo met Johnson and Molly outside of the apartment complex and accompanied them to Suzuki's apartment. (14 RT 3488, 3490; 21 RT 4981.)

When they arrived at the apartment, Masubayashi and his girlfriend, Alexis Huliganga, were asleep on the floor. (13 RT 3325; 14 RT 3491-3492; 21 RT 4981.) When Masubayashi woke up, Mataele and Carrillo were sitting on the couch. (15 RT 3620.) Masubayashi had spoken with Baby earlier that day about going out that night, and was surprised that Mataele and Carrillo showed up without Baby. (15 RT 3619.) Masubayashi, Johnson, Mataele and Carrillo agreed to go to a strip club or to shoot pool. (14 RT 3491-3492; 15 RT 3620-3621; 21 RT 4983.)

The four of them left the apartment and were walking towards Masubayashi's car that was parked in a lot across the street when a patrol car drove by. (14 RT 3492; 15 RT 3618, 3622-3623; 21 RT 4984-4985.) Mataele pulled the gun out of his waistband and stashed it beneath a parked car. (15 RT 3623-3624.) Mataele returned to the apartment with Carrillo, while Masubayashi and Johnson continued walking to Masubayashi's car.[7] (14 RT 3493; 15 RT 3628.)

Molly walked out of the apartment bathroom and saw Carrillo and Mataele sitting on the couch. (14 RT 3493.) She asked them what they

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[7] Carrillo did not recall going back to the apartment, but said when they saw the patrol car, Mataele stashed his gun and they both ducked behind a car. (21 RT 4986; 23 RT 5226.)

were doing back at the apartment and Mataele said the police were outside and he was "strapped," meaning he had a gun. (14 RT 3494-3495.)

Anaheim Police Investigator Dave Heinzel was in a patrol car with reserve Officer Terrance Bowers just before midnight when they came across Johnson and Masubayashi near Masubayashi's car and briefly spoke with Johnson. (14 RT 3489; 15 RT 3627-3628; 16 RT 3842-3846, 3850, 3859-3863; 17 RT 4092.) After speaking with the officers, Masubayashi drove his car to the front of the apartment complex and Johnson went upstairs to get Carrillo and Mataele. (14 RT 3496; 15 RT 3629-3630; 17 RT 4093.) On the way to Masubayashi's car, Mataele grabbed his gun and placed it in his waistband. (21 RT 4986.) Johnson let Carrillo into the backseat of the small two-door coupe (Nissan 300SX) first so Carrillo was seated behind Masubayashi. Mataele got in next and was seated behind Johnson who was in the front passenger seat. (15 RT 3618, 3630-3631.)

Mataele and Carrillo directed Masubayashi to where they knew the Jeep was parked, and where Lee and Chung were hiding. (15 RT 3631-3633; 22 RT 5018-5020.) Carrillo testified that Mataele said he needed to get something out of the Jeep, and, when they arrived, asked to get out of the car for a minute. (22 RT 5019-5020.) Johnson let Mataele out of the backseat of the car and Carrillo tried to follow, but Mataele told Carrillo to stay in the car.[8] (22 RT 5021.) Masubayashi opened his car door with the intent of checking to see if some of his CDs were in the Jeep. (15 RT 3636-3637.) Mataele shook Johnson's hand and said, "All right, then, nigger." (22 RT 5022-5023.) Mataele pulled the gun out of his waistband and shot Johnson in the head. (15 RT 3636; 22 RT 5022.) Masubayashi looked to

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[8] Masubayashi recalled that Mataele and Carrillo both got out of the back seat. Carrillo walked to the rear of the car and Mataele remained near the passenger side door. (15 RT 3634-3635.)

his right and saw Johnson's head bobbing. Mataele then leaned into the car and shot Masubayashi in the chest. (15 RT 3637-3638; 22 RT 5024.) After being shot, Masubayashi ran through the parking lot towards the Jack-in-the Box and Mataele fired three more rounds at Masubayashi. (13 RT 3639-3640; 20 RT 4672-4673, 4683; 22 RT 5028.)

Jose Rodriguez, an employee at the Gateway Urgent Care Clinic, was seated on a bench smoking a cigarette with two fellow employees, John Fowler and Matt Towne, when they heard what sounded like a car backfiring. (20 RT 4669-4671, 4700-4701.) Rodriguez took a few steps and looked around a brick wall. (20 RT 4673.) Rodriquez saw from about 50 feet away the profile of a heavyset to medium-build black male, age 25, about six feet tall, wearing dark pants and a dark top walking towards the Jack-In-The-Box and firing a gun. (20 RT 4669-4687, 4691, 4695, 4698.)[9]

John Fowler also looked around the wall and saw a shadow walking across the parking lot and firing a gun. (20 RT 4702-4703.) He said the Red Lobster parking lot was dimly lit with most light posts either behind or to the rear of where the shooter was walking. (20 RT 4707.) Fowler described the shooter to an officer as being five feet ten inches, thin, and possibly wearing a beanie. (20 RT 4701-4703, 4706, 4734, 4739.)

Carrillo was still inside the small car in close proximity to Johnson and Masubayashi when they were shot. After Mataele shot them, he let

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[9] Mataele is of Tongan descent, has a fair-black complexion and black hair, five feet 11 inches tall, and weighed about 300 pounds. (7 CT 1728; 28 RT 6301-6302.) Masubayashi and Molly testified Mataele was wearing dark jeans and a plaid flannel shirt that was either green and black, or blue and gray. (14 RT 3498; 15 RT 3620.) Carrillo recalled Mataele was wearing a black t-shirt, a beige vest, and beige pants. (22 RT 5016.) Carrillo is five feet nine inches tall, weighed about 150 pounds, and was wearing a white sport's jersey and possibly a black beanie. (15 RT 3620; 22 RT 5015; 23 RT 5218-5219; 28 RT 6302.)

Carrillo out of the backseat of the car. (22 RT 5025.) Mataele and Carrillo got into the backseat of the Jeep. (15 RT 3642; 22 RT 5026-5028.) Lee was worried that Masubayashi saw them so he sped after Masubayashi and said, "I'm going to run his ass over." (22 RT 5029; 23 RT 5383.) Masubayashi ran across North Euclid Street and hid behind a telephone pole. (15 RT 3641-3642, 3644; 19 RT 4519, 4576, 4601-4602; 22 RT 5032.) Lee drove the Jeep over the center divider of Euclid and sped towards Masubayashi, stopping right before he hit the pole. (15 RT 3645-3646; 19 RT 4545, 4547, 4568, 4576-4577, 4602, 4621; 22 RT 5030.) Masubayashi ran around the driver's side of the Jeep towards Norm's restaurant on the other side of Euclid, but his feet gave way and he collapsed in the middle of the street. (15 RT 3646-3648; 19 RT 4625; 22 RT 5034.) Mataele said to let him out of the car so he could finish off Masubayashi and got out of the Jeep. (22 RT 5033-5035.)

A private security guard driving by saw Masubayashi lying in the street and stopped to help him. (18 RT 4412; 19 RT 4562-4563.) Mataele abandoned his efforts and fled the scene on foot and arrived at Quiambao's house a few hours later. On the way there, Mataele discarded the gun. (13 RT 3185, 3188; 22 RT 5042-5043.)

Lee, Chung, and Carrillo left the scene in the Jeep and drove to Quiambao's house where they dropped off Carrillo. On the way there, Lee and Chung concocted their alibi that they were with each other in Los Angeles while Mataele and Carrillo had borrowed the Jeep.[10] (22 RT 5038; 23 RT 5382.)

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[10] When interviewed the next day, both Lee and Chung told officers they were with each other in Los Angeles and never drove the Jeep after 10:00 p.m. (4 CT 1074-1075, 1078-1080; 23 RT 5320.)

Quiambao described Carrillo as scared, paranoid, frantic, and upset. (13 RT 3179, 3181.) Carrillo was praying, and kept saying over and over, "Oh my gosh" and "They shot him." (13 RT 3181-3183.) Quiambao asked Carrillo who shot them and Carrillo said "T-Strong."[11] (13 RT 3184.) Quiambao gave Carrillo a change of socks because Carrillo had blood on his. (13 RT 3293-3295, 3303; 22 RT 5040; 23 RT 5260.) Quiambao asked Mataele several times, "Why did you shoot them?" Mataele said nothing. (13 RT 3186.) Mataele stayed at Quiambao' house for an hour or so and then went to his home, about a block away. (4 CT 1138.) Peter picked up Carrillo in the Jeep. (13 RT 3306; 14 RT 3423-3424, 3427.)

Officer Bruce Linn of the Anaheim Police Department arrived at the scene at 12:25 p.m., and found Masubayashi lying on his back in the middle of Euclid Street. (16 RT 3829-3830, 3837.) Officer Linn asked Masubayashi who shot him. (19 RT 4484.) He replied, "Patch me up and I'll tell you." (19 RT 4485.) Masubayashi told Officer Linn at the hospital that Mataele shot him and Johnson. (19 RT 4487-4489.) Johnson was killed by a bullet entering the right side of his neck that was fired from about six to nine inches away. (19 RT 4632, 4634, 4640.) At the time of trial, Masubayashi still had a bullet lodged in his left armpit. (15 RT 3651.)

Later that day, Carrillo joined Mataele in Hollywood where they bought fake identifications and used them to travel to Salt Lake City with Baby. (22 RT 5043, 5046; 23 RT 5262-5263.) They stayed in Salt Lake City with Mataele and Baby's relatives for about six months. (22 RT 5046-5047.) There, they lived off of Carrillo's monthly income he received from an annuity ($1200), and $20,000 he had in the bank. (22 RT 5045, 5048.) Carrillo returned to Los Angeles in 1998 with Baby. (22 RT 5049-5050.)

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[11] "T-Strong" was Mataele's given name and is on his birth certificate. (31 RT 6993.)

5. Masubayashi Meets Glenda Perdon and the Investigation Resumes

The crime investigation had stalled until late 1999 or early 2000, when Masubayashi began dating Glenda Perdon (Glenda Bloemhof at trial). (14 RT 3466, 3469; 15 RT 3690.) Masubayashi discovered Perdon used to associate with members of the Pinoy Real gang. (15 RT 3691.) She said she had been good friends with Baby since 1997 and would "party" at Quiambao's house. (14 RT 3466-3467, 3477.) Perdon said she saw Mataele there a couple of times. (14 RT 3467.) Also, Perdon had dated Clarito Mina ("Mina," aka "Snoop"), another Pinoy Real gang member that looked similar to Lee. (15 RT 3691, 3695.)

In April 2000, Masubayashi saw Mataele for the first time since the shooting in the parking lot of the Ramona Hotel on Pioneer Boulevard in Cerritos. (15 RT 3691.) Masubayashi told Perdon he saw Mataele and wanted to go to the police. (15 RT 3692.) Perdon then told Masubayashi that she was at a barbeque at Mataele's house sometime after the shooting. (15 RT 3724, 3737-3739.) Mataele was bragging about killing Johnson and said, "I came in my pants when I saw that nigger flop after I shot him." (15 RT 3697, 3737.) Perdon also told Masubayashi about statements Mina had made to her. Based on statements made by Mina to Perdon, Masubayashi temporarily questioned his identification to police of Lee as the driver. (18 RT 4263, 4265-4266, 4311, 4343-4345.)

Perdon accompanied Masubayashi to the Anaheim police station to provide information on the case. Masubayashi told Detective Timothy Schmidt about seeing Mataele and that it was possible Mina was driving the Jeep. (15 RT 3697-3698, 3741; 18 RT 4265-4266.) At trial, Masubayashi said there was no doubt in his mind that Lee was driving the Jeep. (18 RT 4418.)

Mataele was arrested on an outstanding warrant on May 22, 2000. (30 RT 6813.) When Detective Charles Sullivan contacted Mataele, Mataele identified himself as "Don DeMarco." (30 RT 6797.) Chung and Lee were also arrested shortly thereafter. Carrillo was arrested in October 2001, while visiting his wife in custody. (22 RT 5008, 5183.)

6. Gang Expert Testimony

Investigator Alfonso Valdez testified as an expert on criminal street gangs to discuss general gang principles and answer a series of hypothetical questions. (24 RT 5490.) He explained that Asian gangs were generally fluid and financially motivated. (24 RT 5494.) Individuals commonly joined gangs by getting "jumped-in," "crimed-in," or "walked in." (24 RT 5495.) Respect earned by committing violent crimes and creating fear in the community is important to the gang and each individual gang member. (24 RT 5501.) Gang members have a tendency to brag about their crimes and will earn more respect when they volunteer for a criminal act. (24 RT 5501-5502.) Investigator Valdez was of the opinion that a hypothetical shooting mirroring the facts of this case could be consistent with an individual "criming-in." (24 RT 5507.)

B. Lee Defense

Lee argued in his defense that he was not driving the Jeep, but rather it was another Pinoy Real gang member named Clarita Mina, who goes by "Snoop," and looks similar to Lee. Lee read into the record a portion of his interview[12] taken the day after the shooting. Lee told Detective Reneau that he saw Carrillo and Mataele at the Penthouse about 8:00 p.m. the previous

[12] The prosecution presented a redacted version of Lee's interview in its case-in-chief in light of codefendant Mataele's objections on grounds of hearsay and the right to confrontation. (24 RT 5468-5472.) Following Mataele's testimony, Mataele withdrew his objections and Lee presented the unredacted portion of his interview. (31 RT 7031.)

night. At that time Lee drove them in the Jeep to get cigarettes from a nearby 7-Eleven. (31 RT 7059-7060.)

Mataele testified on Lee's behalf, and said Lee was at the Penthouse playing video games, and he continued when they returned to the Penthouse after going to 7-Eleven at 8:00 p.m. to buy cigarettes. (31 RT 6939-6940.) When Mataele, Chung and Carrillo left for Quiambao's house, Lee stayed at the Penthouse. (31 RT 6944.) After stopping at Quiambao's house, Chung, Mataele and Carrillo drove to Mina's house, picked up Mina, and then drove to Suzuki's apartment in Anaheim. (31 RT 6951.)

Perdon was called to testify in Lee's defense and clarified portions of her previous testimony relating to Mina. Perdon explained she met Mina in 1996 and remained friends with him. (25 RT 5587-5588, 5595-5596.) She then met Masubayashi in 1998 or 1999 and they dated for about a year and a half. (25 RT 5593.) A few months into their relationship, Perdon and Masubayashi were at a party at the Comfort Inn off of Normandie and the 405 freeway and Mina showed up. (25 RT 5610, 5625, 5627.) Mina seemed really nervous and left. (25 RT 5600, 5603.) After he left, Mina repeatedly paged Perdon. (25 RT 5603.) Perdon spoke with Mina, who expressed concern that she was hanging out with Masubayashi. (25 RT 5604.) Mina told her that Masubayashi was "the guy we shot up." (25 RT 5608.) When Perdon asked Mina who shot Masubayashi, he said, "No, I can't tell you everything." (25 RT 5609.) Perdon assumed that when Mina said "we" he was referring to Pinoy Real and that he was there, but Mina did not specifically say this. (25 RT 5612, 5628-5629.) Perdon told Masubayashi about Mina's statements as soon as she had a chance to talk to him. (25 RT 5635.)

A few weeks after seeing Mina, Perdon was at Quiambao's house. Quiambao, Mataele and Carrillo were also there. (25 RT 5631, 5665.) Perdon said she spoke to Mataele and Carrillo about the fact she was dating

Masubayashi. (25 RT 5631-5632.) Perdon testified she did not know if Mataele ever used the word "nigger" in connection with Johnson during their conversations. (25 RT 5680, 5687-5688.) She did not remember Mataele saying to her, "I came in my pants when I saw that nigger flop." (25 RT 5681-5682.)

In April 2000, Masubayashi saw Mataele and wanted to tell the police of his whereabouts. (25 RT 5622-5623.) Perdon drove Masubayashi to the police station and relayed her conversation with Mina. (25 RT 5622-5623.) Perdon said she was using methamphetamine daily during this time for about two years. (25 RT 5613-5614.)

C. Mataele Defense

Mataele's defense was that Carrillo was the shooter based on eyewitness testimony, that Carrillo told individuals he was the shooter, and that Carrillo's testimony was incredible. Mataele presented the testimony of two police officers that took statements of eyewitnesses that differed from their trial testimony. (25 RT 5715-5719; 26 RT 5839-5842.) John Fowler testified the shooter did not approach the size of Mataele. (28 RT 6277-6278.)

In November 1997, Mataele and Carrillo showed up unexpectedly at Shawn Monroe's home in Hollywood and Carrillo asked Monroe if he knew someone that could get them false identification cards. (27 RT 6181-6183.) Monroe asked Carrillo why they needed fake identifications, and Carrillo said "he just shot some fools out in Orange County and he needs to leave town." (27 RT 6183-6184.) Monroe told Carrillo he did not want to know any more about it and Mataele told Carrillo to stop talking about it. (27 RT 6184.) It was Monroe's understanding that Carrillo did the shooting. (27 RT 6184.)

Quiambao testified that he was close friends with Mina, Mataele, and Carrillo and only knew Lee casually. (28 RT 6362.) He knew Mina based

on his connection with the Pinoy Real gang, but had not seen Mina since 1999 and would not lie to protect him. (28 RT 6366, 6382.) However, being a gang member includes a certain loyalty to other members within the gang and means not "ratting" on other gang members. (28 RT 6367.) In March 2001, Quiambao visited Carrillo at a hotel and Carrillo told him that he committed the shooting. (28 RT 6347-6348, 6356.)

Mataele presented testimony that when interviewed on April 7, 2000, Perdon did not tell investigators that Mataele made the statement, "I came in my pants when I saw that nigger flop." (27 RT 6097, 6099.) Mataele also presented testimony that when interviewed, Masubayashi described the gun as a black .357 revolver and the shooter's arm as dark skinned, and recognized the shirt sleeve as the flannel Mataele was wearing. (27 RT 6109-6110.) Masubayashi also told Sergeant Schmidt that a third Pinoy Real gang member named "Snoop" was driving the Jeep. (27 RT 6116-6117.) In a second interview, Masubayashi said he was not sure who the driver was because Lee and Mina looked alike. (27 RT 6124-6126.)

It was stipulated that when interviewed by District Attorney Investigator Ron Frazier on November 14, 2001, at the Orange County Jail, Carrillo said when the Jeep was chasing Masubayashi, Mataele reloaded the gun and took one or two more shots at Masubayashi out the window. Carrillo thought one of the rounds hit a metal pole because he heard a "bing," and then Masubayashi ran across the street to the center divider. (25 RT 5698-5699.)

Mataele presented testimony there was no ballistic evidence in the area of Euclid Street where the metal pole was located. (25 RT 5743.) Carrillo testified the gun was a Smith and Wesson. Mataele recalled Laurie Crutchfield with the Orange County crime lab to clarify that unless the firearm had been modified, a .357 Smith and Wesson revolver did not fire the projectile recovered from Johnson's body. (26 RT 5832-5833.)

Forensic scientist Steven Galuzian analyzed gunshot residue kits taken from Johnson and Masubayashi's hands and found three gunshot residue particles on Johnson's left hand, and one gunshot residue particle on Masubayashi's left hand. (26 RT 5817-5818.) He also explained that gunshot residue kits are only conducted on the hands, and he would expect particles to be present on victims shot at close range. (26 RT 5825-5826.)

Jean Huang, a correctional nurse, said Carrillo told her on February 28, 2002, that he did methamphetamine and drank two 40-ounce bottles of beer every day since he was age 15. (25 RT 5701-5705.) Forensic Toxicologist Darrell Clardy testified as an expert on the various effects of alcohol and sleep deprivation on a person. (28 RT 6246-6251.) Based on Carrillo's account[13] of using methamphetamine the day before, being awake for 36 hours, and drinking a 40-ounce alcoholic beverage on an empty stomach between 7:00 and 8:00 p.m., Clardy opined in a hypothetical the individual would have on average a 0.16 blood alcohol content. Adding the combined effect of fatigue and alcohol consumption, the individual would be expected to experience a level of mental impairment equal to 0.30 blood alcohol content. (28 RT 6253-6254.) At this level, Clardy would expect one to be disoriented, confused, and susceptible to misinterpreting what was going on. (28 RT 6254-6255.)

Mataele's cousins testified to his general whereabouts the months before and after the shooting. Fatulisi Mataele testified that Mataele came to San Mateo in July 1997 for his cousin's funeral, and stayed there until sometime in October 1997. (28 RT 6337-6338, 6344.) Maile Mounga, another cousin, said Mataele, Baby and Carrillo arrived in Salt Lake City in

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[13] Carrillo testified he smoked methamphetamine on November 10th, but not on November 11, 1997. On November 11th, around 7:30 p.m., he drank a 40-ounce bottle of Old English beer. (21 RT 4966-4967.)

November 1997, moved in with him and his family a few weeks later, and remained about six months. (28 RT 6298-6300, 6325.) Carrillo and Baby left together, and then Mataele left about two weeks later. (28 RT 6309-6310.) Mounga said Mataele seemed happy when he was there. (28 RT 6331.)

Mataele testified that he returned to Los Angeles from San Francisco on October 15, 1997. (30 RT 6676-6679.) He stayed with his parents in Norwalk for about a week. (30 RT 6679.) At the end of October, Mataele began spending time at the Penthouse and then moved in. (30 RT 6680-6682.) Mataele was aware of the fraudulent activities and methamphetamine sales taking place, but was not involved beyond smoking methamphetamine. (30 RT 6681-6682.) He had heard about an incident between Chung and Masubayashi, but personally had no problems with either of them. (30 RT 6684.)

On November 11, 1997, Mataele was on a date from noon until 6:30 p.m., and then he returned to the Penthouse. (30 RT 6694.) Baby and Carrillo had made plans to go out with Masubayashi and Johnson, and Mataele was planning on joining them. (30 RT 6697.) Mataele smoked methamphetamine with Carrillo. (30 RT 6697.) Mataele, Carrillo, Lee and Chung drove the Jeep to a 7-Eleven to get cigarettes. (30 RT 6803-6804.) Then they went back to the Penthouse; Lee was driving the whole time. (30 RT 6804, 6809.) There, they smoked more methamphetamine. (30 RT 6814.)

Carrillo, Mataele and Chung went to Norwalk in search of Baby. (30 RT 6700.) Carrillo brought the gun—a .357 with a black barrel and blue grips—and put it in the center console. (30 RT 6821.)

When they got to Norwalk, they stopped outside of Quiambao's house. (30 RT 6702.) Carrillo and Quiambao went inside the house. (30 RT 6702-6703.) They returned and were talking about what they were

going to do. (30 RT 6703.) Carrillo mentioned going out with Masubayashi and Johnson. (30 RT 6703.)

Mataele first said it was only himself, Chung and Carrillo in the Jeep, but later said they picked up Mina and Mina drove the Jeep to Suzuki's apartment in Anaheim. (30 RT 6708, 6818-6819, 6849, 6864.) Chung said he was going to stay in the car; Carrillo and Mataele got out of the car. (30 RT 6709.) Chung gave Mataele the gun as Mataele was getting out because Chung was on parole and did not want it in the car with him. (30 RT 6716, 6833.) Mataele took it, even though he was on parole, because he did not expect to see the police. (30 RT 6833-6834.) Mataele followed Carrillo to the apartment complex, ran into Johnson and Molly carrying groceries, and they all went to the apartment. (30 RT 6709-6710.) Mataele woke up Masubayashi who was asleep on the floor with his girlfriend, and asked if they were going out. (30 RT 6710-6712.) Mataele told Masubayashi that Chung was waiting in the car. (30 RT 6837-6838.) Masubayashi said first they needed to go to "Charlie's" to pick up some methamphetamine. (30 RT 6712-6713.)

Johnson was walking ahead of Masubayashi, Mataele and Carrillo as they were leaving the apartment complex, and a police officer pulled up. (30 RT 6714-6715.) Mataele had a gun in his waistband that he threw under the tire well of a car. (30 RT 6715.) Masubayashi and Johnson kept walking, but Mataele and Carrillo returned to the apartment. (30 RT 6717.) Molly walked out of the bathroom and asked what they were doing there. Mataele said, "The cops are out there. I had a gun." (30 RT 6718.) Johnson returned to the apartment and Mataele and Carrillo left with him. (30 RT 6720.)

As Johnson, Carrillo and Mataele walked towards Masubayashi's car, Mataele told Carrillo to grab the gun, which he did. (30 RT 6721.) Johnson, Carrillo and Mataele got into Masubayashi's car and Masubayashi

drove them to the Jeep to get Chung. (30 RT 6722.) Masubayashi parked next to the Jeep, and Johnson let Mataele out of the car. (30 RT 6724.) Mataele saw Chung with his seat reclined talking on the phone, and he flipped him off as a friendly gesture. (30 RT 6725.) Mataele heard two shots, turned around and saw Carrillo's arm in Masubayashi's car. (30 RT 6725-6726.) He pushed Carrillo up against the car and yelled at him, "What the fuck are you doing?" (30 RT 6728.) Carrillo yelled twice, "It's a setup." (30 RT 6728.) Masubayashi ran from the car and Carrillo took a few steps and fired at him. (30 RT 6730-6731.) Carrillo came back and yelled, "Let's go." (30 RT 6731.) Mataele told the "driver" to go get Masubayashi, not meaning to run him over, but help him. (30 RT 6735.) Carrillo started screaming, "Yeah, we've got to get him. We've got to get him. He seen us. He knows where we live. We've got to do this. We got to finish him." (31 RT 6968-6969.)

Mataele told them to stop the car at Jack-in-the-Box and he got out because he did not want to be a part of it. (30 RT 6737-6738.) Mataele started running, then turned around and saw Masubayashi push himself up and run to the telephone pole. (30 RT 6738, 6740-6741.) The Jeep swerved towards the telephone pole and stopped. (30 RT 6742.) Masubayashi ran towards Norm's restaurant and fell in the middle of the street. (30 RT 6742.) The Jeep backed up, shot forward and drove towards Masubayashi and then swerved to avoid him. (30 RT 6743-6746.) Mataele headed down Glen Street and the Jeep passed by him. (30 RT 6746.)

Mataele found his way to a 7-Eleven and paid a man $50 for a ride to the freeway near Norwalk. (30 RT 6749-6750; 31 RT 6904.) From there he ran to Quiambao's house. (30 RT 6750.) Carrillo was already there and met him out front. (30 RT 6751, 6755.) Mataele hit Carrillo on the chin and asked him why he shot them. (30 RT 6765-6766.) Carrillo said it was a setup and Masubayashi had a gun. (30 RT 6766.)

Quiambao asked Mataele why he shot Johnson. (30 RT 6752.) Mataele just looked at Carrillo, and asked Quiambao to go get him the drink he had asked for. (30 RT 6752.) When Quiambao left the room, Mataele asked Carrillo what he had told Quiambao. (30 RT 6755, 6763.) Carrillo said, "Man, I thought you were in jail. I didn't know what to do. [Chung] said he was going to say you and me took the car, and he was going to try to get an alibi." (30 RT 6763.) Mataele stayed there for about an hour or two and went home. (30 RT 6769, 6771.) He returned to Quiambao's house about three hours later. (30 RT 6772.) Mataele headed to Hollywood to see about getting a false identification. (30 RT 6772.) Carrillo joined him later that day. (30 RT 6775.) They went by Monroe's house and then Carrillo got them some money to pay for their false identifications. (30 RT 6777-6778.) They spent the night in a hotel and picked up their false identifications the next day. (30 RT 6778.)

The following day, Mataele, Carrillo and Baby flew to Salt Lake City. (30 RT 6779, 6781.) Initially they stayed in motels, but then moved in with Maile Mounga. (30 RT 6780.) Mataele would leave periodically, traveling to Seattle, Portland and Los Angeles, and Carrillo went with him to San Francisco. (30 RT 6782.) Mataele said he never threatened Carrillo with force or fear. (30 RT 6783.) Mataele moved around until late 1999 when he remained in Los Angeles until being arrested in 2000. (30 RT 6783-6784.) He said he was hiding out because he did not want to go to jail for something he did not do. (30 RT 6784.)

Mataele said he "ran" with the Sons of Samoa gang, but was never an actual member of the gang. (30 RT 6790.) Mataele admitted to being at Quiambao's with Perdon and discussing the murders, but denied ever making the statement to Perdon that he almost "came in his pants when he saw that nigger flop." (31 RT 7042-7047.)

On February 9, 2000, Mataele was arrested for transporting methamphetamine and gave the officers the name of his cousin, Anton Santos, and later released on bail. (31 RT 6927-6928.) He was arrested again and on May 22, 2000, Mataele was interviewed by Detective Charles Sullivan and identified himself as Don DeMarco. (31 RT 6955.) He later pled guilty on December 11, 2000, to transporting methamphetamine. (31 RT 6931-6932.)

Mataele wrote a letter to Carrillo while in custody that said: "Hey, Masubayashi, Sneaky, he's not going to come in here and say it's us because it wasn't. Right?" (31 RT 6973.) Mataele also wrote that he, Lee and Chung were going to be fighting this together. (31 RT 6979.) He said he was writing to Carrillo informing Carrillo that he too should fight the case. (31 RT 6990.)

D. Rebuttal

Officer David Heinzel testified he was the first officer to contact the witness Rodriquez. (31 RT 7601-7062.) Despite later statements to other officers, Rodriquez told Officer Heinzel the shooter was a black male wearing black baggy pants and a black shirt. (31 RT 7062.)

PENALTY PHASE

A. Prosecution Case-in-Chief

1. Mataele's Criminal History

Melanie Janke attended Lakeside Junior High School on March 3, 1988, with Mataele and Diane Ortiz. (35 RT 7772-7773.) When they were in seventh grade, Mataele exposed himself to Janke. Janke also vaguely remembered Mataele touching Ortiz. (35 RT 7777.) Mataele, 13 years old at the time, told Deputy Claude Waddle of the Los Angeles County Sheriff's Department that he showed Janke and Ortiz "his dick," and

touched both girls on the breast and buttocks "because they were there." (35 RT 7789-7790.)

On June 14, 1991, Thomas Kinsey was walking in Hollywood, carrying a briefcase, when he was approached by Mataele and three other individuals. (35 RT 7794, 7797, 7824.) They offered to sell Kinsey rock cocaine. (35 RT 7817.) Mataele said, "That's a nice case. How much you want for it?" (35 RT 7794, 7831-7832.) Kinsey clutched the briefcase to his chest. (35 RT 7832.) One of them took the case from Kinsey and fled. (35 RT 7795, 7833.) Mataele pushed Kinsey, backing him up, and demanded money from him. (35 RT 7795, 7826, 7829-7830.) Mataele said, "Where's the rest of - - where's your other money?" (35 RT 7833.) He made threatening statements to Kinsey as he was backing him up, saying several times, "I'm going to fuck you up." (35 RT 7850.) Mataele also pulled back his fist like he was going to punch Kinsey. (35 RT 7826, 7829-7830.) Kinsey was afraid during the incident. (35 RT 7798.) Los Angeles Police Officer David Dooros was on patrol in Hollywood when he saw three men surrounding and cornering Kinsey. (35 RT RT 7795-7796, 7823-7825, 7827, 7831.) The officers diffused the situation by putting everybody on the ground at gunpoint, and then identified and interviewed the individuals. (35 RT 7826-7828.)

On December 20, 1993, John Hagen was in the area of Fountain and Hayworth, in Los Angeles, when Mataele stepped out from behind a bush and put a gun to his forehead. (35 RT 7852-7854.) Mataele said he wanted his money and checked Hagen's pockets. (35 RT 7853.) Hagen gave Mataele his wallet. (35 RT 7853.) After robbing Hagen, Mataele told him to turn around and leave, saying, "I suggest you run. Walk. Go the opposite way. I will shoot you right now. I hate white boys." (35 RT 7855-7857.) Hagen turned around, went the other way and ran into a police

officer. (35 RT 7855-7856.) Mataele was arrested and pled guilty to armed robbery. (35 RT 7870; People's Ex. 71.)

2. Victim Impact Testimony

Danell Johnson was Melvin Milton's cousin. (35 RT 7870.) They came from a tight-knit family and would see each other a lot at their grandmother's house. (35 RT 7871.) Milton described his finding out about Johnson's murder as a "whirlwind" of feelings and emotions, overwhelming, and something you cannot and do not comprehend. (35 RT 7871-7872.) Johnson's murder has continued to affect Milton and the entire family over the years. (35 RT 7872.) Six months after Johnson was buried, Johnson's mother, Patricia Milton had a nervous breakdown. She was on medication and at the time of trial, was homeless. Milton occasionally saw her around Long Beach. (35 RT 7874, 7938.) About a year after the murder, their grandmother was admitted into a home because "she basically had a nervous breakdown." (35 RT 7873.) Neither Johnson's mother nor grandmother ever recovered from the murder. (35 RT 7874.)

Johnson was Carnell Hart's younger cousin and at age five, Johnson lived with Hart for about ten years. (35 RT 7941-7942.) Johnson's living situation was pretty fluid after that, staying with family and in foster homes. (35 RT 7943.) Hart found out about Johnson's murder when Johnson's mother Patricia Milton (his aunt) called and told him Johnson was shot. (35 RT 7944-7945.) Hart hung up the phone and hit the wall, breaking his hand. (35 RT 7945.)

After the murder, a series of bad things happened, including Johnson's mother becoming homeless, and their grandmother being admitted into an elderly care facility. (35 RT 7947-7948.) Hart said the murder had been a negative experience as Hart no longer had Johnson in his life and Johnson will never have the opportunity to get married and

have kids. At the same time, the experience has been positive in the sense it allowed Hart to become a better person and make sure his brothers become better men. (35 RT 7949-7950.)

Sia Her (Molly) was friends with Johnson for about two or three years, and started dating him when she was 19 years old. (35 RT 7955-7956.) They moved in together and continued to live together until he was killed, shortly before her 21st birthday. (35 RT 7958.) Their relationship was serious and they talked about getting married. (35 RT 7958.) Molly heard the gunshots, but did not find out Johnson was killed until a detective called her the next morning. Molly accompanied the detective to Patricia Milton's home to notify her of her son's death. (35 RT 7958-7959.) Patricia Milton never recovered after that. (35 RT 7959.)

Molly helped plan Johnson's funeral and recalled spending her birthday at the mortuary by herself wondering, "Why? How come God couldn't spare his life?" (35 RT 7960.) Since Johnson's murder, Molly had a hard time trusting anybody and did not have any friends. It taught her to be strong both emotionally and mentally as she learned to deal with his death all by herself. (35 RT 7960.) Molly said even though it has been so long it still hurt. It taught her that tomorrow is never promised so always cherish the ones you love. Molly added, "Until this day I have so much hate. Something was stripped from me." (35 RT 7960.)

B. Defense Evidence in Mitigation

1. Mataele's Tongan Background and Childhood

Mataele is of Tongan descent and presented the expert testimony of Professor Inoke Funaki on the Tongan culture. (38 RT 8472-8474.) In the Tongan culture it is acceptable to use an authoritarian parenting style where the man is the central authority figure, is very strict, and may administer physical punishment to discipline children. (38 RT 8476-8477.) Children

are born as "vale" (not wise, untrained, and uncultured) and the socialization process expects parents to train the child to become "poto" (smart, knowledgeable, cultured, and disciplined). (38 RT 8477.) Children are expected to obey their parents and socially conform to Tongan values. (38 RT 8477-8478.)

Family ties are very important in the Tongan culture and certain family relationships give people privileges and create obligations and duty to each other. (38 RT 8478-8479.) Although it is common for husbands to beat their wives, female siblings are revered. (38 RT 8481-8482.) Property and privilege is allotted based on age and birth order. (38 RT 8483-8484.) Also, religion is very important to the culture and even woven into their constitution. (38 RT 8480.)

Professor Funaki opined, based on interviews with members of the Mataele family, that Mataele and his siblings were raised in a very much authoritarian parenting style. (38 RT 8491.) However, when the children became teenagers they changed to a permissive parenting style that entailed freedom without guidance. (38 RT 8492-8494.) Overall, he saw strong and substantial ties to the Tongan culture even after the Mataele family immigrated to the United States. (38 RT 8498.)

Pakimuka "Tuini" Mataele, Mataele's father, came from Tonga to the United States in 1971. (35 RT 7983; 36 RT 8118-8119, 8129.) On his way, he stopped in Pago Pago for a week and married Lupe Mataele to help bring her to the United States. (35 RT 8005, 8009-8010; 36 RT 8120, 8123.) Lupe arrived in 1973. (35 RT 7983, 8010-8011, 8013.) Tuini and Lupe lived in Lynwood from 1975 to 1985, and then moved to Norwalk. They had four children; Mataele was the oldest. (35 RT 7984-7987.) The Lynwood house was the party house because it was somewhere all their Tongan friends could gather. (36 RT 8129, 37 RT 8396-8397.) There was a "drinking party" every Friday, Saturday and Sunday nights. (35 RT

7996-7997.) Friends and family would come over, drink and sometimes get in arguments and fistfights. (36 RT 8097-8098.) In addition to the Mataele family, five other Tongan males were also living in the house. (35 RT 7997-7998.)

Mataele's parents and other family members testified to the ongoing physical abuse taking place in the Mataele household. Mataele's uncle Lucky Mataele grew up in Tonga and explained that in the Tongan culture, parents and older siblings "Pu'i"—boss around and beat—their children and younger siblings. (35 RT 7970-7972.) In the Tongan culture it is embarrassing if your child does not do something when told in front of guests and so they must be disciplined. (35 RT 7991.) If the child is not crying, it shows guests that the parent is not really strict. (35 RT 7992.)

Mataele's younger sisters Piutiena Mataele and Ilaisaane Kelley and other family members said their parents were constantly yelling and fighting. (36 RT 8073-8075, 8106-8107, 8110-8112, 8173-8174.) Tuini would argue with Lupe a lot and hit her because he did not like her talking too much or talking back to him. (35 RT 7988; 36 RT 8132-8133; 37 RT 8397-8399.) Lupe also testified Tuini would beat her every week when he got drunk. (35 RT 8019.) Mataele's aunt, Nyoka Mataele, said the violence between Tuini and Lupe had occurred as recent as April or May of 2005. (36 RT 8080-8082.)

Tuini and Lupe beat Mataele almost daily because he was hyper and to discipline him. (35 RT 7989-7990; 36 RT 8127-8128.) Tuini and Lupe would beat all of their children, but Mataele was the most abused. (36 RT 8072-8073, 8078, 8113, 8175-8176, 37 RT 8397-8399; 39 RT 8682.)

Tuini stopped beating Mataele when he was 14 or 15 because Mataele would try to step in and take the beatings for his younger siblings and mother. (36 RT 8134-8135, 8139-8140.) Mataele would try to intervene and get his father off of his mother or provide Lupe with something to help

her fight back. (36 RT 8095.) Tuini saw Mataele as the father and mother of the younger children because he and Lupe were gone a lot and Mataele looked after them. (36 RT 8140.)

Lucky often observed the children unsupervised and neglected, and felt that Mataele was beaten and disciplined for the wrong reasons. (35 RT 7998, 8001.) Nyoka said Mataele's parents did not support him or participate regularly in school activities. (36 RT 8084.) She would often have to communicate with Tuini and Lupe on behalf of the school. (36 RT 8087.)

Piutiena said Mataele was a loving brother growing up and looked out for her and their other sister. (36 RT 8102.) Mataele was also very close with their mother but did not have a relationship with his father. (36 RT 8084, 8102.) Mataele's cousin Cecelia Anau "Cece" had cerebral palsy and stayed with the Mataele family for about 10 years. (35 RT 8033-8035; 36 RT 8101-8102, 8213-8214.) Cece said Mataele took her places and helped take care of her. (36 RT 8215.) In 1991, Mataele stopped going to school and started working in construction for an uncle to help the family financially. He only came home on the weekends. (36 RT 8100-8101, 8159-8160.)

Edward Cross, Jr. testified that Mataele was friends with his son, Manuel, and would come to their house in Norwalk a couple times a week between 1985 and 1991. (37 RT 8353-8554.) Cross said Mataele was always very protective of his friends and family, friendly, outgoing, courteous and respectful to the household. (37 RT 8354, 8379-8380.)

In July of 1992, Sean Monroe was walking down the street with Mataele, Anton Santos and "Kenny" when they were confronted by a group of 10 to 15 men from a Mexican gang. (39 RT 8744-8745.) Words were exchanged between Kenny and the gang members. (39 RT 8745.) Monroe was shot twice—on the left side of his chest and stomach—and fell to the

ground. (39 RT 8744.) Mataele provided him mouth-to-mouth resuscitation. (39 RT 8744.)

Mataele went to prison in 1993 for four and a half years for the armed robbery of Hagen. (35 RT 8036.) When Mataele was released from prison in March 1997, he was very close with his cousin Loma Mataele. (39 RT 8686-8687.) Loma was killed in Los Angeles on July 22, 1997, at age 27. (36 RT 8220-8221.) Mataele, Loma, and two cousins had gone to Los Angeles to retrieve a car when Loma was shot to death. (36 RT 8233-8237; 37 RT 8262-8263.) Mataele blamed himself for Loma's murder because he felt they never should have gone there. (36 RT 8241.)

Mataele attended Loma's funeral in San Mateo and stayed with his cousin Fatulisi Mataele for three months until returning to Los Angeles in October 1997. (36 RT 8223; 37 RT 8387, 8390.) Fatulisi said Mataele was devastated, heartbroken, and lost after Loma's murder. (36 RT 8231; 37 RT 8390.) He cried all the time, and twice had to be picked up because he slept at Loma's grave. (39 RT 8690-8691.)

Ramona Rodriguez met Mataele in 1997 while walking to school. Someone was following her in a car and he walked with her so she felt secure. (37 RT 8329.) They became close friends and Mataele became a father figure to her. (37 RT 8330-8331.) When Mataele was incarcerated, his family took her in and she lived there. (37 RT 8332.)

When Mataele returned from Utah following the shooting of Johnson and Masubayashi, he set up family meetings once a week in 1998 and 1999 to encourage everyone to better themselves and help each other. (36 RT 8180-8182; 38 RT 8462-8465; 39 RT 8692-8693.) Mataele's cousin Ilaisaane Puaka recalled two such meetings in 1998 and 1999. (37 RT 8404-8406, 8412.) Mataele portrayed himself as a role model, explaining he had made mistakes in his life and encouraged lifestyle changes. (38 RT 8466.) Mataele also wrote and co-wrote songs for his cousin, Voka

Mataele's reggae band. (36 RT 8226-8228; 39 RT 8702, 8704-8705.) The song "Stand Tall" was written for Loma when he died. (36 RT 8228.)

2. Mataele's School Experience

Puaka Voka Mataele, Mataele's cousin, and Mataele's classmate Laura Silva, said other children would pick on Mataele because he was Tongan, bigger than other children, and did not have nice clothes. (38 RT 8516-8521; 39 RT 8676-8677.) They said Mataele was not a bully, but his size was intimidating and allowed him to stand up for her and other children, which further made him a target of ridicule. (38 RT 8518-8519; 39 RT 8679-8681.)

Stirling Broadhead was the principal at Mataele's elementary school where he attended part of fifth grade and all of sixth grade. (41 RT 9010-9011.) In fifth grade, Mataele was probably the largest boy in his class. (41 RT 9013.) When Mataele was sent to the principal's office for discipline problems, he was always respectful, listened, and did what Broadhead asked. (41 RT 9015.) Broadhead took Mataele home a number of times as a means of informal suspension and had sent Mataele home to change his clothing. (41 RT 9013, 9018.) Once Mataele brought a knife to school, but did not use it for threats, he just wanted to show it off. (41 RT 9019-9020.)

Mataele's Elementary and Junior High school teachers Mona Keith and Eugenia Blackburn said Mataele was a great student and very respectful, but also misunderstood because "he stood out like a sore thumb." (37 RT 8277-8280; 38 RT 8561-8564.) Estella Reid taught Mataele and his sister Polynesian dancing for about five years beginning in 1985, and said Mataele was very kind and eager to learn. (37 RT 8341-8344.)

James Harvey was vice principal at Mataele's middle school in 1987 and 1988. (38 RT 8522-8523.) Mataele stood out because of his size and

very outgoing personality. (38 RT 8524.) Mataele was always truthful and took responsibility when discipline issues arose. (38 RT 8525-8526.) His appearance and manner of dress made it difficult for him to assimilate with other children, but also caused children to look to him as a protector. (38 RT 8528-8529.) Based on visits to Mataele's home, Harvey felt Mataele's parents were only able to give Mataele very limited support. (38 RT 8530.) Harvey acknowledged numerous occasions where Mataele was suspended from school; 11 times during his seventh grade year. (38 RT 8539-8547.) He was eventually expelled in his eighth-grade year. (38 RT 8549-8550.)

In 1990, Probation Officer Sean Porter worked at Camp Kilpatrick Juvenile Detention Facility as Mataele's case worker and football coach for about five months. (38 RT 8453-8455.) Porter found Mataele to be very positive, and let him be released early because he had done well in the program. (38 RT 8456.) Mataele was respectful, compassionate, followed instructions, got along with his peers, and did not cause any problems. (38 RT 8457.)

Mike Fitch was a teacher and Mataele's football coach at Whittier High School in 1990 and 1991. (36 RT 8164-8165.) Fitch described Mataele as a team player, always polite and respectful, and played the game hard and with passion. (36 RT 8166.) Fitch said he was testifying because Mataele was a "good kid." (36 RT 8167.)

3. Expert Testimony

Dr. Kenneth Nudleman, a medical neurologist, conducted a series of neurological tests on Mataele. (38 RT 8440-8444.) The results for each test were within the normal range, except for the second part of the electroencephalogram (EEG) had a pattern of change commonly seen in people who have had head injuries. (38 RT 8444-8449.) Dr. Nudleman explained severe head trauma has been associated with some violent

behavior where there have been structural changes to the brain, but those types of changes were not seen on Mataele. (38 RT 8449-8450.)

Clinical psychologist and neuropsychologist Dr. Timothy Collister was appointed by the court to administer numerous tests on Mataele to test his general intellectual function and his neuropsychological functioning. (39 RT 8613.) He testified Mataele was very intelligent, and in the 60th to the 75th pencentile compared to the general population. (39 RT 8615.) His neurological performance was quite strong and would not suggest he had impaired frontal lobe function limiting inhibition. (39 RT 8616-8618.) Overall, he did not experience Mataele to be exaggerating or prevaricating, but straight-forward and honest giving his best results. (39 RT 8619.) It was his opinion Mataele had the capacity to benefit from education and rehabilitation. (39 RT 8621.)

James Esten, a retired employee of the California Department of Corrections and Rehabilitation, testified as a correctional consultant and rendered an opinion on Mataele's amenability to prison and whether his background presented any indication of future dangerousness. (39 RT 8629.) Esten met with Mataele and reviewed his custodial history, including disciplinary actions. (39 RT 8632-8634.) Mataele was involved in a fight that was determined to be mutual combat and did not involve weapons. (39 RT 8634.) Otherwise, Mataele had a number of rule violations. (39 RT 8660-8664.) Esten opined that Mataele's past history showed he was adaptable and suitable to prison life and did not pose a danger. (39 RT 8644-8645.) He was of the opinion that Mataele was a good candidate to lead a productive and nonviolent life in prison. (39 RT 8644-8645.)

Dr. Ronald Siegel, a psychopharmacologist, testified as an expert on methamphetamine. (40 RT 8794-8802.) Methamphetamine is a stimulant that increases blood pressure, heart rate, alertness and concentration, and

lessens fatigue. (40 RT 8807.) It is also long-lasting, with the effects lasting six to 18 hours. (40 RT 8808.) In the short term it elevates the mood with feelings of euphoria, but over a period of time these feelings are replaced by depression, sadness, and the inability to concentrate, pay attention, and make judgments. (40 RT 8808-8809.) Continued use of methamphetamine then turns to paranoia, irritability, impulsivity, and delusions. (40 RT 8809-8813.) Long term use can cause psychosis and lasting paranoia. (40 RT 8814-8815.) Studies have shown that when people use methamphetamine in groups, the drug is more toxic, reactions are more exaggerated and paranoia accelerates. (40 RT 8816-8818.)

Dr. Nancy Kaser-Boyd identified a series of risk factors in Mataele's life such as child abuse, domestic violence, poverty, and racism. (40 RT 8904.) These factors can lead to anxiety, behavior problems, substance abuse disorders, limits on treatment resources, community violence and feelings of alienation that can carry over into adulthood. (40 RT 8905-8906.) Dr. Kaser-Boyd was of the opinion Mataele had Attention Deficit Hyperactivity Disorder (ADHD) as a child in light of his impulse control and behavior problems. (40 RT 8893-8894.) Mataele's above average intelligence, normal brain function, and relationships would mitigate some of the risk factors. (40 RT 8908-8909.)

Dr. Kaser-Boyd explained that posttraumatic stress disorder (PTSD) comes from the experience of a life-threatening event. (40 RT 8896.) She was of the opinion Mataele had PTSD on account of Mataele being shot at and witnessing his cousin Loma's murder in July 2007 and still had symptoms of PTSD on November 11, 1997. (40 RT 8911-8918.) Some of the symptoms Mataele reported to her included constantly thinking about the events, suicide, and the resulting psychological distress of surviving the assault. (40 RT 8913-8914.) Other symptoms associated with Mataele's

behavior and diagnosis, were numbing, hyper vigilance, and outbursts of anger. (40 RT 8915-8918.)

4. Mataele's Testimony

Mataele testified on his behalf against the advice of counsel. (41 RT 9040.) Mataele was slapped around a lot by his father and his father's friends. His father would also hit him with a variety of objects. (41 RT 9056-9057.) Domestic violence was ongoing between his parents. (41 RT 9057-9058.) When they moved to Norwalk, the violence inflicted by his father against his mother began to taper off. (41 RT 9060.)

In fifth and sixth grades, Mataele was much different than the other kids and only knew one way to react to their teasing so he got into a lot of fights. (41 RT 9062.) He also defended other kids that were being teased. (41 RT 9062-9063.) Mataele said he only bullied two people and they deserved it: one who made fun of other kids, and another who made his sister cry. (41 RT 9064-9065.)

Mataele described himself as a "magnet for trouble" that always felt people had things against him, and so he had a chip on his shoulder. (41 RT 9066-9067.) In junior high school, he exposed himself after being told to do it by his friends. (41 RT 9068.) He also slapped Janke on her "ass" when she was bending over and grabbed Diane Ortiz's nipples. (41 RT 9069-9071.)

Mataele attended Santa Fe High School, was kicked out, and spent eight months at Camp Kilpatrick Juvenile Hall. (41 RT 9080.) He did not want to leave Camp Kilpatrick, but eventually ended up at Whittier High School. (41 RT 9082-9083.) He quit school in tenth grade to help his family financially and began working in construction. (41 RT 9083-9084.)

In 1991, Mataele stole a pair of shoes from Payless and pled guilty to petty theft. (41 RT 9094-9095.) In 1992, he stole a pair of work gloves and had another petty theft conviction. (41 RT 9095-9096.) Mataele said

he did not rob Kinsey in 1991. He said Kinsey approached him trying to trade his bag for crack. (41 RT 9096-9097.) Mataele told him to go to another area and try to make his trade. (41 RT 9096-9097.) Kinsey and another guy got into a fight and Mataele was just there watching. (41 RT 9098.) In 1991, Mataele did crack for about a month and a half. (41 RT 9154.)

Mataele said he was present in 1992 when Monroe was shot. (41 RT 9103.) Mataele, Monroe, and two other friends were on their way to the liquor store when a group of men approached them and eventually shot Monroe. (41 RT 9103-9105.) Monroe stopped breathing and so Mataele gave him CPR for a minute or two. (41 RT 9106.) He fled the scene as soon as he heard sirens. (41 RT 9179.)

In 1993, Mataele robbed Hagen. (41 RT 9107-9108.) When contacted by the police a few minutes later, Mataele said, "I did it. I did it. I'm sorry I did it." (41 RT 9113-9114.) He pled no contest and admitted the gun use allegation and was sentenced to five years in prison. (41 RT 9114.) After being released, Mataele spent a lot of time with Loma. (41 RT 9115.) He also resumed his relationship with Cece, spending time with her and taking her for walks. (41 RT 9116-9117.)

On the night of Loma's murder, Mataele and Loma were picked up from a bar at 12:30 a.m. by Mataele's cousins Kamaloni Mataele and Cheyenne Vaka. Mataele and Loma were told they were going with Kamaloni and Vaka to pick up Vaka's car from her friend's house near Crenshaw and Hyde Park in Los Angeles. (41 RT 9119-9120.) When Mataele, Loma, Kamaloni and Vaka arrived at the house, a group of guys came outside of the house and Mataele and Loma told them they were there to get Vaka's car and needed the keys. A guy threw the keys to Mataele. (41 RT 9121-9122.) One of the guys who was leaning on the car said, "What's up?" and shot Loma. (41 RT 9122-9123.) Mataele threw a 40-

ounce bottle at the gunman and ran. The gunman followed Mataele and tried to shoot him. (41 RT 09123-9124.) Mataele eventually met up with Vaka and Kamaloni, and they walked back down to the scene and found out Loma was dead. (41 RT 9125.) Mataele said Loma's death "really messed me up in the head." (41 RT 9126.)

After returning to Los Angeles from Salt Lake City in 1998, Mataele discovered a number of family members were not getting along and so he started family meetings in October to keep lines of communication open. (41 RT 9131-9132.) In 1999, Mataele began doing significant quantities of methamphetamine again and he began distancing himself from his family. (41 RT 9133.) He was arrested on May 22, 2000 in this case, and had been in custody since that time. (41 RT 9134.)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED THE PROSECUTION'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR N.

Mataele contends his Sixth and Fourteenth Amendments rights to select a fair and impartial jury were denied by the trial court's erroneous granting of a challenge for cause and dismissing Prospective Juror N. (Juror No. 259). He claims the trial court's finding that Prospective Juror N.'s views on capital punishment substantially impaired her ability to render a fair verdict is not supported by substantial evidence and mandates the reversal of his verdict of death. (AOB 57-75.) The trial court's finding that the prospective juror was substantially impaired in her ability to render a fair verdict is supported by substantial evidence and entitled to due deference.

A. Standard Of Review

"A prospective juror may be excused for cause based on his or her views of capital punishment when 'the juror's views would prevent or

substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v. Montes* (2014) 58 Cal.4th 809, 843; quoting *Uttecht v. Brown* (2007) 551 U.S. 1, 7 [127 S.Ct. 2218, 167 L.Ed.2d 1014,]; *Wainwright v. Witt* (1985) 469 U.S. 412, 424 [105 S.Ct. 844, 83 L.Ed.2d 841].)

"Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court," (*People v. Moon* (2005) 37 Cal.4th 1, 14, quoting *People v. Boyette* (2002) 29 Cal.4th 381, 416) "'. . . seldom disturbed on appeal.'" (*People v. Haley* (2004) 34 Cal.4th 283, 306, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 675.) "There is no requirement that a prospective juror's bias against the death penalty be proven with unmistakable clarity." (*People v. Jones* (2003) 29 Cal.4th 1229, 1246; *Wainwright v. Witt*, *supra*, 469 U.S. at p. 424.)

> In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts.

(*People v. Bivert* (2011) 52 Cal.4th 96, 111, quoting *People v. Hawthorne* (2009) 46 Cal.4th 67, 83.)

"It is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Bivert, supra*, 52 Cal.4th at p. 111, quoting *People v. Martinez* (2009) 47 Cal.4th 399, 425.) "We pay due deference to the trial court, which was in a position to actually observe and listen to the prospective jurors." (*People v. Moon, supra*, 37 Cal.4th at p. 14, quoting *People v. Cain* (1995) 10 Cal.4th 1, 60.) "Where equivocal or conflicting responses are elicited regarding a prospective juror's ability

to impose the death penalty, the trial court's determination as to his true state of mind is binding on an appellate court." (*Moon, supra*, at p. 14, quoting *People v. Boyette, supra,* 29 Cal.4th at p. 416.) "If there is no inconsistency, [the appellate court] will uphold the court's ruling if it is supported by substantial evidence." (*People v. Jones, supra*, 29 Cal.4th at p. 1247, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 357.)

B. There is Substantial Evidence Supporting the Trial Court's Decision to Dismiss Prospective Juror N. (Juror No. 259)

Mataele argues Prospective Juror N.'s responses as a whole do not support the trial court's finding of substantial impairment. (AOB 57-75.) The trial court's conclusion is supported by the record because Prospective Juror N's responses were equivocal, and she stated that she could not be impartial.

Prospective Juror N. wrote in her questionnaire that she was a "[l]ittle uncomfortable seeing how young the [defendants] were, and finding out the crime was done [eight] years ago. Just questioning myself if I can be impartial, without being sympathetic." (13 CT 3622.) With respect to her feelings on the death penalty, Prospective Juror N. wrote,

> I do not think it's a deterrent; however, I believe there are evil people in the world, who cannot be reformed. They will continue to murder, with no remorse, and those are the individuals the death penalty is for. I used to believe the death penalty was for no one. However, too many crimes are repeat murderers.

(13 CT 3629.)

She also wrote in her questionnaire when asked about having to make the decision to impose the death penalty, "I don't care for it - would rather give that responsibility to someone else." (13 CT 3630.) She also wrote, "I would have to be sure that it serves a purpose - life is too precious for a chosen few to take it away." (13 CT 3631.) Otherwise, Prospective Juror

N. wrote, "If I believe the individual willfully [and] without remorse did the crime - and has no chance of being rehabilitated - I would not have a problem voting for the death penalty." (13 CT 3631.)

Mataele's counsel asked Prospective Juror N., "How do you feel about sitting in judgment of a case of this nature . . .?" (9 RT 2209-2210.) She replied, "I'm hoping the prosecution doesn't have enough evidence to get to the second phase." (9 RT 2210.) Prospective Juror N. continued, "I don't want to see the second phase. I see two innocent men, and I'm hoping that he doesn't have enough." (9 RT 2210.) Codefendant Lee's counsel asked Prospective Juror N. if she had any concerns about her ability to be fair. She responded, "The only thing I have is I just see these men. They're just so young . . . I've got sons about that age. Maybe that might taint my view a little bit. That's about it." (9 RT 2227.) Prospective Juror N. also said, "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." (9 RT 2228.)

The prosecutor asked Prospective Juror N. if she was opposed to the death penalty, and she replied "No." (9 RT 2234.) He then asked about her earlier comment that she hoped there would be insufficient evidence to show guilt. (9 RT 2236.) Prospective Juror N. reaffirmed her statement and clarified that she expected the prosecution to prove its case, she did not want to get to the penalty phase, and she hoped the prosecutor did not have enough evidence. (9 RT 2236-2237.) She said, "If you have enough 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." (9 RT 2238.)

The following colloquy took place between the prosecutor and Prospective Juror N.:

> [Prosecutor]: That would be a problem. So it - - it seems like you're saying that your personal opinion is, because of how you feel and because of your sympathetic nature, that you have a predisposition in the guilt phase to hope that there's insufficient evidence that you are leaning one way. Is that accurate?
>
> [Prospective Juror N.]: I know what you're saying. I understand - -
>
> [Prosecutor]: I'm trying to understand what you're saying.
>
> [Prospective Juror N.]: - - 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.
>
> [Prosecutor]: Okay.
>
> [Prospective Juror N.]: I'll tell you right now. Because I don't want to get to the second phase. I don't.
>
> [Prosecutor]: Okay.
>
> [Prospective Juror N.]: I don't want that burden.
>
> [Prosecutor]: 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 - - everyone 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?
>
> [Prospective Juror N.]: Yes.

(9 RT 2239-2240.)

The prosecutor requested Prospective Juror N. be excused for cause because she admitted she could not be fair, hoped to not get to the penalty

phase, and was sympathetic to the age of the defendants. (9 RT 2258-2259, 2261.) Mataele's counsel objected, arguing Prospective Juror N.'s response was a product of the prosecutor skillfully twisting her belief in the presumption of innocence, and confusing her into believing she was unfair. (9 RT 2259-2260.) Lee's counsel noted that Prospective Juror N. said she could vote for the death penalty and engage in the weighing process, although she hoped not to get there. (9 RT 2260.)

The trial court granted the challenge for cause, finding:

> Okay. I note what you folks are saying. I note the answer at number 111 on the questionnaire, page 25, as was articulated by [the prosecutor].
>
> She equivocates when she says 'I would have to be sure that it serves a purpose. Life is too precious for a chosen few to take it away.' That's her answer, number 9 on page 33 of 38. Her other answers are set forth in the questionnaire.
>
> She says here in court that she would be pulling for the defense. She says, 'I'm hoping the D.A. doesn't have enough evidence to go to a penalty phase.' She also said "I have an open mind" when she was talking to Mr. Harley on voir dire. But then later she said to Mr. Myers, 'I can be fair but these defendants are so young, this might taint my views. It will be hard.'
>
> And then [the prosecutor] went through this with her and she said she looks for the good in people and she said, 'I'm hoping you don't have enough. I don't want to go to the penalty phase. I'm pulling for the defense.' And then admitted flat-out that this would substantially impair her ability to return a death verdict.
>
> So the challenge for cause by [the prosecutor] is granted as well and we'll call two more jurors.

(9 RT 2262-2263.)

The trial court acted within its discretion in excusing this juror based upon a deferential impression that the prospective juror held views that would substantially impair her ability to perform the duties of a juror in this

case. (*People v. Salcido* (2008) 44 Cal.4th 93, 135.) To the extent the prospective juror's views were conflicting, this Court must defer to the assessment of the trial court that the juror entertained views substantially impairing the ability to perform the duties of a juror. (*Ibid.*)

The trial court properly excused Prospective Juror N. for cause because her answers were equivocal, and she admitted her sympathy and resistance to making a death penalty decision would affect her ability to be impartial. Although Prospective Juror N. said she was not opposed to the death penalty (9 RT 2234), she made statements that conflicted with this position, in particular, "I would have to be sure that it serves a purpose – life is too precious for a chosen few to take it away." (13 CT 3631.)

Also, Prospective Juror N.'s claim that she would be willing to impose the death penalty (9 RT 2228), conflicted with her repeated statements that she was pulling for the defense and hoped the prosecution did not prove its case (9 RT 2210, 2236-2237, 2239). Moreover, she even admitted that her sympathy for the defendants, because of their age and her resistance to making a death penalty decision, impaired her ability to be fair and impartial. (9 RT 2240.) Prospective Juror N.'s equivocal statements and admission of partiality provided substantial evidence from which the trial court found her unable to perform her duties as a juror. (See generally *People v. Jones*, *supra*, 29 Cal.4th at pp. 1249-1250 [juror properly excused because of conflicting and problematic answers that left trial judge with impression that the juror could not be impartial].)

Mataele likens the circumstances of Prospective Juror N.'s dismissal to that discussed in the opinion of *People v. Heard* (2003) 31 Cal.4th 946 (*Heard*). (AOB 69-70.) In *Heard*, the prospective juror expressed in his questionnaire that imprisonment for life was a worse punishment than death. (*Id.* at pp. 963-964.) During voir dire, the trial court explained that California law considers death the more serious punishment, and thereafter,

the prospective juror did not give any indication that his views would substantially impair his ability to serve as a juror. (*Id.* at p. 964.) The trial court dismissed the prospective juror for cause because his answers indicated he would vote for life in prison without the possibility of parole. (*Id.* at p. 963.) This Court found the response in the questionnaire was insufficient to support his removal for cause when he later changed that response after an explanation of the governing legal principles. (*Id.* at pp. 964-965.) It also found the prospective juror's responses during voir dire did not support a conclusion that his views regarding the death penalty would prevent or substantially impair the performance of his duties as a juror, and added, "[i]f the trial court remained uncertain as to whether [the prospective juror]'s views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror, the court was free, of course, to follow up with additional questions." (*Id.* at p. 965.)

This case is inapposite. Here, Prospective Juror N.'s responses in her questionnaire and during oral voir dire were consistently equivocal. She stated she could follow the law and understood the presumption of innocence, but at the same time explained that she was "pulling for" the defense. This is not a correct application of the presumption of innocence. An unbiased juror will rightly perceive the defendant as innocent and require the prosecution to prove its case, but does not approach the task with the preconceived desire not to have to render a verdict one way or the other. The prosecutor's final question was not an artful manipulation by words as Mataele claims, but rather a direct inquiry into her wavering responses, and she responded with a succinct answer that certain elements would impair her ability to render a fair verdict. Substantial evidence supports the trial court's finding of substantial impairment and is due deference.

II. THE TRIAL COURT PROPERLY GRANTED THE PROSECUTION'S CHALLENGE FOR CAUSE AS TO PROSPECTIVE JUROR H.

Mataele also contends his Sixth and Fourteenth Amendments rights to select a fair and impartial jury were denied by the trial court's erroneous granting of a challenge for cause and dismissing Prospective Juror H. (Juror No. 190). Again, he claims the trial court's finding that Prospective Juror H.'s lack of credibility substantially impaired her ability to render a fair verdict is not supported by substantial evidence and mandates the reversal of his verdict of death. (AOB 76-92.) The trial court's finding that the juror was substantially impaired is supported by substantial evidence and entitled to due deference.

A. There is Substantial Evidence Supporting the Trial Court's Dismissal for Cause of Prospective Juror H. (Juror No. 190)

Respondent incorporates by reference the standard of review set forth in Argument I, B., *ante*. To be succinct, the trial court may excuse a prospective juror for cause when the juror's views of capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7.) A trial court's impression that a juror will be unable to impartially follow the law is entitled to due deference when supported by substantial evidence. (*People v. Bivert*, *supra*, 52 Cal.4th at p. 111; *People v. Jones*, *supra*, 29 Cal.4th at p. 1247.)

Prospective Juror H. wrote in her questionnaire (29 CT 8157-8192) that if she were to make any changes to our criminal justice system, it would be to "eliminate death penalty – speed up system." (29 CT 8166.) She also wrote, "though I am not morally opposed to the death penalty, I would not vote for it because if a mistake it couldn't be undone. (29 CT 8179.) Prospective Juror H. explained in her questionnaire, "I formerly

considered the death penalty immoral, but now just am concerned because human error might cause a wrong decision." (29 CT 8186.) She also wrote, "I am not sure it is our right" to make a death penalty decision. (29 CT 8187.) However, Prospective Juror H. indicated, "I have much ambivalence about the death penalty – killing a child, Scott Peterson – I think it was deserved." In response to the question of whether the death penalty is used too often, seldom, randomly, or racially disproportionately, Prospective Juror H. wrote, "I hate the death penalty." (29 CT 8188.) She wrote that she agreed somewhat that any person who kills another should get the death penalty, and explained, "While scared to make a mistake, sometimes (the death penalty) is the only answer." (29 CT 8190.) At the same time, Prospective Juror H. declared that she could set her own personal feelings aside and follow the law as explained by the court. (29 CT 8191.)

During voir dire, the prosecutor asked Prospective Juror H. if she thought it would be unfair to allow her "to be influenced by something that happened in another case when trying to determine the appropriate penalty for this case?" (10 RT 2352.) She responded,

> I think it would be unfair, yes. But I do have concerns looking at our system as a whole. Whereas 12 people today might find one way, the same exact case, 12 people tomorrow might find another way. So it's the whole system that concerns me. In this case, I think I can just focus on this case.

(10 RT 2353.) She explained that she had to make an individual decision, but the fact someone else could come to a different decision is a flaw in the system. (10 RT 2354.) She further explained that in a perfect situation the truth would be black or white and not change. (10 RT 2354-2355.) Then the following colloquy ensued:

> [Prosecutor]: On your questionnaire you say that you could not vote for the death penalty because a mistake could be made that couldn't be undone.

[Prospective Juror H.]: Right.

[Prosecutor]: Is that still your opinion?

[Prospective Juror H.]: 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 anymore. 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.

(10 RT 2356.)

The prosecutor expressed concern that Prospective Juror H. initially said she could not vote for the death penalty and then completely changed her mind. (10 RT 2357.) Prospective Juror H. explained:

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, I just get 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 that 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.

. . . .

It's possible.

(10 RT 2357-2358.)

The prosecutor then asked Prospective Juror H. if she could be fair to both sides and "would your beliefs substantially impair your ability to be a fair juror in this case?" She replied, "No." (10 RT 2358.)

[Prosecutor]: Okay. Let me ask you about a question that you answered on page 33 - -

[Prospective Juror H.]: Okay.

[Prosecutor]: - - 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.

[Prospective Juror H.]: Exactly. Exactly. I'm not sure.

[Prosecutor]: 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.'

[Prospective Juror H.]: Right.

[Prosecutor]: Now you say you can.

[Prosecutor]: I - -

[Prospective Juror H.]: And I can see that's a problem for you, so - -

[Prospective Juror H.]: Right.

[Prosecutor]: 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?'

[Prospective Juror H.]: 'I'm not sure it's our right' is that what I wrote.

[Prosecutor]: Yes.

[Prospective Juror H.]: I'm not sure it's our right to take a life, the state's right to take a life.

[Prosecutor]: Yes.

[Prospective Juror H.]: I am sure it's right for the state to - - that it is okay for the state to do that. I am sure. I have an emotional reaction, but I am sure that it's okay.

[Prosecutor]: I'm trying to understand.

[Prospective Juror H.]: I understand your confusion and - -

[Prosecutor]: 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 a human life even though it's the law.

[Prospective Juror H.]: Right.

[Prosecutor]: And it's constitutional.

[Prospective Juror H.]: Right.

[Prosecutor]: Something has to change to make you say it's not our right and then come in and say it is our right and it's moral and I can do it. Something.

[Prospective Juror H.]: Well, I'm - -

[Prosecutor]: I'm not good enough to do that. I'll tell you that.

[Prospective Juror H.]: I'm not saying - -

[Prosecutor]: Not me.

[Prospective Juror H.]: It's not you. I'm saying in - - where I'm saying 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.

[Prosecutor]: 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.'

[Prospective Juror H.]: I do. I hate that we have to have it.

[Prosecutor]: But that's not what you wrote.

[Prospective Juror H.]: 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.

[Prosecutor]: As you sit here right now, you're saying that you could be fair and neutral.

[Prospective Juror H.]: 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 had to make this decision, I think that I'm as capable and fair as anyone if this decision has to be made.

[Prosecutor]: And, despite the fact that you hate the death penalty, don't think could you [sic] vote on it, or initially said that.

[Prospective Juror H.]: Initially I said that.

[Prosecutor]: You don't think it's - - all right. You think you're neutral now.

[Prospective Juror H.]: I hate the death penalty. I hate the death penalty. I hate that we have to have the death penalty.

[Prosecutor]: My question was - -

[Prospective Juror H.]: But I do think I could vote on it.

(10 RT 2359-2362.)

A sidebar conference was held and defense counsel expressed his concern the dialogue was lasting too long and becoming an adversarial confrontation in an effort to establish cause. (10 RT 2363.) The trial court stated,

> Well, let me say this before I hear from you folks: the law is that, if a juror is equivocal, a challenge for cause can be granted. The law is, if a juror is inconsistent, a challenge for cause can be granted. And certainly that has to be taken in the context of every case.
>
> But in her questionnaire she said on page 25, number 111: I am not morally opposed to the death penalty. I would not vote

for it because a mistake - - because of a mistake. It couldn't be undone.

Yesterday I granted your challenge for cause, Mr. Harley, because of the extreme inconsistency between what a juror said in court and what a juror said in the questionnaire. So I am mindful of the fact she is hugely inconsistent. So I think [the prosecutor] has a right, absolutely, to explore this to his fullest. And, of course, I have the right at some point to intercede and say enough is enough.

. . .

But I'm indicating to you right now that I'm not going to cut him off, but you folks can be guided by what I have just indicated in terms of my view of this juror and the differences in her questionnaire as opposed to her differences now as opposed to her statements now.

So, with that, I'm not going to cut you off, Mr. Murray.

(10 RT 2363-2364.) The prosecutor made a formal challenge for cause, and the trial court said its tentative ruling was to excuse her for cause, but opted to defer its ruling when addressing all the challenges for cause. (10 RT 2364-2365.) The prosecutor resumed his questioning of Prospective Juror H. by asking her, what she heard, what happened, or what she learned that changed her position on the death penalty:

[Prospective Juror H.]: 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. 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.

[Prosecutor]: Okay. What - - what is it that changes your fear about a wrong decision, which is what you listed as something that would make it impossible for you to vote death.

[Prospective Juror H.]: Because I'm the one making the decision. And I think that I would know if it was right or if it was wrong.

[Prosecutor]: Are you saying that when you filled out the questionnaire you thought as a juror you wouldn't have any say?

[Prospective Juror H.]: I didn't know.

[Prosecutor]: You thought as a juror it would be a potential that you wouldn't get to vote?

[Prospective Juror H.]: No. As to guilty or not guilty, I knew I would get to vote.

[Prosecutor]: But, as to penalty, you didn't think you would get to vote?

[Prospective Juror H.]: I wasn't sure.

[Prosecutor]: And what is it that changed the belief that it's not our right to take somebody else's life as a punishment after a full and fair hearing?

[Prospective Juror H.]: I think that I answered that emotionally rather than intellectually or morally. I would rather not.

[Prosecutor]: But it's . . . your position that you could be completely neutral at the beginning of the penalty phase. You wouldn't be pulling for one side or the other.

[Prospective Juror H.]: It's my position right now that I would be neutral. I believe I could be. I believe I would be neutral.

[Prosecutor]: Would you be pulling for one side or the other at the beginning of the penalty phase?

[Prospective Juror H.]: I . . . would rather not have to - - I think I probably would rather not have to impose the death penalty.

[Prosecutor]: Okay. Does that mean you would be pulling for the defendant, Mr. Mataele, hoping that there would be insufficient evidence?

[Prospective Juror H.]: I probably would. I would probably hope that I would be able to weigh the factors honestly in the favor of the defendant.

(10 RT 2371-2373.)

Defense counsel acknowledged the inconsistencies between Prospective Juror H.'s questionnaire and her testimony, but felt she was able to explain these differences in an articulate manner. (10 RT 2387-2388, 2390.) The prosecutor argued Prospective Juror H. had definitive answers that she was against the death penalty in her questionnaire, which she then tried to explain away during voir dire. However, she ultimately said she was hoping there would be insufficient evidence to justify a verdict, and would be pulling for the defendants. (10 RT 2388-2389.)

The trial court granted the challenge for cause, finding:

. . . 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.

So, for all those reasons, the challenge for cause on number 190 is granted.

(10 RT 2390.)

There is substantial evidence to support the trial court's conclusion Prospective Juror H. could not be fair and impartial. Many prospective jurors "'simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these [prospective jurors] may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true

feelings.'" (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 7, quoting *Witt*, *supra*, 469 U.S. at pp. 424-425.) "The lack of an unequivocal statement . . . expressing an inability to vote for death did not deprive the trial court of discretion to find, after considering the prospective juror's answers, demeanor, and tone, that his feelings about the death penalty would substantially impair the performance of his duties as a juror." (*People v. Duenas* (2012) 55 Cal.4th 1, 12.) Mataele focuses on the fact Prospective Juror H. consistently maintained she could be fair and impartial in spite of her position on the death penalty. The trial court's finding she lacked credibility is entitled to deference.

Prospective Juror H. gave definitive answers in her questionnaire opposing the death penalty, including: she would "eliminate the death penalty"; she "would not vote for" the death penalty; she "hate[s] the death penalty"; and she was "not sure it is our right" to make death penalty decisions. (29 CT 8166, 8179, 8187-8188.) However, during voir dire, Prospective Juror H. now stated she could impose the death penalty and be neutral, despite her strong feelings against the death penalty. (29 CT 2356-2358, 2361-2362, 2373.) Although Prospective Juror H. attempted to explain the inconsistencies between her questionnaire and statements during voir dire, the trial court did not find her explanations credible. Her explanations were not enough to overcome her earlier opposition to the death penalty, and left the trial court with the "definite impression" that her lack of credibility called into question her ability to serve as a juror. (10 RT 2390; *People v. Solomon* (2010) 49 Cal.4th 792, 836 [prospective juror's "equivocal answers, combined with the court's firsthand assessment of her responses and demeanor, could give rise to a 'definite impression' on the part of the court that [her] views would substantially impair the performance of her duties as a juror."].) The trial court was in the best position to assess Prospective Juror H.'s credibility, and its findings are due

deference by this Court. (*People v. Moon*, *supra*, 37 Cal.4th at p. 14.) There was substantial evidence supporting the trial court's decision to dismiss Prospective Juror H. for cause.

III. THE SUBSTANTIAL IMPAIRMENT STANDARD FOR DETERMINING JUROR BIAS IN CAPITAL CASES DOES NOT VIOLATE THE FEDERAL AND STATE CONSTITUTIONS

Mataele argues the *Adams*[14] "substantial impairment" standard used for determining juror bias in capital cases violates federal and state constitutional rights to an impartial jury. (AOB 93-113.) He reasons the substantial impairment standard was premised on balancing the competing interests of the state and the defendant which is inconsistent with recent Supreme Court decisions holding the proper inquiry is the intent of the Framers of the Sixth Amendment. (AOB 93-113.) Mataele then provides a historical introspective of the Sixth Amendment and reasons the Framers did not intend juror bias to include a juror's opinion of the law, and thus, the substantial impairment standard is unconstitutional because it considers a prospective juror's views on capital punishment. (AOB 93-113.) Respondent disagrees. The substantial impairment test is consistent with the right to an impartial jury as contemplated by the Framers of the Sixth Amendment.

Preliminarily, the United States Supreme Court has not expressly determined whether the substantial impairment standard is unconstitutional because it is inconsistent with the Framers' intent in adopting the Sixth Amendment. Courts must adhere to the established precedent until the Supreme Court explicitly reconsiders it. (See *Hohn v. United States* (1998) 524 U.S 236, 252-253 [118 S.Ct. 1969, 141 L.Ed.2d 242] ["[O]ur decisions remain binding precedent until we see fit to reconsider them, regardless of

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[14] *Adams v. Texas* (1980) 448 U.S. 38 [100 S.Ct. 2521, 65 L.Ed.2d 581].

whether subsequent cases have raised doubts about their continued validity."].) Therefore, this Court is guided by the unwavering decisions in effect upholding the *Adams* substantial impairment standard. (*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9; *People v. Gonzalez* (2012) 54 Cal.4th 1234, 1284-1285.)

The Sixth Amendment was adopted in 1791 guaranteeing the right of a defendant "[i]n all criminal prosecutions . . . [to] trial, by an impartial jury of the State and district wherein the crime shall have been committed." (U.S. Const. Amend. IV.) The right to trial by an impartial jury is guaranteed equally and independently by the Sixth Amendment and by article I, section 16 of the California Constitution. (*People v. Thomas* (2011) 51 Cal.4th 449, 462.) "The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence 'based on the evidence presented in court.'" (*Skilling v. United States* (2010) 561 U.S. 358, 438 [130 S.Ct. 2896, 177 L.Ed 2d 619], quoting *Irvin v. Dowd* (1961) 366 U.S. 717, 723 [81 S.Ct. 1639, 6 L.Ed.2d 751].)

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." (*United States v. Wood* (1936) 299 U.S. 123, 145-146 [57 S.Ct. 177, 81 L.Ed. 78].) "Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. [Citations.]. 'Voir dire plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored.'" "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be

fulfilled." (*Morgan v. Illinois* (1992) 504 U.S. 719, 729-730 [112 S.Ct. 2222; 119 L.Ed.2d 492]; *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 [101 S.Ct. 1629, 68 L.Ed.2d 22] (plurality opinion).)

In *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776], the Supreme Court considered the Illinois capital sentencing scheme and held, "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 or expressed conscientious or religious scruples against its infliction." (*Id.* at p. 522.) The State had no valid interest in excluding veniremen who opposed capital punishment because "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him . . . and can thus obey the oath he takes as a juror." (*Id.* at p. 519.) Whereas, "in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." (*Id.* at p. 518.) *Witherspoon* reasoned, "[t]he most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." (*Id.* at p. 522, fn. 21.)

Adams v. Texas applied the *Witherspoon* holding to the Texas capital sentencing scheme and determined a prospective juror could not be excused for refusing to take an oath that the mandatory penalty of death or life imprisonment would not affect their deliberations on any issue of fact. (*Adams v. Texas*, *supra*, 448 U.S. 38 at pp. 49-50.) *Adams* reviewed a series of cases that acknowledge "the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." (*Adams v.*

Texas, *supra*, 448 U.S. 38 at pp. 44-45.) It clarified "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Id.* at p. 45.)

In *Wainwright v. Witt*, *supra*, 469 U.S. 412, the Court explained the standard for determining whether prospective jurors may be excluded for cause based on their views on capital punishment and held the relevant inquiry is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*Id.*, at 424, quoting *Adams v. Texas*, *supra*, 448 U.S. at p. 45.) The substantial impairment standard was most recently affirmed in *Uttecht v. Brown*, *supra*, 551 U.S. 1. In doing so, in 2007, the Supreme Court reviewed the controlling precedents and concluded as follows:

> These precedents establish at least four principles of relevance here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U.S., at 521, 88 S. Ct. 1770, 20 L. Ed. 2d 776. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U.S., at 416, 105 S. Ct. 844, 83 L. Ed. 2d 841. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. (*Id.*, at 424, 105 S. Ct. 844, 83 L. Ed. 2d 841.) Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424-434, 105 S. Ct. 844, 83 L. Ed. 2d 841.

(*Uttecht v. Brown*, *supra*, 551 U.S. at p. 9.)

In an attempt to discredit the substantial impairment standard, Mataele presents a line of Supreme Court sentencing decisions emphasizing the need to interpret the Sixth Amendment in light of its historical context when assessing the appropriate power of the jury to consider punishment in deciding guilt or innocence. (AOB 97-106.) In each decision, the Supreme Court has examined the Framers' intent in order to ascertain the Sixth Amendment's meaning and scope. (See *United States v. Booker* (2005) 543 U.S. 220, 238-239 [125 S.Ct. 738, 160 L.Ed.2d 621] ["The Framers of the Constitution understood the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases."]; *Blakely v. Washington* (2004) 542 U.S. 296, 306 [124 S.Ct. 2531, 159 L.Ed.2d 403] [jury must "exercise the control that the Framers intended"]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 478-489 [120 S.Ct. 2348, 147 L.Ed.2d 435] [examining historical record and holding that any fact that increases penalty for crime beyond statutory maximum must be submitted to jury]; *Jones v. United States* (1999) 526 U.S. 227, 244 [119 S.Ct. 1215, 143 L.Ed.2d 311] [considering historical record, especially "tension between jury powers and powers exclusively judicial [that] would likely have been very much to the fore in the Framers' conception of the jury right"]); see also *United States ex rel. Toth v. Quarles* (1955) 350 U.S. 11, 18-19 [76 S.Ct. 1, 100 L.Ed. 8] [defining scope of jury right and discussing knowledge of Founders in fashioning Sixth Amendment]; see also *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] [reviewing English and early American historical sources to apply Confrontation Clause, and departing from prior, contrary case law].)

The forgoing opinions echo the importance of the jury and its "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." (*Jones v. United States*, *supra*, 526 U.S. at p. 245, citing 4 Blackstone 238-239.) The jury was endowed to judge not only the facts, but also the law by imposing a lesser included offense or outright acquittal to allow for the protection of the accused's rights from overreaching government and despotism. (*Ibid.*) The substantial impairment standard is not at odds with these principles.

Mataele maintains the notion of dismissing a prospective juror based on his or her opinion of the law does not comport with the intent of the Framers. (AOB 106.) However, the *Adams* standard does not allow for the dismissal of a prospective juror based on his or her opinion of the law, but rather his or her ability to be impartial and open-minded to the law.

Permitting voir dire on the subject of whether jurors can be impartial to the death penalty does not remove the independence of the jury as contemplated by the Framers or erode this fundamental principle. Rather, it ensures a vital element of the Sixth Amendment that juries are impartial. Mataele points out the very limited basis for excusing jurors historically as support for his position; nobility, prior convictions, defects, and for refusing to deliberate. (AOB 107-108, fns. 18-19.) A prospective juror's inability to follow their oath and be impartial is precisely what the substantial impairment standard ascertains.

Historically, the jury pool was extremely limited, but allowed for a dismissal for cause if a juror refused to deliberate. Removing prospective jurors that refuse to abide by their oath as a juror is consistent with the intent of the Framers and does not implicate a defendant's right to an impartial jury. "It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held." (*Hayes v. Missouri* (1887) 120 U.S. 68, 70 [7 S.Ct. 350,

30 L.Ed. 578.) To be consistent with what the Framers thought a jury was at the time of the Bill of Rights' adoption, it was imperative the jury would deliberate and had the discretion to prevent any judiciary misconduct.

The substantial impairment standard is consistent with notions of Sixth Amendment jurisprudence as recently interpreted by the Supreme Court. Mataele advances the position that, "To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience." (AOB 112.) Is this not embodied in California's capital sentencing scheme? First, potential jurors are made aware a guilty verdict of first-degree murder with special circumstances will result in either life in prison or the death penalty. The jury is tasked with the role as fact finder and determines if the defendant's guilt has been proven beyond a reasonable doubt. Only then does the jury exercise its discretion in the form of sentencing. California's capital scheme specifically provides the jury the opportunity to exercise its conscience and not impose the death penalty. Thus, it in no way usurps the jury's role as adjudicator of the evidence and the law. Consistent with the intent of the Framers, the jury's presence at every stage ensures the defendant is safeguarded from "judicial despotism."

Capital jury selection process does not impinge on the fundamental principles contemplated by the Sixth Amendment right to an impartial jury. A juror's ability and willingness to be impartial is at the core of the Sixth Amendment and the substantial impairment standard recognizes the necessary inquiry to make this determination, but limits excusal to actual bias. The jury still has full control over the factfinding and sentence to impose. The balancing of interests provided for under *Adams* is consistent with what the Framers had envisioned when they included in the Sixth Amendment the right to an impartial jury. It ensures all parties the jurors will put aside preconceived notions and uphold their oath. At the same

time, it still interposes the jury between the defendant and the government to assure the community has the opportunity to exercise its conscience in the course of factfinding and sentence.

IV. THE TRIAL COURT PROPERLY DENIED MATAELE'S MOTION TO DISMISS BECAUSE HE FAILED TO ESTABLISH ACTUAL PREJUDICE RESULTING FROM THE DELAY IN FILING CHARGES

Mataele contends his right to due process was denied by the trial court's denial of his motion claiming the prosecution's delay in filing charges against him and proceeding to trial was unreasonable. (AOB 114-133.) He claims the delay was unjustified and prejudicial, resulting in the loss of exculpatory witnesses and material evidence on the issue of third-party culpability. (AOB 120-133.) The trial court properly concluded that the prosecution's delay in filing charges was reasonable in light of the complexities of the case, and that Mataele had failed to demonstrate actual prejudice.

A. Standard of Review

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging." (*People v. Cowan* (2010) 50 Cal.4th 401, 430; see also *United States v. Lovasco* (1977) 431 U.S. 783, 789 [97 S.Ct. 2044, 52 L.Ed.2d 752].)

"Prejudice to a defendant from precharging delay is not presumed." (*People v. Jones* (2013) 57 Cal.4th 899, 921.) "A defendant seeking relief for undue delay in filing charges must first demonstrate resulting prejudice, such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time." (*People v. Abel* (2012) 53

Cal.4th 891, 908.) "'If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.] But if the defendant fails to meet his or her burden of showing prejudice, there is no need to determine whether the delay was justified.'" (*People v. Jones*, *supra*, 57 Cal.4th at p. 921, quoting *Abel*, *supra*, at pp. 908-909.)

The balancing process is the same under both the state and federal constitutions, however, the United States Constitution imposes an additional requirement: it must be shown that the delay was deliberately undertaken to gain a tactical advantage over the defendant. (*People v. Caitlin* (2001) 26 Cal.4th 81, 107.) "Because the law under the California Constitution is at least as favorable to defendant as federal law," this Court applies California law to a claim of undue delay in filing charges. (*People v. Abel*, *supra*, 53 Cal.4th at p. 909, fn. 1.) A trial court's ruling on a motion to dismiss for prejudicial delay in filing charges is reviewed for an abuse of discretion, with deference given to underlying factual findings by the trial court supported by substantial evidence. (*People v. Jones*, *supra*, 57 Cal.4th at p. 922; *People v. Cowan*, *supra*, 50 Cal.4th at p. 431.) "[W]e consider all evidence that was before the court at the time the trial court ruled on the motion." (*People v. Jones*, *supra*, at p. 922.)

B. Background

Mataele killed Johnson and shot Masubayashi just past midnight the morning of November 12, 1997. (15 RT 3637-3638; 22 RT 5024.) Masubayashi identified the shooter as Mataele to Officer Linn later that day at the hospital. (19 RT 4487-4489.) In an interview with Detective Guy Reneau, Masubayashi identified Mataele, Carrillo, Chung and Lee as possible suspects. (17 RT 3943-3945, 3953-3957.) Lee and Chung were interviewed and claimed they were with each other in Los Angeles at the

time of the shooting. (4 CT 1074-1075; 18 RT 4407; 23 RT 5320.) Additional efforts were made to locate Mataele by serving a search warrant at his residence and questioning his associates. (13 RT 3241, 3313-3314; 14 RT 3420; 30 RT 6785.)

Meanwhile, Carrillo and Mataele procured false identifications in Hollywood and fled to Salt Lake City. (22 RT 5043, 5046; 23 RT 5262-5263.) They remained in Salt Lake City with Mataele's relatives for about six months. (22 RT 5046-5047.) On February 9, 2000, Mataele was arrested for transporting methamphetamine and identified himself as Antoine Santos. (31 RT 6927.) He posted bail and was released from custody. (31 RT 6928.)

On April 7, 2000, Masubayashi contacted the Anaheim Police Department and told them he had seen Mataele at the Pioneer Hotel the day before. (15 RT 3691; 27 RT 6094.) By this time, the original lead detective, Guy Reneau, had been diagnosed with cancer and was on medical leave. (27 RT 6134.) Officers interviewed Masubayashi a second time on May 4, 2000. (27 RT 6099.)

On May 22, 2000, Mataele was arrested on an outstanding warrant for unrelated charges. (30 RT 6813.) Mataele pled guilty to transporting methamphetamine and was sentenced on December 12, 2000, to three years in prison. (30 RT 6663.) While Mataele was in custody for his guilty plea, the investigation continued.

On October 19, 2001, an amended felony complaint was filed. (1 CT 2, 11-15.) Mataele was appointed counsel and arraigned on December 7, 2001. (1 CT 4-5.) The preliminary hearing was held on September 6, 2002. (1 CT 8-9.) On September 12, 2002, a felony information was filed charging Mataele with murder, conspiracy to commit murder, and attempted murder. (1 CT 19-23.)

On July 21, 2003, Mataele filed a motion to dismiss alleging an unreasonable delay of his prosecution violated his right to due process. (1 CT 135-158.) In relevant part, he contended the delay rendered Detective Guy Reneau unavailable due to health problems and hampered the defense ability to question him about inconsistent statements made by Masubayashi. (1 CT 142-145, 158.) The prosecution opposed the motion. (1 CT 167-171.) The trial court reserved ruling on the motion until conclusion of the jury trial. (1 RT 27, 34.)

The motion was revisited on October 7, 2005, after trial. (42 RT 9353.) In addition to the points raised in the original motion, Mataele's counsel contended the delay negatively impacted Perdon's recall of her interview with Detective Schmidt and resulted in the defense losing contact with Towne. (42 RT 9355-9356, 9360-9361.) The prosecutor responded that no prejudice had been shown as Perdon's statement was made only a year before the filing, she was not called as a witness by Mataele, and her impaired memory was on account of her drug use and relationship to the parties. (42 RT 9357-9358.) Also, the defense made a tactical decision not to subpoena Towne, and the fact they lost contact with him had nothing to do with the filing delay. (42 RT 9358-9360.)

The trial court read on the record its order denying the motion:

> Analyzing this case under the federal due process clause, there is no evidence that the suggested delay between the date of offense (11-12-97), the date of filing the complaint (10-19-01), and the date of arrest of defendant in May of 2000 was undertaken to gain a tactical advantage over defendant. See, People v. Catlin, 26 Cal.4th 81, 107 (2001). 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. In short, there is no violation of federal due process.

Under state constitutional law, there is likewise no due process violation. Defendant has not shown actual prejudice from the delay. To establish that preaccusation delay violated defendant's right to due process under Article I, section 15 of the California Constitution, he must 'demonstrate prejudice arising from the delay.' See, People v. Catlin, *supra*, 26 Cal.4th at p. 107. Prejudice is not presumed. People v. Lawson, 94 Cal.App.4th 194, 198 (1979). The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to defendant against justification for the delay. Catlin, *supra*, p. 107. But when a defendant fails to meet his burden of proving prejudice, 'the court need not inquire into the justification for the delay (since there is nothing to "weigh" such justification against).' See, People v. Lawson, *supra*, at p. 198. When prejudice is established, it may be outweighed by the prosecution demonstrating the delay was caused by the district attorney's desire to engage further investigation. Catlin, *supra*, at p. 198. 'Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.' (*Ibid.*, quoting People v. Dunn-Gonzales, 47 Cal.App.4th 899, 913 (1996). 'In sum, to prosecute a defendant following investigative delay does not deprive the defendant of due process, even if his or her defense might have been somehow prejudiced by the lapse of time.' People v. Dunn-Gonzales, *supra* at p. 914.

Accordingly, the motion to dismiss for violation of due process is denied.

(6 CT 1689-1691; 42 RT 9362-9367.)

C. Mataele Failed to Demonstrate Actual Prejudice

The trial court properly exercised its discretion in denying Mataele's motion to dismiss on due process grounds on account of his inability to establish any resulting prejudice. Specifically, Mataele contends the delay rendered two exculpatory witnesses unavailable—Towne and Detective Reneau, impaired the efforts to locate witnesses challenging the credibility of Carrillo and Quiambao, and impacted Perdon's ability to recall previous statements. (AOB 120-133.) These claims are speculative at best.

1. Detective Guy Reneau

Detective Reneau was the original lead investigator on the case, but by April 2000, he was placed on medical leave due to cancer. (27 RT 6134.) His earlier interviews of Masubayashi on November 12, 1997, at the hospital, and on November 18, 1997, at Masubayashi's home, were recorded and available to law enforcement and the defense. (10 Supp. CT 2980-3000; 11 Supp. CT 3001-3072; 27 RT 6139-6140.)

At the hospital, when initially asked who shot him, Masubayashi said, "I don't, I don't know." (10 Supp. CT 2981.) When asked again, Masubayashi said it was Mataele. (10 Supp. CT 2982.) Mataele argues his inability to question Detective Reneau about Masubayashi's inconsistent statements shows actual prejudice. He is wrong. The record does not clarify Detective Reneau's status when the trial began, but all parties agreed he was unavailable. Detective Reneau was on medical leave in April 2000 at the latest. Mataele has failed to demonstrate when Detective Reneau became unavailable and how the filing delay played a role in his unavailability.

Moreover, Mataele had access to the taped interviews and transcripts of the interviews conducted by Detective Reneau of Masubayashi, which he could use to impeach Masubayashi, and he did question him extensively on

this. (17 RT 3943-3959, 3981-3984.) He did not establish that Detective Reneau could have shed any additional light on the matter beyond that in the recordings. Mataele has not established prejudice.

2. Eyewitness Matthew Towne

Mataele also argues the delay in prosecution caused witness Matthew Towne to become unavailable at the time of trial. (AOB 123-124.) Matthew Towne would have testified,

> On November 12, 1997, around midnight I was sitting outside about to go home and I was talking to John Fowler and Jose Rodriguez who were fellow employees.
>
> I heard a single gun shot [sic]. As I looked towards the parking lot across the street, I saw a male 5'8" to 6' tall, thin build wearing a cap on his head walking eastbound through the parking lot away from the driver's side door of a black compact car. This unknown male fired 3-4 more shots in an eastbound direction towards Euclid while walking eastbound. I didn't see anything else because I ducked behind the wall and ran inside the clinic.
>
> Within five minutes the police arrived and I gave them a statement which I have reviewed. That statement has a Bates number 000018 on the lower right hand corner. That statement is still true and correct.
>
> The man I saw shooting definitely had a thin build. The man was definitely not anywhere near 300 pounds. Based on his build I would estimate his weight to be 160-170 pounds.

(6 CT 1643-44.)

In February 2004, Defense Investigator David Carpenter contacted Matthew Towne in Muncie, Indiana. Towne said he was agreeable to traveling to California to testify whenever necessary. (6 CT 1644, 1658.) After moving to Las Vegas in November 2004, Towne provided the

defense with a current address and phone number. (6 CT 1645, 1658.) Investigator Carpenter called Towne on April 30, 2005, and "got a recording that number was 'not in service.'" (6 CT 1658.) Investigator Carpenter continued to make efforts to locate Towne, but to no avail. (6 CT 1658-1662.) Investigator Carpenter explained in a motion to continue that Towne resided out of state, but had always been a cooperative witness and so the defense decided not to compel his attendance through the interstate compact. (29 RT 6454-6456.)

Towne was evicted from his apartment in June 2005. (6 CT 1645.) Towne said from the time he was evicted in late June until the beginning of August 2005, he had "no access to a phone, no car, no friends, no job, no money and I was struggling to survive." (6 CT 1645.) Towne did not contact the defense with his location until August 17, 2005. (6 CT 1645, 1662.)

Mataele has not demonstrated Towne was unavailable on account of the delay in filing charges. Mataele was initially charged by information in this case on September 12, 2002. (1 CT 19.) The defense was able to contact Towne after charges were filed and remained in contact with Towne until his personal problems interfered. However, the timing of the filing had no impact on the substance of Towne's proffered testimony or his willingness to testify. Further, the defense chose not to compel his attendance by interstate compact and Towne did not make his whereabouts known until August 2005. This temporary loss of communication was not the result of prefiling delay, but the consequence of Towne moving without forwarding an address and the defense temporarily could not find him. It is speculation to assume Towne would have been available had the authorities prosecuted Mataele sooner.

Anyhow, Towne's testimony was cumulative. He would have proffered a general description of the shooter as having a thin build and

between five feet eight inches to six feet tall. He gave a general description consistent with the ones given by Rodriguez and Fowler, who were located in the same spot under the same poor lighting conditions. Mataele has not shown actual prejudice.

3. Impeachment Witnesses

Mataele also argues the delay prevented him from acquiring evidence to impeach Carrillo's and Quiambao's credibility. (AOB 124-125.) Specifically, he claims the delay prevented him from locating witnesses to challenge their credibility on account of their drug use, mental illness, fraudulent activities, dishonesty, and bias. (AOB 124-125.) This general assertion fails to establish actual prejudice. "Prejudice may be shown by "'loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memories attributable to the delay.'" [Citations.]" (*People v. Cowan, supra*, 50 Cal.4th at p. 430.) Mataele has not shown any loss of actual evidence or even likely evidence.

In addition, Carrillo's credibility was thoroughly challenged at trial. He readily admitted to habitual drug use, depression, involvement in fraudulent schemes, being a Pinoy Real gang member, and having pled to lesser offenses in exchange for his testimony. (21 RT 4942-4948, 4955; 22 RT 6171.) The many facets of Carrillo's credibility were fully disclosed to the jury and argued by counsel. (32 RT 7219-7255.) This was also the case with Quiambao. (32 RT 7255-7262.) The prosecution played Quiamboa's 2003 interview in Virginia for the jury, and the jury heard his conflicting trial testimony. (13 RT 3154-3155, 3178, 3240-3241, 3281-3288, 3316-3317; 14 RT 3449-3454; 24 RT 5543; 28 RT 6346-6357.) He also disclosed his lifestyle of being a gang member, using drugs, and joining the military. (13 RT 3142, 3191-3192, 3202.) The jury was not shielded from any of his unsavory attributes as a witness. Both Carrillo and

Quiambao were thoroughly vetted by all parties, and Mataele has not established the loss of material impeachment evidence.

4. Perdon's Memory

Mataele claims he was prejudiced from the prefiling delay because it impaired Perdon's ability to recall her conversations with Mataele. Specifically, she could not remember if Mataele made a comment to her about shooting Johnson. It was Masubayashi's testimony that Perdon told Masubayashi that Mataele said he shot Johnson. (AOB 125-126.) The trial court did not abuse its discretion in finding Mataele had not established prejudice from the delay.

Perdon was interviewed in April 2000 by the Anaheim Police Department. She testified in 2005, explaining that when she gave the statement in 2000, she told them what she knew to be true at that time, and that incidents were fresher in her mind five years earlier. (25 RT 5601.) Perdon said she received a call from the District Attorney's Office about three years before testifying at trial and was questioned about the case. She told the District Attorney's Office that "there really wasn't much that I could say." (25 RT 5602.) After the 2002 call, she received a copy of the transcript of her interview in the mail, read it once and threw it away. (25 RT 5649.) She said, "some of the stuff I read, I don't remember saying." (25 RT 5649-5650.) Perdon never testified in any prior proceedings concerning this case. (25 RT 5602.) She also said she was using methamphetamine daily from April 1998 to October or November of 2000. (25 RT 5613-5614, 5621.) Perdon said she could not remember the statements she made to the police, but since they were recorded, she must have made them. (25 RT 5619.)

Perdon said in her 2000 interview that she could not remember Mataele ever using the word "nigger" in connection with Johnson. (25 RT 5680, 5687-5688.) At trial, she said that she could not remember Mataele

ever saying anything like, "I came in my pants when I saw that nigger flop." (25 RT 5681-5682.)

The essence of Perdon's testimony relating to Mataele was that she saw Mataele at Quiambao's house likely in 1999 or early 2000 and spoke with him, but did not remember any details. (14 RT 3466-3469; 25 RT 5631, 5665.) More specifically, in April 2000, she told Detective Schmidt that she did not remember Mataele making a statement to her using the word "nigger." (14 RT 3468; 24 RT 5680-5681.) At the same time, she was using methamphetamine everyday, so her memory at the time was not necessarily reliable. (25 RT 5613-5614, 5621.)

However, there was nothing to suggest that her memory improved over subsequent time. She explained in 2002 she received the transcript of her interview and did not remember saying some of it. (25 RT 5649-5650.) Also, at trial she stated she did not remember making the statements in 2000, but thought they were accurate on account of the fact they were tape-recorded. (25 RT 5619.) Mataele's claim that Perdon's lack of memory was a result of the delay is speculative at best and did not establish prejudice. (See e.g., *People v. Jones*, *supra*, 57 Cal.4th at pp. 922-923 [witness "was a habitual drug user, and the trial court reasonably concluded her memory would not have been the best in any case"].)

D. The Delay Was Justified

The justification for the delay in filing charges outweighed any possible prejudice. The trial court did not abuse its discretion when it found the delay was nothing more than investigative delay. Mataele was initially identified as the shooter, and then fled with Carrillo. Meanwhile, Chung and Lee provided alibis for each other, and Masubayashi had doubts on his identification of the driver. Also, at some point, the lead investigator was diagnosed with cancer. In addition, the case involved gang members withholding statements and ultimately four defendants.

The case was at a standstill investigation-wise until Masubayashi contacted the Anaheim Police Department in April 2000 after seeing Mataele, and subsequent interviews led to statements by Chung, Carrillo and Quiambao implicating the defendants in the murder. Once the prosecution was able to identify and locate cooperating witnesses, charges were promptly filed. There was no due process violation because not only was the delay on account of ongoing investigation, but no prejudice has been shown. Thus, the trial court did not abuse its discretion in denying Mataele's motion to dismiss for precharging delay.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DETERMINED THAT TOWNE'S STATEMENTS TO OFFICER BOWERS DID NOT QUALIFY FOR ADMISSION UNDER THE SPONTANEOUS STATEMENT EXCEPTION TO THE HEARSAY RULE

Mataele argues the trial court abused its discretion and committed prejudicial error by denying his request to admit statements made by Matthew Towne to Officer Terrance Bowers as spontaneous statements under Evidence Code section 1240. (AOB 134-147.) The trial court correctly found a lack of foundation establishing the statements were made under the stress of excitement. Moreover, even assuming the trial court abused its discretion, any resulting error was harmless as there is no reasonable probability that Mataele would have received a more favorable outcome at trial had the statements been introduced.

A. Matthew Towne's Statements to Officer Terrance Bowers

Mataele's counsel sought to question Officer Terrence Bowers about the statement he took from Matthew Towne at the crime scene and admit it under Evidence Code section 1240, the excited utterance hearsay exception. (31 RT 7003-7005.) Defense counsel proffered that Towne was interviewed within five minutes of the murder, was nervous and operating

under stress, and gave a description of the shooter. (31 RT 7004-7008.) Towne told Officer Bowers the shooter was between five feet eight inches and six feet tall, and had a thin build. (31 RT 7004.) The prosecutor disagreed with the timing of the interview and claimed that it was taken hours after the shooting, and argued there was nothing in the officer's report to indicate Towne's mental or physical state would qualify under Evidence Code section 1240. (31 RT 7005.)

Officer Bowers testified at an Evidence Code section 402 hearing that he arrived at the scene five to ten minutes after the shooting. (31 RT 7009.) Officer Bowers assisted Officer Heinzel with the scene and they determined it was a homicide. (31 RT 7012.) There were groups of people standing around that had told other officers they had seen something, and were directed to wait there until officers could get to them. (31 RT 7012-7013.) It was then determined that Officer Bowers would speak with Fowler and Towne. (31 RT 7014.) Fowler and Towne were pointed out to Officer Bowers because they had communicated with other officers. (31 RT 7015.) Officer Bowers contacted Fowler first, and then separately spoke with Towne for a few minutes to find out what they had observed. (31 RT 7009, 7011, 7014.) Towne appeared to be nervous; he was a little visibly shaken, but not visibly upset. (31 RT 7010-7011.) Officer Bowers explained that his general impression was that Towne was nervous, which would be normal under the circumstances, but did not recall anything specific about Towne to support his impression. (31 RT 7015.)

The trial court sustained the prosecutor's objection to admitting the statement;

> . . . It doesn't qualify as a spontaneous declaration for a couple of reasons. The Law Revision Commission comment behind 1240 reminds us that the rationale of this exception is that the spontaneity of such statements and the lack of opportunity for

reflection and deliberate fabrication provide adequate guaranty of their trustworthiness.

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.

(31 RT 7021.)

B. The Trial Court Properly Found Towne's Statements Did Not Qualify Under The Spontaneous Statements Exception

Evidence Code section 1240 provides:

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.

To render statements admissible under the spontaneous declaration exception to the hearsay rule, it is required that:

(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.

(*People v. Poggi* (1988) 45 Cal.3d 306, 318, quoting *Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468; see also *People v. Lynch* (2010) 50 Cal.4th 639, 751-752.)

This Court has explained that:

> [t]he crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . . 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 . . . . [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter.

(*People v. Farmer* (1989) 47 Cal.3d 888, 903-904, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

Whether the requirements of the spontaneous statement exception are satisfied in any given case is largely a question of fact. (See *People v. Poggi, supra*, 45 Cal.3d at p. 318.) The question of whether a declarant is under the stress of excitement caused by his or her perception of a startling event is a preliminary determination of fact to be made by the trial court, and a reviewing court must uphold such a determination where supported by substantial evidence. (See *People v. Brown* (2003) 31 Cal.4th 518, 540-542; *People v. Poggi, supra*, 45 Cal.3d at p. 318 [the discretion of the trial court is at its broadest when it determines whether the nervous excitement still dominated the declarant and whether his or her reflective powers were still in abeyance].) After a reviewing court determines whether substantial evidence supports a trial court's preliminary factual determination, it reviews the trial court's legal conclusions to admit or exclude a statement as an excited utterance for an abuse of discretion. (See *People v. Lynch, supra*, 50 Cal.4th at p. 752; *People v. Brown, supra*, 31 Cal.4th at p. 541; *Poggi, supra*, at p. 318.)

The trial court did not abuse its discretion when it refused to admit Towne's statement to Officer Bowers as a spontaneous statement under Evidence Code section 1240. The trial court made the preliminary factual determination that Towne was not acting under the stress of nervous excitement when he was interviewed by Officer Bowers. This determination is supported by substantial evidence. (See *People v. Brown*, *supra*, 31 Cal.4th at p. 541.)

As noted by the trial court, Towne had ample opportunity for reflection and deliberate fabrication, undermining the trustworthiness of the statement. (31 RT 7021.) Mataele repeatedly argues Towne's statements were made five to ten minutes after the shooting, but this is not an accurate representation of Officer Bowers' testimony. (AOB 139-141.) Officer Bowers testified that he arrived at the scene five to ten minutes after the shooting, not that he interviewed Towne within minutes of the shooting. (31 RT 7009.) First, Officer Bowers assisted Officer Heinzel with the scene and they determined it was a homicide. (31 RT 7012.) Then they determined that Officer Bowers would speak with Fowler and Towne. (31 RT 7014-7015.) In the meantime, other officers had contact with Fowler and Towne to some extent because they notified Officer Bowers that Towne and Fowler needed to be interviewed. Also, the potential witnesses were described as groups of people standing around and were directed to wait there until officers could get to them. (31 RT 7012-7013.) Once Officer Bowers was able to begin his interviews, he contacted Fowler first, and then separately spoke with Towne. (31 RT 7014.)

The series of actions taken by Officer Bowers between the time of his arrival until his actual interview of Towne preclude the possibility that Towne was interviewed five to ten minutes after the shooting. Rather, here, there is substantial evidence that enough time had passed to alleviate the stress of witnessing the shooting, and provides the opportunity for

reflection and fabrication. Furthermore, the fact Towne was likely standing in a group with other witnesses, calls into question the reliability of his statements because it is unknown what influence these contacts had on his statement. Accordingly, the interview was not so immediate to support a finding the statements were spontaneous.

Moreover, the evidence substantially supported the trial court's finding that Towne's mental state was not one under the stress of excitement of the event. The only observation Officer Bowers was able to articulate was that Towne gave him the general impression of being nervous; a little visibly shaken, but not visibly upset. (31 RT 7010-7011, 7015.) He considered this the expected reaction to witnessing a shooting. (31 RT 7015.) The trial court recognized that Officer Bowers's testimony established "common nervousness and nothing more." (31 RT 7021.) There was nothing to indicate Towne was still in a state of stress from the excitement. (Cf. *People v. Poggi, supra*, 45 Cal.3d at p. 320 [statement to police 30 minutes after attack and in response to questioning spontaneously because witness "excited and bleeding profusely from multiple and ultimately fatal stab wounds to the chest"]; *People v. Brown, supra*, 31 Cal.4th at p. 541 [the declarant "could not stop his body from shaking nor stem the flow of tears"].) In this case, although Officer Bowers testified that Towne appeared "nervous" there is nothing to suggest that his emotions held such control on him as to prevent deliberation. (See, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 892-893 ["A spontaneous statement is one made without deliberation or reflection."])

The trial court's factual determinations and conclusion that Towne was not acting under the stress of nervous excitement, but had the opportunity to reflect and deliberate prior to being interviewed by Officer Bowers is supported by substantial evidence. The trial court's conclusion the statement does not fall under the spontaneous statement exception to the

hearsay rule was not an abuse of discretion. (*People v. Lynch*, *supra*, 50 Cal.4th at p. 754; *People v. Farmer*, *supra*, 47 Cal.3d at p. 904.)

C. Even Assuming the Trial Court Abused its Discretion When it Excluded Towne's Statement, Mataele Suffered No Prejudice

Even assuming the trial court abused its discretion when it refused to admit Towne's statement under the spontaneous statement exception to the hearsay rule, there is no reasonable probability that the outcome of Mataele's trial would have been more favorable to him had the statement been admitted into evidence. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 813 [abuse of discretion regarding admission of spontaneous statement evaluated for prejudice under *People v. Watson* (1959) 46 Cal.2d 818, 836].)

Mataele argues exclusion of the evidence also violated his federal constitutional due process right to present a complete defense and urges this Court to apply the harmless beyond a reasonable doubt standard in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (AOB 144.) The right to present a defense is a fundamental element of due process. (*Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019].) However, "'[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Dement* (2011) 53 Cal.4th 1, 52, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834.) Thus, the trial court did not violate Mataele's right to present a defense by excluding inadmissible hearsay and the proper standard to be applied is state law error.

The jury evaluated and rejected Mataele's trial testimony, in which he set forth his version of the events, asserted that he had not intended for Johnson and Masubayashi to be killed and claimed Carrillo committed the shooting. Nothing in Towne's statement would have altered the jury's

conclusion. Mataele's defense theory that Carrillo was the shooter rested on his own self-serving testimony, and the incredible testimony of Quiambao and Monroe.

The jury had already heard evidence from the two other eyewitnesses that were with Towne outside the urgent care clinic at the time of the shooting. (20 RT 4688, 4699.) Jose Rodriguez described the shooter as 6 feet tall, heavyset, appeared black, 25 years old, and was wearing dark clothes. (20 RT 4673-4680.) John Fowler was also outside the urgent care clinic and described the shooter as five feet ten inches, thin, and possibly black but he was not sure. (20 RT 4710-4720, 4734.) Towne's proffered statement could only render an opinion as to the shooter's height that was a range consistent with the other two witnesses. He also gave an opinion that the shooter was thin, consistent with Fowler, but contrary to Rodriguez. Given this testimony from the other live eyewitnesses, introducing the hearsay statement of Towne through Bowers would have been cumulative and significantly less persuasive than the evidence already before the jury. Accordingly, Mataele's claim must be rejected.

Furthermore, as explained above, the evidence establishing Mataele's culpability for first-degree murder was truly overwhelming. Not only was Mataele identified by three separate individuals as being in possession of a gun, he was identified by Masubayashi and Carrillo as the shooter. Moreover, after the shooting he fled the scene on foot to continue after Masubayashi rather than returning in the Jeep with Chung, Lee and Carrillo. He also fled to Utah for a period of time. Mataele's defense identifying Carrillo as the shooter lacked all credibility with the jury and Towne's statement would not have made a difference in the outcome.

VI. THE TRIAL COURT PROPERLY EXCLUDED CARRILLO'S STATEMENTS TO ALANA SWIFT EAGLE AS INADMISSIBLE HEARSAY AND IRRELEVANT

Mataele argues the trial court abused its discretion and denied him his right to present a defense by refusing to allow Alana Swift Eagle to testify that Carrillo told her "everything pointed to T-Strong and he (Carrillo) was going to 'run with that.'" He contends the statement was admissible as a prior inconsistent statement because it contradicted Carrillo's testimony denying shooting Johnson and Masubayashi. (AOB 148-163.) The trial court properly excluded the statement because it was too ambiguous to be relevant and inconsistent, and any possible probative value was substantially outweighed by the potential prejudice on account of the ambiguity. Moreover, any possible error from the omission did not implicate Mataele's right to present a defense and was harmless.

A. Factual Background

Initially, Mataele sought to introduce statements made by Carrillo to his sister-in-law, Alana Swift Eagle, in 2001 as an implied admission. (29 RT 6427.) The proffered testimony was that in 2001, Swift Eagle saw Carrillo on the jail bus going to court and asked him if it were true what she was hearing. Carrillo replied, "I don't know. What are you hearing?" Swift Eagle said, "You killed someone for a dime." Carrillo replied, "I can't talk about it." Swift Eagle asked Carrillo how much time he was looking at, and he replied, "Hopefully, not a lot." (29 RT 6431-6432.)

The prosecutor responded the statements were irrelevant and were hearsay, and Carrillo was represented by counsel so the adoptive admission did not apply. (29 RT 6432.) The trial court ruled the evidence was inadmissible hearsay. (29 RT 6439-6440.)

Mataele's counsel met and spoke with Swift Eagle during a recess. (29 RT 6468-6469.) Counsel indicated to the court that Swift Eagle had

held back a portion of her conversation with Carrillo on the bus when she had been interviewed earlier by the defense. (29 RT 6470.) Swift Eagle now told defense Investigator David Carpenter that she also asked Carrillo if he committed the killing. Carrillo responded that "everything pointed to T-Strong and he (Carrillo) was 'going to run with that.'" (5 CT 1205-1206; 29 RT 6470.) Mataele's counsel now sought to admit Carrillo's statement to Swift Eagle as a prior inconsistent statement since Carrillo had testified that he was not the shooter. (29 RT 6471-6472.) The trial court held, "[h]er testimony regarding what [Carrillo] told her, 'everything points to T-Strong, and I'm going to run with that,' is excluded as hearsay." (29 RT 6473.)

The trial court later explained:

> 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. And that's aside from the fact that it's only recently revealed to the prosecution.

(29 RT 6476-6477.)

B. Carrillo's Statement to Swift Eagle Was Irrelevant

"A trial court has broad discretion in determining relevancy, but it cannot admit evidence that is irrelevant or inadmissible under constitutional or state law." (*People v. Blacksher* (2011) 52 Cal.4th 769, 819-820; *People*

v. Morrison (2004) 34 Cal.4th 698, 724.) "The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule." (*Morrison, supra*, at p. 724.) "Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. [Citations.]" (*Ibid.*)

"Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.'" (*People v. Riccardi* (2012) 54 Cal.4th 758, 815, quoting *People v. Jablonski* (2006) 37 Cal.4th 774, 821; Evid. Code, § 210.) "Evidence that 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive' is generally admissible." (*People v. Riccardi, supra*, 54 Cal.4th at pp. 814-815; *People v. Garceau* (1993) 6 Cal.4th 140, 177.)

Mataele testified that Carrillo was the actual shooter, not him. He reasons Carrillo's statements to Swift Eagle are relevant because they create the reasonable inference that Carrillo was the shooter and he was shifting the blame onto Mataele. While evidence concerning the identity of the shooter would be relevant, Carrillo's statements had no tendency to shed light on this disputed fact. In response to Swift Eagle's question of whether Carrillo killed Johnson, Carrillo merely said the evidence points to Mataele and that he was going along with it. The neutrality of his response does not reasonably equate with culpability as the shooter. As the trial court pointed out, the ambiguity of the statement undermined its relevance. There was no logical inference that because Carrillo said the evidence pointed to Mataele and he was not contesting it then he was actually the shooter. The trial court did not abuse its discretion in finding the statements irrelevant.

C. Carrillo's Statement To Swift Eagle Was Not Admissible As A Prior Inconsistent Statement Because It Was Not Inconsistent With Carrillo's Trial Testimony

In addition to being irrelevant, the statements were hearsay. They were not admissible under the prior inconsistent statement exception to the hearsay rule because they were not inconsistent with Carrillo's trial testimony. "'A 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 under the conditions set forth in Evidence Code sections 1235[15] and 770[16].'" (*People v. Cowan, supra*, 50 Cal.4th at p. 462, quoting *People v. Johnson* (1992) 3 Cal.4th 1183, 1219.)

"'The "fundamental requirement" of section 1235 is that the statement in fact be inconsistent with the witness's trial testimony.' [Citation.] '"Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement ... ."' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 859; *People v. Cowan, supra*, 50 Cal.4th at p. 462.) "'As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. On a

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[15] 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."

[16] 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." Since Carrillo had not yet been excused from giving further testimony, the foundation requirements of Evidence Code section 770 were met. (*People v. Cowan, supra*, 50 Cal.4th at p. 462, fn. 19.)

comparison of the two utterances, are they in effect inconsistent?'" (*Worley v. Spreckels Bros. Com. Co.* (1912) 163 Cal. 60, 72, quoting 2 *Wigmore*, Evidence § 1040.) The prior statement is admissible if it has "'. . . a tendency to contradict or disprove the [trial] testimony or any inference to be deduced from it.'" (*People v. Spencer* (1969) 71 Cal.2d 933, 942.)

Whether the requisite facts exist to permit admission of statements under an established hearsay exception is a determination vested in the trial court's discretion. "The trial court is vested with wide discretion in determining the admissibility of evidence." (*People v. Karis* (1988) 46 Cal.3d 612, 637.) On appeal, an appellate court applies the abuse of discretion standard to a trial court's ruling on the admissibility of evidence, including a ruling that turns on the hearsay nature of the evidence at issue. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008.) A trial court's ruling will not be disturbed "'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266, quoting *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The trial court did not abuse its discretion when finding the proffered statement was not a prior inconsistent statement because Swift Eagle's proffered testimony was not inconsistent with Carrillo's trial testimony. Notably, Carrillo's trial testimony gave a full account of the shootings and events surrounding them. He admitted to being involved throughout the conspiracy, and only denied firing the gun. Thus, Carrillo never denied his guilt beyond firing the gun at Johnson and Masubayashi. Carrillo's statement that "all the evidence pointed to T-Strong" and he was "going to run with it" cannot be reasonably interpreted as admitting he was the shooter. The only remotely reasonable inference is that when asked if he

killed Johnson, Carrillo said he was relying on the state of the evidence. There is no reasonable basis to find that Carrillo was admitting to being the shooter, only that he was pointing out the obvious—the evidence showed Mataele was the shooter.

The statement should also be taken in context with other statements Swift Eagle said took place on the bus. Although the precise chronology of these statements is not in the record, it appears they were made during a single conversation. In that conversation, Swift Eagle was questioning Carrillo about his plea agreement and he responded that he could not talk about it, but hopefully he was not looking at a lot of time. (29 RT 6422-6423.) Contemporaneous to this, Swift Eagle asked Carrillo if he did the killing and his response was the evidence showed Mataele did it and he was relying on that. (5 CT 1206; 29 RT 6470.)

The overall impression of the conversation is that Carrillo was relying on the state of the evidence pointing to Mataele's guilt and taking a deal for his involvement. The fact Carrillo was "going to run with that" or go along with it, does not mean he was being dishonest in any fashion. Rather, at trial he admitted to his involvement. It is utter speculation to interpret his statement as an admission to being the shooter. Not only had he indicated to Swift Eagle that he could not discuss the matter, but his response was merely an affirmation of the state of the evidence. Carrillo's statement was properly excluded because it did not have a tendency to contradict Carrillo's trial testimony.

D. The Trial Court Properly Found the Statement More Prejudicial than Probative

Even assuming the statements were relevant or admissible hearsay, the trial court further acted within its discretion in excluding the statements upon finding their probative value was substantially outweighed by potential prejudice. Evidence Code section 352 authorizes a trial court to

exclude relevant evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For purposes of Evidence Code section 352, prejudice means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Heard, supra*, 31 Cal.4th at p. 976.) A decision to exclude evidence under Evidence Code section 352 comes within the trial court's broad discretionary powers and "will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

Here, the trial court acted within the broad scope of its discretion and properly performed the balancing test required by Evidence Code section 352 when it concluded the statement was inadmissible. Mataele sought to introduce Carrillo's statements to Swift Eagle on the bus, four years after the shootings and four years before trial, to show Carrillo was the shooter. But as argued above, Carrillo's statements were ambiguous at best, and required an enormous leap of speculation to reasonably interpret the statement as an implied admission that Carrillo was the shooter. Thus, the statement's probative value was low and would have been more prejudicial than probative.

E. Exclusion of the Statement Did Not Deny Mataele His Right to Present a Defense and Was Harmless Error

Finally, the exclusion of Carrillo's statement did not deprive Mataele of his state and federal constitutional rights to present a defense. Contrary to Mataele's argument (AOB 159-163), mere evidentiary error, like other trial error, generally is not subject to the more stringent standard of prejudice (i.e., harmless beyond a reasonable doubt) for federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18. The

application of the ordinary rules of evidence to exclude defense evidence does not infringe on the right to present a defense. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.) The Sixth and Fourteenth Amendments guarantee a state criminal defendant a meaningful opportunity to present a complete defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690-691 [106 S.Ct. 2142, 90 L.Ed.2d 636].) Although the *Chapman* standard may apply when a trial court completely excludes all evidence in support of a defendant's defense, this was not the case because the trial court admitted evidence in support of Mataele's claim that Carrillo was the shooter. (*People v. Fudge*, *supra*, at p. 1103 ["If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense'"].) "A defendant's right to present relevant evidence is not unlimited" and may be restricted in circumstances where necessary """to accommodate other legitimate interests in the criminal trial process,""" such as adherence to standard rules of evidence. (*United States v. Scheffer* (1998) 523 U.S. 303, 308 [118 S.Ct. 1261, 140 L.Ed.2d 413]; see also *Taylor v. Illinois* (1988) 484 U.S. 400, 410 [108 S.Ct. 646, 98 L.Ed.2d 798].)

Here, the trial record demonstrates that Mataele had a meaningful opportunity to present a complete defense that Carrillo was the actual shooter. The trial court's exclusion of the evidence at issue here did not prevent Mataele from presenting other admissible evidence challenging Carrillo's credibility and supporting his defense that Carrillo was the shooter. For example, defense counsel was afforded the opportunity to vigorously cross-examine Carrillo and question him on his involvement, plea agreement, and motives. (23 RT 5257-5283.) In his defense, Mataele personally testified that Carrillo was the shooter, and presented the testimony of multiple eyewitnesses whose description of the shooter

included characteristics of Carrillo, including that the shooter was thin and possibly wearing a hat. Also, the defense presented the testimony of both Quiambao and Monroe who said Carrillo told them he was the shooter.

In addition, defense counsel forcefully argued during his closing arguments that Carrillo was an incredible witness, and that Carrillo had the opportunity and motive to place the blame on Mataele and the gun in his hand. (32 RT 7219-7249.) Throughout his closing, defense counsel repeatedly attacked Carrillo's credibility and his account of the incident. The foregoing record demonstrates that the court's exclusion of the evidence did not prevent Mataele from vigorously presenting the defense that Carrillo was the shooter. Because Mataele has failed to show a "complete exclusion of evidence intended to establish an accused's defense" (*Cunningham*, *supra*, 25 Cal.4th at p. 999), he has failed to show any assumed error implicated his constitutional rights and required the application of the *Chapman* harmless error standard.

Because any possible error by the trial court did not rise to the level of constitutional error, the applicable harmless error standard is the one set forth in *People v. Watson*, *supra*, 46 Cal.2d at page 836. (See *People v. Marks* (2003) 31 Cal.4th 197, 226-227 ["[T]he application of ordinary rules of evidence like Evidence Code section 352 does not implicate the federal Constitution, and thus we review allegations of error under the 'reasonable probability' standard of *Watson*, *supra*, 46 Cal.2d at page 836."].) Under the *Watson* standard, if a trial court erroneously excludes evidence, the defendant must show on appeal that it is reasonably probable he or she would have received a more favorable result had that evidence been admitted. (*Watson*, at p. 836; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1125.)

Mataele has not shown it is reasonably probable he would have received a more favorable outcome had the trial court not excluded

Carrillo's statements. Had Swift Eagle testified to her conversation with Carrillo, Carrillo could have been recalled and reaffirmed his earlier testimony that he was not the shooter. Moreover, the prosecution presented substantial evidence corroborating Carrillo's testimony that Mataele was the shooter. Specifically, Masubayashi identified Mataele as the shooter, and multiple eyewitnesses provided descriptions of a shooter consistent with Mataele. In addition, Mataele testified to his version of events placing the gun in Carrillo's hands which was clearly rejected by the verdict. It is not reasonably probable that an ambiguous statement recalled by Carrillo's unapproving sister-in-law made by Carrillo four years earlier on a jail bus would have provided the necessary corroboration to lend credibility to the defense in light of the contradicting evidence implicating Mataele. Accordingly, the trial court did not abuse its discretion, deny Mataele his right to present a defense, or commit prejudicial error by excluding Carrillo's statements.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING MASUBAYASHI TO TESTIFY TO A PRIOR INCONSISTENT STATEMENT OF PERDON

Mataele contends the trial court should not have allowed Masubayashi to testify that Perdon told him Mataele confessed to killing Johnson because it was inadmissible hearsay and did not qualify as a prior inconsistent statement. He argues the ruling denied him of his right to due process. (AOB 164-188.) The statements were properly admitted as prior inconsistent statements. Sufficient evidence supports the trial court's finding that Perdon's trial testimony was evasive and untruthful, qualifying her earlier statements to Masubayashi as prior inconsistent statements. The admission of the statement did not violate Mataele's constitutional rights, and any possible error was harmless.

A. Relevant Factual Background

On June 3, 2005, District Attorney Investigator Gary Hendricks interviewed Masubayashi. (See 6 Supp. CT 1617-1618; 15 RT 3576.) The timing of the interview coincided with voir dire and in limine motions. During this interview days before Mataele's trial commenced, Masubayashi told the prosecution for the first time that in 2000, before Masubayashi went to the Anaheim Police Department, Perdon told Masubayashi that Mataele told her, "I came in my pants when I saw that nigger flop." Mataele was referring to Johnson when he said this. (6 Supp. CT 1617.) The statement had not been previously disclosed by Masubayashi or Perdon in any prior interviews. The defense objected to the prosecution calling Perdon to testify about the alleged statement made by Mataele. (14 RT 3338-3342.) The trial court allowed the prosecution to question Perdon about the statement. (14 RT 3438-3439.)

On direct examination the prosecutor asked Perdon if Mataele ever spoke with her about a shooting that took place in 1997, or any shooting, and made the statement, "I came in my pants when I saw that nigger flop." Perdon responded to each of three questions on the subject, "I can't remember." (14 RT 3468-3469.) She was also asked if she remembered talking to Masubayashi about things she had heard from Mataele at Quiambao's house, and responded, "I can't remember." (14 RT 3470.)

The trial court found a reasonable basis in the record to conclude that Perdon's "I don't recall" answers were evasive and untruthful. (15 RT 3670-3681.) It clarified:

> My finding is: There is a reasonable basis in the record for concluding that Glenda Bloemhof, also known as Perdon's 'I don't recall' answers here in court are evasive and untruthful so that the witness's prior statements are considered inconsistent with her implied testimony of denial of insinuations in the examiner's questions. That is, there's a reasonable basis in this

record to say that the - - to conclude that the 'I don't recall" answers are evasive and untruthful.

. . . And, furthermore, just because I make these findings does not mean that the jury is somehow delegated to just accepting Masubayashi's testimony because under CALJIC 2.13 there is that last paragraph to the effect, quote, 'If you disbelieve a witness's testimony that he or she no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by him or her describing that event.'

And that's a big if. That is, that leaves to the jury the power to conclude whether they - - they disbelieve the witness's testimony versus believe the witness's testimony as to whether she could really recall these things or not.

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.

On the other hand, how do you forget that? How could - - How could any reasonable person possibly forget that statement? I mean, 'I almost did it in any pants when I saw that "N" flop,' I mean that's something that you don't forget. So she could have said, 'I'll tell you what that never happened folks, okay. You know, folks, I've been here saying "I don't recall" because I don't want to get involved. But, on that little gem, I'm telling you straight-out that never happened, and somebody needs to get their act together if you think that that's true.'

But, she didn't say that. She said, 'I don't recall.' And that - - that to me is - - is indicative of the fact that she is being evasive and untruthful. And, when you look at the rest of her I don't recalls, as I said, some of which were intertwined with recollection of certain things, then I think there is a reasonable basis for that and the prior inconsistent statement does come in and [sic] substantive evidence. And I think in that - - in that - - in that scenario is where there's no denial of confrontation and cross examination.

(15 RT 3676-3678.)

Masubayashi testified that Perdon said Mataele told her, "He came in his pants watching that nigger flop after he shot him." (15 RT 3697.) The trial court later revisited and reaffirmed its ruling citing to *People v. Zapien* (1993) 4 Cal.4th 929, 950. (33 RT 7483.)

B. Perdon's Statement to Masubayashi Was Properly Admitted as a Prior Inconsistent Statement

A statement by a witness that is inconsistent with his or her trial testimony is admissible as a hearsay exception to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770. The "fundamental requirement" of Evidence Code 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.) Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. (*People v. Green* (1971) 3 Cal.3d 981, 988.) In *People v. Green*, this Court held that a witness's deliberately evasive forgetfulness is an implied denial of prior statements, which creates "inconsistency in effect" and allows admission of the witness's prior statements under Evidence Code section 1235. (*Id.* at p. 989.) "As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of [the witness's] prior statements is proper." (*People v. Johnson, supra*, 3 Cal.4th at pp. 1219-1220, fn. omitted; see also *People v. Ervin* (2000) 22 Cal.4th 48, 85.)

Whether the requisite facts exist to permit admission of statements under an established hearsay exception is a determination vested in the trial court's discretion. The exercise of that discretion will not be disturbed on appeal unless the court's decision is not supported by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966 & fn. 13; *People v. Rios* (1985) 163 Cal.App.3d 852, 863.) The trial court's decision

to admit a prior inconsistent statement is reviewed for an abuse of discretion. (*People v. Homick*, *supra*, 55 Cal.4th at p. 859.)

In *People v. Perez*, the witness's prior statements to a police officer describing the crime were admitted into evidence as prior inconsistent statements pursuant to Evidence Code section 1235 because the court found the witness's forgetfulness at trial to be deliberately evasive. (*People v. Perez* (2000) 82 Cal.App.4th 760, 763.) The witness repeatedly answered "I don't remember" or "I don't recall" when questioned at trial about what she saw the night of the murder and what she told the police. (*Ibid.*) However, she then testified that she knew the defendant was not the person who shot the victim. (*Id.* at p. 766.) The court reasoned that, even though the witness professed total inability to recall the crime or her statements to police, the jury had the opportunity to assess her demeanor and whether any credibility should be given to her testimony or her prior statements. (*Id.* at p. 766; accord *People v. Rodriguez* (2014) 58 Cal.4th 587, 633.)

The present circumstances provide a reasonable basis for the trial court's conclusion that Perdon was evasive in her "I don't recall" answers. Perdon was called as a witness by the prosecution and identified Quiambao and Mataele in court. (14 RT 3466-3467.) She said in 1999 she occasionally went to Quiambao's house. (14 RT 3467.) Perdon said she was good friends with Mataele's brother, Baby. (14 RT 3469, 3477.) Initially she said she couldn't remember if she saw Mataele at Quiambao's house in 1999. (14 RT 3467.) Perdon then said she may have seen Mataele there a couple of times. (14 RT 3467.) She also testified that she may have had conversations with Mataele. (14 RT 3467.) However, when asked twice if Mataele ever spoke about a shooting with her, Perdon replied, "I can't remember." (14 RT 3468.) The prosecutor asked if Mataele ever made the following statement to her, "I came in my pants when I saw that

nigger flop." (14 RT 3468.) Perdon said, "I can't remember." (14 RT 3468-3469.)

Perdon also testified she could not remember if she spoke with Masubayashi about things she heard at Quiambao's house from Mataele. (14 RT 3470.) However, Perdon said if she heard something she would have told Masubayashi because they were dating at the time and she would not have lied about it. (14 RT 3470.)

Perdon did not have any problem recalling spending time at Quiambao's house in 1999, but when it came to her interactions with Mataele and the details of his incriminating statements, Perdon said she could not recall. The trial court, which had the benefit of observing the demeanor of the witness, could reasonably find it improbable that the witness would not recall ever speaking with Mataele and in particular, his statement about killing Johnson. Thus, Masubayashi's testimony regarding Perdon's statements Mataele made to her was properly admissible as a prior inconsistent statement, and thus an exception to the hearsay rule. (Evid. Code, § 1235.)

C. The Admission of Perdon's Statement to Masubayashi Did Not Violate Mataele's Rights to Due Process and Any Possible Error Was Harmless

Mataele contends the statements were unreliable to the point of rendering his trial fundamentally unfair and denying him due process. (AOB 175.) No due process violation will be found unless the state's evidence was so unreliable or prejudicial that it rendered the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439; *Estelle v. McGuire* (1991) 502 U.S. 62, 70 [112 S.Ct. 475, 116 L.Ed.2d 385].)

> The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but

> by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 343-345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); compulsory process, *Taylor v. Illinois*, 484 U.S. 400, 408-409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); and confrontation plus cross-examination of witnesses, *Delaware v. Fensterer*, 474 U.S. 15, 18-20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985) (*per curiam*).

(*Perry v. New Hampshire* (2012) _ U.S. _ [132 S.Ct. 716, 723, 181 L.Ed.2d 694].)

"Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

As argued above, there were permissible inferences to be drawn from the statement and it was properly admitted as a prior inconsistent statement. Moreover, Mataele was afforded all the constitutional safeguards to ensure the credibility and reliability of the statement was properly assessed by the jury and did not render the trial fundamentally unfair.

"Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test [*People v. Watson* (1956) 46 Cal.2d 818, 836]: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida, supra*, 37 Cal.4th at p. 439.) However, even if the trial court erred in admitting Perdon's prior statements to Masubayashi, any such error was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.) "The reviewing court conducting a harmless error analysis under *Chapman* looks to the 'whole record' to

evaluate the error's effect on the jury's verdict." (*People v. Aranda* (2012) 55 Cal.4th 342, 367.)

Masubayashi's statement did not impact the verdict. First, the jury was apprised of the circumstances surrounding Masubayashi's testimony concerning Mataele's statement to Perdon. The jury was made aware that Masubayashi brought it to the attention of the parties just a few days earlier and it was not disclosed to detectives in earlier interviews, contrary to Masubayashi's testimony. (27 RT 6097). Perdon testified for the defense that she recalled seeing Mataele at Quiambao's house, but did not recall him making the statement or using "nigger" in reference to Johnson. (25 RT 5680-5681.) Mataele also recalled seeing Perdon, but said he never made the statement. (31 RT 7042-7044.) All of the relevant witnesses surrounding the statement were available and thoroughly questioned by all parties.

Defense counsel also addressed the statement in closing argument and challenged Masubayashi's credibility. (32 RT 7278-7281.) The prosecutor did not argue the alleged statement in closing argument, and even went so far as to distance himself from it. In rebuttal, the prosecutor argued the statement "came from Glenda Perdon, who was high the whole time. I didn't go near it." (33 RT 7396.) Moreover, in addition to argument and clarification by the attorneys, the trial court thoroughly instructed the jury on assessing witness credibility.

Also, in light of the overwhelming evidence supporting Mataele's conviction, the jury's verdict did not rest on Masubayashi's statement. Mataele presents a much skewed representation of the evidence at trial; giving his defense credibility it was not due. (AOB 181-188.) Masubayashi always identified Mataele as the shooter. From his initial interview with Officer Bruce Linn in triage, to trial, Masubayashi identified Mataele as the shooter. (19 RT 4487-4489.) In the hospital, Masubayashi

initially told Detective Reneau he did not know who the shooter was because he was "groggy," but after that identified Mataele. Even though there were times Masubayashi had doubts about other particulars of the case, he always maintained Mataele was the shooter. (17 RT 3959; 18 RT 4360-4361.) In particular, Masubayashi testified Mataele was wearing a flannel shirt and dark pants, and at the very least, Masubayashi saw the shooter's arm matching Mataele's shirt. (15 RT 3620, 3638; 19 RT 4382, 4433, 4468.) Masubayashi also said that Carrillo was wearing a white hockey jersey. (15 RT 3620.) This was consistent with Molly's testimony that Mataele was armed in the apartment and wearing a flannel shirt and dark pants. (14 RT 3494, 3498.) Carrillo also identified Mataele as the shooter, with the jury's full awareness Carrillo entered into a plea agreement with the prosecution for a six-year sentence in exchange for his testimony. (21 RT 4942; 22 RT 5011, 5022-5024.)

Quiambao corroborated Carrillo's testimony regarding the events before and after the shooting in his initial interview with the deputy district attorney and Orange County District Attorney Investigator Patrick O'Sullivan. Quiambao also said Mataele had told him that he had thrown the gun away in a bush. (4 CT 1136; 13 RT 3188.) Quiambao testified at trial that Carrillo had told him a few weeks prior to the shooting that he was going to kill Johnson and Masubayashi, and Quiambao lied in his interview to the prosecutor to protect Carrillo. (13 RT 3316; 14 RT 3453.) Quiambao also testified for the first time at trial that Carrillo was wearing a flannel that night, although he could not remember what Carrillo was wearing when interviewed a few years earlier. (14 RT 3400, 3402.) Quiambao admitted to telling Mataele's family that he was going to change his testimony. (13 RT 3288.)

Independent witnesses gave descriptions that were consistent with both Mataele and Carrillo. Mataele was dark skinned, with black hair, just

less than six feet tall, about 300 pounds, and wearing dark clothing. (7 CT 1728; 14 RT 3498; 15 RT 3620; 28 RT 6301-6302.) Carrillo on the other hand only weighed about 150 pounds, is five feet nine inches tall, and was wearing a white shirt and possibly a black beanie. (15 RT 3620; 22 RT 5015; 23 RT 5218-5219; 28 RT 6302.)

Rodriguez said he saw the left side of the shooter firing the black gun with his right hand. (20 RT 4674, 4683.) He did not see the shooter's face, but said he was wearing dark baggy clothing, appeared to be black, about 25 years old, about six feet tall and had a medium to heavyset build. (20 RT 4675, 4678, 4680, 4691.) Fowler was with Rodriguez and another fellow employee Towne, and saw a "shadow walking across the parking lot" and firing a gun. (20 RT 4703.) A few hours after the shooting Fowler described the shooter as five feet ten inches, with a thin to medium build, and that he might have been wearing a cap on his head. (20 RT 4734, 4739, 4742-4743.) Fowler described the shooter to the defense investigator a few months earlier, before trial, and said he was certain the shooter was "average" colored black. (20 RT 4710-4711, 4717, 4721.) At trial Fowler said he was not sure of the shooter's race. (20 RT 4717.) A call to 9-1-1 described a heavyset man in dark clothes running from the scene. (4 CT 1024-1026.)

Mataele's defense lacked any credibility. As the prosecutor poignantly stated in his closing argument, the defense was only credible if the surviving victim Masubayashi, along with Quiambao and Carrillo, conspired to create the story that Lee was driving and Mataele was the shooter to protect Carrillo and Mina. (32 RT 7128-7129.)

Given the jury was provided evidence of all the surrounding facts and circumstances, and thoroughly instructed on how to assess the statement, coupled with the overwhelming evidence that Mataele was the shooter,

there is no doubt Masubayashi's testimony as to Perdon's statement did not effect the outcome of the trial and was not the basis for the guilty verdict.

VIII. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON CONFESSIONS IN ADDITION TO ADMISSIONS WAS HARMLESS ERROR

The trial court instructed the jury with CALJIC No. 2.71, the cautionary instruction defining admissions. Mataele argues the trial court committed reversible error by failing to instruct the jury sua sponte with CALJIC No. 2.70, defining both confessions and admissions, because Masubayashi's testimony that Mataele told Perdon he "came in his pants when he saw that nigger flop after he shot him" amounted to a confession. (AOB 189-197.) While CALJIC No. 2.70 was the more appropriate instruction, any possible error was harmless because the jury was provided a cautionary instruction on evaluating statements by Mataele.

The trial court instructed the jury with CALJIC No. 2.71 as follows:

> An admission is 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. You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> Evidence of an oral admission of a defendant not made in court should be viewed with caution.

(5 CT 1292; 33 RT 7425.)

Had the trial court instructed the jury with CALJIC No. 2.70 instead, the jury would have received the contents of the forgoing instruction, CALJIC No. 2.71, with the additional paragraph defining confessions:

> *A confession is a statement made by a defendant in which [he] [she] has acknowledged [his] [her] guilt of the crime[s] for which [he] [she] is on trial. In order to constitute a confession,*

the statement must acknowledge participation in the crime[s] as well as the required [criminal intent] [state of mind].

An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence.

You are the exclusive judges as to whether the defendant made a confession [or an admission], and if so, whether that statement is true in whole or in part.

[Evidence of [an oral confession] [or] [an oral admission] of the defendant not made in court should be viewed with caution.].

(See CALJIC No. 2.70, italics added.)

"It is well established that the trial court must instruct the jury on its own motion that evidence of a defendant's unrecorded, out-of-court oral admissions should be viewed with caution. [Citations.] The purpose of the cautionary language . . . is to assist the jury in determining whether the defendant ever made the admissions. [Citations.]." (*People v. McKinnon* (2011) 52 Cal.4th 610, 679; *People v. Carpenter*, *supra*, 15 Cal.4th 312, 392-393 (superseded by statute on other grounds as stated in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106); *People v. Garceau*, *supra*, 6 Cal.4th at p. 194; *People v. Lang* (1989) 49 Cal.3d 991, 1021.)

However, any error in failing to instruct with a cautionary instruction will be harmless if it is not "reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. [Citations.]" (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) "Mere instructional error under state law regarding how the jury should consider evidence does not violate the United States Constitution." (*Ibid.*, citing *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-75.) "Failure to give the cautionary instruction is not one of the '"very narrow []"' categories of error that make the trial fundamentally unfair." (*Carpenter*, *supra*, at p.

393, quoting *Estelle v. McGuire*, *supra*, 502 U.S. at p. 73.) Accordingly, the *Chapman* standard (*Chapman v. California*, *supra*, 386 U.S. at p. 24) does not apply here as state-law instructional error does not violate the United States Constitution. (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) Even assuming that standard applied here as Mataele argues (AOB 193-194), any error was harmless beyond a reasonable doubt.

Notably, the trial court did not neglect to instruct the jury to view statements attributed to Mataele with caution, but merely provided the less applicable instruction. This Court has addressed the issue of providing the incorrect cautionary instruction on evaluating out of court oral statements by a defendant and has repeatedly held the error to be harmless when the jury was instructed with CALJIC No. 2.71 on admissions. (*People v. Clark* (2011) 52 Cal.4th 856, 957.) In *Clark*, the trial court failed to instruct the jury with CALJIC No. 2.71.7, the cautionary instruction used to evaluate pre-offense statements made by a defendant. (*Id.* at pp. 956-957.) The instruction "would have directed the jury to view with caution the evidence of his pre-offense statements of intent, plan, motive, or design." (*Id.* at p. 956.) However, the error was harmless because "the court did instruct with CALJIC No. 2.71, which directed the jury to view with caution any statement by defendant that was offered to establish his guilt. We have long recognized that this cautionary instruction is sufficiently broad to cover all of a defendant's out-of-court statements." (*Clark*, *supra*, at p. 957, citing *People v. Zambrano* (2007) 41 Cal.4th 1082, 1157; *People v. Lang*, *supra*, 49 Cal.3d at p. 1021.)

Likewise, here, the trial court did provide a cautionary instruction to the jury by instructing the jury with CALJIC No. 2.71 on admissions, which was amply broad enough to also caution the jury on a confession. This instruction sufficiently informed and assisted the jury in determining if the statements attributed to Mataele were in fact made. (*People v. Beagle*

(1972) 6 Cal.3d 441, 456 [In assessing potential prejudice, the primary purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made].) Although the jury was not provided the definition of a confession, the instruction on admissions sufficiently encompassed confessions also. The jury was told that an admission is a statement that tends to prove the defendant's guilt; it was their duty to determine whether or not the admission was made and to determine if it was true in whole or part; and to view such evidence with caution.

The only difference between the instructions was a confession would have been defined as a statement acknowledging guilt, whereas an admission is a statement tending to establish guilt when considered with other evidence. A jury would reasonably interpret "confessions" to also be admissions and apply the cautionary instruction provided. It is not reasonably possible the jury would distinguish the statement offered by Masubayashi where Mataele told Perdon, "I almost came in my pants when I saw that nigger flop after I shot him" from an admission, and thus disregard the cautionary instruction. The jury was instructed that incriminating statements made by a defendant should be viewed with caution, and since this is such a statement, the jury would apply the same principles to determine if the statement was made and view it with caution.

Mataele argues that there was evidence suggesting the alleged confession was fabricated by Masubayashi and not repeated accurately. (AOB 195-196.) The instruction provided addressed these concerns by instructing the jury to determine if the statement was made and view it with caution. An instruction on confessions in addition to admissions would not have provided the jury with any additional substance and direction on judging the evidence.

"Moreover, the court fully instructed the jury on judging the credibility of a witness, thus providing guidance on how to determine

whether to credit the testimony." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) The jury was given CALJIC No. 2.20, which instructed the jury on factors to consider in evaluating the believability of a witness, including the ability of the witness to remember or to communicate, the character and quality of the testimony, the demeanor and manner of the witness, existence of bias, inconsistent statements by the witness, and prior felony convictions of the witness. (5 CT 1281; 33 RT 7420-7422.) The jury was also instructed with CALJIC No. 2.21.1, which instructed on how to evaluate discrepancies in testimony. (5 CT 1282; 33 RT 7422.) CALJIC No. 2.21.2, which was given to the jury, instructed that "[a] witness who is willfully false in one material part of his testimony, is to be distrusted in others." The instruction also informed the jury that it could "reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars." (5 CT 1283; 33 RT 7422.) CALJIC No. 2.22 guided the jury on how to weigh conflicting testimony. (5 CT 1284; 33 RT 7423.) The jury was also given CALJIC No. 2.23, which instructed the jury regarding witnesses such as Masubayashi who had been convicted of a felony and the effect that felony could have on the witness' believability. (5 CT 1285; 33 RT 7423.)

In addition, the jury was fully cautioned about all the deficiencies in Masubayashi's credibility with regard to the confession by both defense counsel and the prosecutor. Mataele's counsel argued:

> Now, before I leave the topic of John Masubayashi, I want to talk to you about this disturbing racial statement that was supposedly made by Mr. Mataele.
>
> John Masubayashi said Glenda Perdon told him that 'I came in my pants when I saw that nigger flop,' that statement is out there.

> And Ryan Carrillo also said something about, 'all right, nigger.' That statement was made right before Danell Johnson was shot. His honor is going to instruct you that oral statements are to be viewed with caution. There is a good reason because anybody can make up a statement[,] an inflammatory, prejudicial statement like seeing a 'nigger flop' in order to incite you, to arouse your passions, to hold it against anybody, any citizen accused of a crime. That is why his honor is going to tell you oral statements should be viewed with caution, especially with the background that Ryan Carrillo and John Masubayashi bring before you. You should just throw that out.
>
> . . .
>
> What I am mainly concerned about John Masubayashi's statement, Glenda Perdon told him that [Mataele] made this statement, 'I came in my pants when I saw that nigger flop,' and [Masubayashi] is absolutely positive he told Detective Schmidt that statement on April 7, 2000 because it was so shocking and so disturbing it would have been something he would have mentioned to Detective Schmidt.
>
> First of all, Glenda Perdon denies ever making that statement. Detective Schmidt verified that Glenda Perdon never said anything about that shocking, disturbing racist statement. And Detective Schmidt testified that John Masubayashi never told him anything about hearing that statement from Glenda Perdon. In other words, ladies and gentlemen, I just don't think that statement was ever made.
>
> Again use your common sense. I don't think the statement was made. The prosecution hasn't proven it, and I would suggest to you that, perhaps, the prosecution is just playing the race card. That is probably what they are doing.

(32 RT 7278-7280.)

The prosecutor responded to Mataele's counsel's closing argument, pointing out that he went back over his argument and "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." (33 RT 7396.) Thus,

the prosecutor appeared to implicitly acknowledge the statement lacked credibility.

Finally, the other properly admitted evidence of guilt was overwhelming, and giving the limiting instruction on confessions in addition to the one on admissions would not have affected the outcome. There is no reasonable probability the error was prejudicial and, indeed, any such error was harmless beyond a reasonable doubt. (*People v. Box* (2000) 23 Cal.4th 1153, 1214, 1219, disapproved on other grounds in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10).

IX. THE TRIAL COURT DID NOT ERR BY GIVING CALJIC NO. 8.71 REGARDING WHETHER THE MURDER WAS FIRST OR SECOND DEGREE; AND ANY ERROR WAS HARMLESS

Mataele contends that his conviction for the murder of Johnson (count 1) should be reduced to second-degree murder because the trial court prejudicially erred by instructing the jury with a flawed version of CALJIC No. 8.71 on "Doubt Whether First or Second Degree Murder." (AOB 198.) The trial court instructed the jury with former CALJIC No. 8.71 (6th ed. 1996) without objection[17]. (32 RT 7119):

> 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

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[17] Mataele has forfeited this claim on appeal by failing to object to CALJIC No. 8.71, or to request a clarifying or amplifying instruction in the trial court. (See, e.g., *People v. Bolin* (1998) 18 Cal.4th 297, 327 ["The instruction correctly states the law, and defendant did not request clarification or amplification. He has therefore waived the issue on appeal."]; *People v. Johnson* (1993) 6 Cal.4th 1, 52 [same]; *People v. Daya* (1994) 29 Cal.App.4th 697, 714 ["[A] defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions."].)

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.

(5 CT 1343; 33 RT 7452-7453.)

Mataele contends the jury could have misinterpreted CALJIC No. 8.71 as requiring it to unanimously find there was reasonable doubt Mataele committed first-degree murder before it could give him the benefit of the doubt and find second-degree murder. (AOB 198.) He reasons this suggestion made first-degree murder the de facto default finding and lowered the prosecution's burden of proof. (AOB 198.) This Court has acknowledged the potential confusion of former CALJIC No. 8.71, but found any error harmless beyond a reasonable doubt in light of other instructions provided. (*People v. Moore* (2011) 51 Cal.4th 386, 411-412.) As will be shown, any possible confusion derived from CALJIC No. 8.71 was clarified by other instructions and harmless beyond a reasonable doubt.

A. Standard of Review

A claim of instructional error is reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) The court must assume that the jurors are intelligent and are capable of understanding, correlating, and applying all the instructions given to them. (*People v. Lewis* (2001) 26 Cal.4th 334, 390.)

B. This Court's Decision in *People v. Moore* (2011) 51 Cal.4th 386

Mataele's argument was addressed by this Court in *People v. Moore* (2011) 51 Cal.4th 386. In *Moore*, this Court found the "better practice" was not to use the 1996 revised version of CALJIC No. 8.71 because it carried "at least some potential for confusing jurors about the role of their individual judgments in deciding between first and second degree murder." (*Id.* at p. 411.) The references to unanimity in CALJIC No. 8.71 were "unnecessary, as CALJIC No. 8.75 fully explains that the jury must unanimously agree to not guilty verdicts on the greater homicide offenses before the jury as a whole may return verdicts on the lesser. [Fn. omitted.]" (*Id.* at pp. 411-412.) Of further note, the court in *Moore* did not explicitly hold that error occurred in that case, determining instead that "[a]ny error was harmless beyond a reasonable doubt . . . ." (*Id.* at p. 412.)

Significantly, the *Moore* opinion acknowledged and declined to disturb the holdings in two lower appellate court decisions, *People v. Pescador* (2004) 119 Cal.App.4th 252, and *People v. Gunder* (2007) 151 Cal.App.4th 412. Both opinions found instructing a jury with the 1996 version of CALJIC No. 8.71 was not error because the challenged instruction was given with other instructions, specifically CALJIC No. 17.40, that made it unlikely jurors would believe they had to vote for first-degree murder if any other juror found first-degree murder had been proven. (*People v. Moore*, *supra*, 51 Cal.4th at pp. 410-412.) In both *Pescador* and *Gunder*, the same version of CALJIC No. 8.71 was at issue. (*People v. Pescador*, *supra*, 119 Cal.App.4th at p. 256; *People v. Gunder*, *supra*, 151 Cal.App.4th at p. 424.) Both appellate courts determined the jury would not have erroneously applied CALJIC No. 8.71 because it was also provided CALJIC No. 17.40 instructing on the duty of each individual

juror to decide the case for themselves. (*Pescador*, *supra*, at p. 257; *Gunder*, *supra*, at p. 425.)

As the court in *Gunder* explained:

> If indeed it were reasonably likely that CALJIC No. 8.71 communicated the need for the procedural prerequisite of a unanimous finding of doubt as to degree, the parallel pattern instruction does not refute this any more directly than the instruction on the duty to deliberate individually [CALJIC No. 17.40]. It is mere icing on the cake. What *is* crucial in determining the reasonable likelihood of defendant's posited interpretation is the express reminder that each juror is not bound to follow the remainder in *decisionmaking*. Once this principle is articulated in the instructions, a reasonable juror will view the statement about unanimity in its proper context of the procedure for *returning verdicts*, as indeed elsewhere the jurors are told they cannot *return* any verdict absent unanimity and cannot *return* the lesser verdict of second degree murder until the jury unanimously agrees that the defendant is not guilty of first degree murder.

(*People v. Gunder*, *supra*, 151 Cal.App.4th at p. 425, original italics.)

Although the court in *Moore* concluded the "better practice" was to avoid the use of CALJIC No. 8.71, it did not hold the instruction was given in error and declined to decide whether *Gunder* was correct that giving CALJIC No. 17.40 in conjunction with CALJIC No. 8.71 removed the danger of jurors being confused by the unanimity language in CALJIC No. 8.71. (*People v. Moore*, *supra*, 51 Cal.4th at pp. 411-412.) Instead, *Moore* held that any error was harmless beyond a reasonable doubt because, having found that the defendant had killed the victim while committing robbery and burglary, the jury was precluded from finding the defendant guilty of either of the lesser offenses of second-degree murder or manslaughter. (*Id.* at p. 412.)

Similarly, here, the jury was also instructed on reading the instructions as a whole, as required by CALJIC No. 1.01. (5 CT 1266; 33 RT 7414.) In addition, the jury was provided and instructed with CALJIC

No. 17.40. (5 CT 1360; 33 RT 7463.) CALJIC No. 17.40 specified that each juror had a duty to render an "individual opinion," and required each juror to "decide the case for yourself." (5 CT 280; 3 RT 7463.) Moreover, the jury was given the general instruction on reasonable doubt set forth in CALJIC No. 2.90. (5 CT 1298; 33 RT 7428).

The crucial factor in determining whether the jury was confused by CALJIC No. 8.71 is whether the jurors were properly instructed as to their duty to make decisions individually. CALJIC No. 17.40 accomplished this task. Considering the whole of the instructions to the jury, it is not reasonably likely that the jurors misinterpreted CALJIC No. 8.71 as requiring them to unanimously find that they had a reasonable doubt as to the degree of the murder to convict defendant of murder in the second degree. The entire charge to the jury made it clear that each juror must make his or her own determination of guilt. Accordingly, there was no error.

C. Any Possible Error Was Harmless Beyond a Reasonable Doubt

Even assuming for argument's sake that the trial court committed instructional error, it was harmless. The standard set forth in *Chapman v. California, supra,* 386 U.S. 18 applies. (*People v. Moore*, *supra*, 51 Cal.4th at p. 412.) Under *Chapman*, there need be no reversal if the error is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The jury's findings that Mataele was guilty of lying in wait, conspiracy to commit murder, and premeditated attempted murder, shows they unanimously believed Mataele committed first-degree murder when killing Johnson. This is the only reasonable conclusion as the evidence simply does not support a finding of second-degree murder. The evidence shows that Mataele acted willfully and deliberately, and with premeditation and malice aforethought. In other words, the crime Mataele committed was

first-degree murder and nothing else. Therefore, in light of the evidence and the other verdicts, any instructional error was harmless beyond a reasonable doubt.

X. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE LYING-IN-WAIT SPECIAL-CIRCUMSTANCE FINDING

Mataele argues the evidence is insufficient to sustain the lying-in-wait special-circumstance finding and the death judgment must be reversed. (AOB 210-220.) Respondent disagrees as there is substantial evidence from which the jury reasonably found Mataele concealed his purpose for coming to Suzuki's apartment, waited for the opportune time to kill Johnson and Masubayashi, and then ambushed them.

A. Standard of Review

> In reviewing a criminal conviction challenged as lacking evidentiary support, "'the court must review 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.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496 [117 Cal. Rptr. 2d 45, 40 P.3d 754].) The same standard of review applies to special circumstance allegations. (*People v. Maury* (2003) 30 Cal.4th 342, 396 [133 Cal. Rptr. 2d 561, 68 P.3d 1].) 'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.' (*People v. Combs* (2004) 34 Cal.4th 821, 849 [22 Cal.Rptr.3d 61, 101 P.3d 1007].)

(*People v. Streeter* (2012) 54 Cal.4th 205, 241.)

At the time Mataele committed the crimes in 1997, the lying-in-wait special circumstance required "'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a

position of advantage.'" (*People v. Streeter*, *supra*, 54 Cal.4th at pp. 246-247, quoting *People v. Combs* (2004) 34 Cal.4th 821, 853.)[18] Contrary to Mataele's argument, there is substantial evidence supporting all three elements of the special circumstance.

B. There Was Evidence of a Concealment of Purpose

Mataele argues there is insufficient evidence of concealment because Mataele confronted Johnson directly by shaking his hand and then displaying the gun, thus, he did not use words or actions to conceal his purpose. (AOB 215.) Mataele then presents the theory- - based on statements made by Chung to the police that were never admitted at trial- - that Johnson may have been shot in the course of a robbery. (AOB 216.) Mataele conveniently ignores the abundance of evidence that the group went to Anaheim to kill Masubayashi and Johnson, and Mataele and Carrillo concealed this purpose from Masubayashi and Johnson by telling them they were coming to the apartment and then going out to shoot pool.

"The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (*People v. Streeter*, *supra*, 54 Cal.4th at p. 246, quoting *People v. Combs*, *supra*, 34 Cal.4th at p. 853, internal citations and quotation omitted.) In *Streeter*, this Court found the defendant "concealed his purpose by luring Yolanda to the restaurant under the pretext of an attempted reconciliation and a familial visit." (*Streeter*, *supra*, at p. 247.) Likewise, in numerous other cases, this Court has found evidence the

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[18] "In March 2000, the language of the lying-in-wait special circumstance was changed to delete the word 'while' and substitute the phrase 'by means of.' (Stats. 1998, ch. 629, § 2, pp. 4163, 4165; see *People v. Lewis* (2008) 43 Cal.4th 415, 512, fn. 25 [75 Cal.Rptr.3d 588, 181 P.3d 947].)" (*People v. Streeter*, *supra*, 54 Cal.4th at p. 246.)

defendant has the intent to kill and lures the victim under a ruse supports a finding of concealment of purpose. (See *People v. Combs*, *supra*, at p. 853 [To carry out his plan to rob and kill Janine, defendant devised a ruse about needing a ride to a campsite in Odessa Canyon to meet a fictitious friend.]; *People v. Sims* (1993) 5 Cal.4th 405, 433 [Defendant lured victim to motel room on pretext of ordering pizza, concealing true intent to rob and murder him.].)

Mataele's intent to kill Masubayashi and Johnson was established before leaving the Penthouse. Mataele, Chung, Carrillo and Lee were at the Penthouse when they agreed to kill Masubayashi and Johnson. (21 RT 4963.) Mataele said "we're going to go handle them," and volunteered to kill them, saying, "Let's go smoke those mother-fuckers." (21 RT 4960-4961.) On the way there, they stopped at Quiambao's and said they were headed to Anaheim to "do those two guys," meaning kill Masubayashi and Johnson. (13 RT 3159, 3242.) On the way to Anaheim, Mataele had his gun on him and said he was going to kill Masubayashi and Johnson. (21 RT 4972, 4975; 23 RT 5377.)

To conceal Lee and Chung's presence, only Carrillo and Mataele went to the apartment because they were still on good terms with Masubayashi and Johnson. (21 RT 4974, 4977.) Meanwhile, Lee and Chung remained hidden in the Jeep. (15 RT 3633; 22 RT 5019-5020.) Mataele and Carrillo walked to the gated apartment complex entrance and called Suzuki's apartment, but no one answered. (21 RT 4979, 4981.) They then reached Johnson on a cellular phone as he was returning from the grocery store with Molly, and accompanied them to Suzuki's apartment. (14 RT 3488, 3490; 21 RT 4981.)

There, Masubayashi, Johnson, Mataele and Carrillo agreed to go to a strip club or to shoot pool. (14 RT 3491-3492; 15 RT 3620-3621; 21 RT 4983.) The four of them left the apartment and headed towards

Masubayashi's car that was parked across the street. (14 RT 3492; 15 RT 3618, 3622; 21 RT 4984.) Interrupted temporarily by the presence of a police car, the four of them got into Masubayashi's car to go out. (15 RT 3630-3631.) Continuing the ruse of going out, Mataele and Carrillo had Masubayashi stop at the Jeep where Lee and Chung were hiding because they claimed they were going to take that car too. (15 RT 3631-3633; 22 RT 5018-5020.)

But Mataele never intended to go out with Masubayashi and Johnson, and instead used this ruse to lure them out of the apartment and back to the Jeep where he shot them. Even before leaving the Penthouse, Mataele had decided he was going to kill Masubayashi and Johnson. In order to kill them, Mataele and Carrillo approached Johnson and Masubayashi under the ruse of going out, when in fact their true intent was to kill them. In particular, the presence of Chung and Lee hidden in the Jeep defy any reasonable conclusion that they were in fact there to socialize given Chung was on bad terms with Masubayashi and Johnson. There is substantial evidence Mataele concealed his purpose of being at Suzuki's apartment to effectuate the killing.

Moreover, Chung and Lee's clandestine presence in the Jeep also demonstrates a concealment of purpose. Chung and Lee conspired with Mataele and Carrillo to kill Masubayashi and Johnson and drove them to Suzuki's apartment. Chung and Lee remained in the Jeep, because their presence would have alerted Masubayashi and Johnson of a nefarious intent. Mataele, Lee and Chung were all convicted of conspiracy to commit murder. (5 CT 1379-1386; 21 RT 4824.) As coconspirators, Mataele was also liable for their actions concealing the true purpose of their presence. (*People v. Maciel* (2013) 57 Cal.4th 482, 515-516.)

C. There Was a Substantial Period of Watching and Waiting for an Opportune Time to Act and a Surprise Attack on An Unsuspecting Victim

Mataele contends there was no substantial period of watching for Johnson's arrival and a surprise attack because he was always in their presence. (AOB 216-217.) Respondent disagrees. There was ample evidence from which the jury could infer Mataele waited and watched for an opportune time to act, and thereafter sprung a surprise attack on Johnson while in a position of advantage.

To be substantial, the period of watchful waiting does not have to continue for any particular period of time, as long as the duration is sufficient to show a design to take the victim by surprise and a state of mind equivalent to premeditation and deliberation. (*People v. Stevens* (2007) 41 Cal.4th 182, 202; *People v. Moon*, *supra*, 37 Cal.4th at pp. 23-24.) "The purpose of the watching and waiting element is to distinguish those cases in which the defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Stevens*, *supra*, at p. 202.) Further, the watchful element does not require that the defendant literally have the victim in the defendant's view; rather, the element is satisfied if the defendant is "alert and vigilant in anticipation of [the victim's] arrival so that [the] defendant could take [the victim] by surprise." (*People v. Sims*, *supra*, 5 Cal.4th at pp. 432-433.)

Here, the evidence showed Mataele did not act out of rash impulse, but rather, in a calculated manner, patiently waiting while at the same time, manufacturing the opportunity to kill both Masubayashi and Johnson. In preparation, he arrived at Suzuki's apartment with a loaded gun, but waited because their girlfriends were present. Thereafter, he lured them out of the apartment, but was briefly interrupted when a patrol car stopped and spoke with Johnson. Still maintaining the ruse of going out, Mataele got into the

car with Carrillo, Masubayashi and Johnson, but directed them to the Jeep where Chung and Lee were hiding and waiting for them. (15 RT 3630-3632; 22 RT 5018.) Once Mataele was out of Masubayashi's car, he jumped on the opportunity to kill Johnson and Masubayashi and shot them both. (15 RT 3634-3638; 22 RT 5022-5024.) This was an ideal time because they were in a dark parking lot, there was no one else present, and their getaway car, the Jeep, was there. (15 RT 3642; 22 RT 5026-5028.) Furthermore, Chung and Lee were hiding in the Jeep, providing the advantage of two more bodies to overpower Masubayashi and Johnson. Mataele armed himself in preparation of killing Johnson and Masubayashi, but remained patient and seized the opportunity when it presented itself. Until then, Mataele immersed himself with Masubayashi and Johnson by going to the apartment and making plans to go out, and waited until they were sufficiently secluded and he had a means of escape.

There is also substantial evidence that Mataele committed a surprise attack on Johnson and Masubayashi. Under the impression they were stopping at the Jeep before going out, Mataele suddenly shot Johnson in the head and Masubayashi in the chest. The attack was done immediately when the period of waiting for an opportune time ended. There is substantial evidence supporting these elements.

D. There Was a Continuous Flow of Uninterrupted Lethal Events

Finally, Mataele argues the flow of events was interrupted because there was a series of nonlethal encounters and interruption by the police, therefore, the special circumstance finding was not proved. (AOB 217-220.) Most importantly, any interruptions in the waiting period did not alter Mataele's intent to kill Johnson and Masubayashi, and he immediately acted when the opportune time presented itself.

"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." (*People v. Lewis*, *supra*, 43 Cal.4th at p. 512; CALJIC No. 8.81.15.)

> We have held that there is no cognizable interruption between the lying in wait and the killing where there is 'no lapse in the culpable *mental state* of the defendant.' [Citation.] Thus, 'if a person lies in wait intending first to rape and second to kill, then immediately proceeds to carry out that intent (or attempts to rape, then kills), the elements of the lying-in-wait special circumstance are met.'

(*People v. Lewis*, *supra*, 43 Cal.4th at p. 514, quoting *People v. Carpenter*, *supra*, 15 Cal.4th at p. 389, italics added.)

Mataele went to Suzuki's apartment planning on killing Johnson and Masubayashi, interacting with them until he was presented with an ideal set of circumstances and thus, an opportune time. He then immediately shot them. Even though Mataele did not shoot them the moment he arrived at the apartment, such an immediate killing was not necessary because during the entire waiting period and while concealing his purpose for being with them, Mataele maintained the same culpable mental state of intending to kill them. In addition, as soon as the period of concealment and waiting ended, Mataele immediately killed Johnson and attempted to kill Masubayashi. There is substantial evidence supporting the lying-in-wait special-circumstance finding.

XI. THE JURY WAS PROPERLY INSTRUCTED BY THE TRIAL COURT ON LYING IN WAIT

Mataele contends his state and federal constitutional rights were violated because the lying-in-wait special-circumstance instruction (CALJIC No. 8.81.15) omitted key elements, was internally inconsistent and confusing, and lowered the prosecution's burden of proof.

Specifically, he claims CALJIC No. 8.81.15 is erroneous for these reasons: it does not require a substantial period of watchful waiting or that the purpose concealed must be deadly; it does not clearly distinguish murder while lying in wait from premeditated and deliberate murder that is not committed while lying in wait; and it does not clearly distinguish murder by means of lying in wait from first-degree murder committed while lying in wait. He also claims CALJIC No. 8.83.1 omits the burden of proof to his detriment. (AOB 221-235.) These contentions have been addressed and rejected by this Court, and should likewise be rejected here.

Preliminarily, Mataele's claims of instructional error have been forfeited for failing to object and present them in the trial court. (Pen. Code, §1259; *People v. Bonilla* (2007) 41 Cal.4th 313, 329, fn. 4.) Respondent is mindful that claims of instructional error are reviewable by this Court on appeal to the extent they affected Mataele's substantial rights. This is not the case and his challenges to these instructions should be forfeited.

A. There Was No Instructional Error in Regards to CALJIC No. 8.81.15

The jury was provided a modified version of CALJIC No. 8.81.15 on the murder while lying-in-wait special circumstance;

> To find that the special circumstance referred to in these instructions as murder while lying in wait is true, each of the following facts must be proved:
>
> 1. A defendant intentionally killed the victim, and
>
> 2. The murder was committed while a defendant was lying in wait.
>
> The term 'while lying in wait' within the meaning of the law of special circumstances is defined as a 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 or deliberation.

Thus, 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.

A mere concealment of purpose is not sufficient to meet the requirement of concealment set forth in this special circumstance. However, when a defendant intentionally murders another person, under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, the special circumstance of murder while lying in wait has been established.

If you find that a defendant was not the actual killer of the victim, you cannot find this special circumstance to be true as to that defendant unless you are satisfied beyond a reasonable doubt that said defendant with the intent to kill aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any actor in the commission of the murder in the first degree.

(5 CT 1347-1348; 33 RT 7456-7457.)

Mataele presents numerous challenges to this instruction, none with merit. A single jury instruction is not to be considered in isolation, but must be viewed in the context of the overall charge. Even when there is an ambiguity, inconsistency or deficiency in a jury instruction, there is no due process violation unless there is a reasonable likelihood the jury misapplied the instruction in a manner that violates the Constitution. (*People v. Huggins* (2006) 38 Cal.4th 175, 192.) Mataele has not demonstrated by

any means that the jury would have misapplied the instructions in any matter.

1. The Instruction Does Not Omit Any Key Elements

Mataele argues CALJIC No. 8.81.15 erroneously eliminates the requirement of a substantial period of watchful waiting by instructing the jury that the lying in wait necessary to establish the special circumstance need not last any longer than that required for premeditation and deliberation necessary for murder. (AOB 223-224.) His argument rests on the concurring and dissenting opinions of Justices Kennard and Moreno in *People v. Stevens*, *supra*, 41 Cal.4th 182. The *Stevens* majority disagreed and found the instruction internally consistent. (*Id.* at p. 204.) This Court clarified,

> The instruction requires a period of time long enough to show a 'state of mind equivalent to premeditation or deliberation.' (See, *ante*, at pp. 201–202, fn. 10.) This formulation describes the durational requirement of the special circumstance, which is demonstrated by a substantial period of watching and waiting during which the defendant is physically concealed or conceals his purpose.

(*Ibid.*; accord *People v. Bonilla*, *supra*, 41 Cal.4th at pp. 332-333 ["We previously have concluded an instruction that conveys both that a defendant must lie in wait at least long enough to premeditate and deliberate and that he must do so for a not insubstantial period of time is not unconstitutionally imprecise"].)

Mataele also argues CALJIC No. 8.81.15 is confusing because it does not explain that the concealed purpose of the watching and waiting must be the intent to kill or to have a surprise lethal attack. (AOB 224.) As Mataele recognizes, this argument was rejected by this Court most recently in *People v. Streeter*, *supra*, 54 Cal.4th 205. In *Streeter*, the defendant lured the victim to a restaurant under the pretext of seeing their son and killed

her. (*Id.* at pp. 247-248.) The defendant claimed his concealed purpose was to leave with his son not kill the victim, and therefore nonlethal. (*Id.* at p. 251.) He argued the instruction allowed the jury to find the watchful waiting and concealment elements based on a nonlethal intent. (*Ibid.*) This Court concluded that "[b]ecause the instruction required an intentional killing and an uninterrupted connection between the lethal acts and the period of lying in wait, a reasonable jury would not have believed that the nonlethal act and intent of taking Little Howie would have satisfied the requirements of concealment of purpose and watchful waiting to act." (*Ibid.*) Likewise, the instruction conveyed to the jury that the defendant was acting with a lethal intent while lying in wait.

2. CALJIC No. 8.81.15 Sufficiently Distinguished The Lying-in-Wait Special Circumstance from Premeditated and Deliberate Murder and Lying-in-Wait Murder

Mataele maintains that the instruction on the lying-in-wait special circumstance (CALJIC No. 8.81.15) does not adequately and clearly distinguish the theory from premeditated and deliberate murder (CALJIC No. 8.20) and lying-in-wait murder (CALJIC No. 8.25). (AOB 225-227.) Respondent disagrees as do the opinions of this Court. (*People v. Streeter*, *supra*, 54 Cal.4th at p. 253 ["We have rejected these contentions before and continue to do so." (*People v. Stevens*, *supra*, 41 Cal.4th at pp. 203-204; *People v. Nakahara* (2003) 30 Cal.4th 705, 721; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.)

a. Premeditated and deliberate murder

Mataele argues CALJIC No. 8.81.15 does not distinguish for the jury the lying-in-wait special circumstance from premeditated, deliberate murder. (AOB 225.) This claim has consistently been rejected by this Court and Mataele offers no reason for a different result in his case.

In *People v. Stevens*, *supra*, 41 Cal.4th at p. 182, this Court rejected the claim raised by Mataele that the special-circumstance instruction fails to distinguish between premeditated, deliberate murder and the lying-in-wait special circumstance. This Court stated,

> In distinction with premeditated first degree murder, the lying-in-wait special circumstance requires a physical concealment or concealment of purpose and a surprise attack on an unsuspecting victim from a position of advantage. [Citations.] Thus, any overlap between the premeditation element of first degree murder and the durational element of the lying-in-wait special circumstance does not undermine the narrowing function of the special circumstance. [Citation.] Moreover, contrary to Justice Moreno's concurring and dissenting opinion, concealment of purpose inhibits detection, defeats self-defense, and may betray at least some level of trust, making it more blameworthy than premeditated murder that does not involve surprise. [Citation.]

(*People v. Stevens*, *supra*, 41 Cal.4th at pp. 203-204; see also *People v. Gutierrez*, *supra*, 28 Cal.4th at pp. 1083, 1148-1149.)

b. Lying-in-wait first-degree murder

Mataele's claim that the distinction between the lying-in-wait special circumstance and lying-in-wait first-degree murder (CALJIC No. 8.25)[19] is

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[19] CALJIC No. 8.25 on murder by means of lying in wait, was provided to the jury 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 a 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 or deliberation.
>
> The word 'premeditation' means considered beforehand.

(continued...)

unclear and confusing, has also been rejected by this Court. (AOB 225-226.) As stated in *People v. Gutierrez, supra*, 28 Cal.4th at pages 1148-1149:

> '[M]urder by means of lying in wait requires only a wanton and reckless intent to inflict injury likely to cause death.' In contrast, the lying-in-wait special circumstance requires 'an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage . . . .' Furthermore, the lying-in-wait special circumstance requires 'that the killing take place *during the period of concealment and watchful waiting*, an aspect of the special circumstance distinguishable from a murder perpetrated by means of lying in wait, or following premeditation and deliberation.'
>
> The distinguishing factors identified in *Morales* and *Sims* that characterize the lying-in-wait special circumstance constitute 'clear and specific requirements that sufficiently distinguish from other murders a murder committed while the perpetrator is lying in wait, so as to justify the classification of that type of case as one warranting imposition of the death penalty.'

(*People v. Gutierrez, supra*, 28 Cal.4th at pp. 1148-1149, internal citations omitted, emphasis in original; *People v. Sims, supra*, 5 Cal.4th at p. 432-434; *People v. Morales* (1989) 48 Cal.3d 527, 557-558.)

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(...continued)

> The word 'deliberation' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.

(5 CT 1336; 33 RT 7448-7449.)

B. The Trial Court's Instructions Did Not Undermine and Dilute the Requirement of Proof Beyond a Reasonable Doubt

Mataele contends the difference between CALJIC No. 8.83 (Special Circumstances-Sufficiency of Circumstantial Evidence-Generally) and CALJIC No. 8.83.1 (Special Circumstances-Sufficiency of Circumstantial Evidence to Prove Required Mental State) enabled the jury to find the specific intent or mental state of the special circumstance without finding the underlying fact beyond a reasonable doubt, lowering the prosecution's burden of proof. (AOB 228-230.) This claim has been repeatedly presented to and rejected by this Court. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1226.)

The trial court instructed the jury with CALJIC Nos. 8.83.1 and 8.31. (5 CT 1349-1350; 33 RT 7457-7458.) The only significant difference between the instructions is that CALJIC No. 8.83 includes:

> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt.
>
> In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

This additional language in CALJIC No. 8.83 is not necessary to adequately apprise the jury of the reasonable doubt standard provided other standard instructions regarding the prosecution's burden to prove guilt beyond a reasonable doubt were given by the court. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165.) "As a whole, the instructions made clear that the prosecution had to prove defendant's guilt, including the existence of the required mental states, beyond a reasonable doubt." (*Ibid.*, citing *People v. Maury* (2003) 30 Cal.4th 342, 428-429.) Likewise, here, the jury

was instructed with CALJIC No. 2.90, on reasonable doubt, alleviating any concern of instructional error. (5 CT 1298; 33 RT 7428.)

Mataele also points out that CALJIC No. 3.31 (Concurrence of Act and Specific Intent) and CALJIC No. 3.31.5 (Mental State) similarly do not repeat the burden of proving the underlying facts and inferences beyond a reasonable doubt. (AOB 229.) To the extent he is claiming this was error, this Court has made clear that this standard need not be repeated in every single instruction when it has properly been presented to the jury in CALJIC No. 2.90. (*People v. Livingston*, *supra*, 53 Cal.4th at p. 1165.)

C. Any Instructional Error Was Harmless

Finally, if there were any error in the instruction, it was harmless. Under state law, the instructional error is harmless if there is no reasonable probability the outcome of the defendant's trial would have been different had the jury been properly instructed. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1158, 1208-1209, citing *People v. Flood* (1998) 18 Cal.4th 470, Cal. Const., art. VI, §13, *People v. Watson*, *supra*, 46 Cal.2d at pp. 818, 836-837.) Under federal law, the error requires reversal unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1208-1209, *citing Neder v. United States* (1999) 527 U.S. 1, 8-16 [119 S. Ct. 1827, 144 L. Ed. 2d 35]; *Chapman v. California*, *supra*, 386 U.S. at p. 18; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Flood*, *supra*, 18 Cal.4th at pp. 502-504.)

As set forth extensively in Argument X, the overwhelming evidence established that Mataele concealed his purpose to kill Johnson and Masubayashi on the pretext of going out and socializing with them. He prepared for the murder by arming himself with a gun and traveling to Suzuki's apartment. Mataele then watched and waited for the opportune time to come, and then took Johnson and Masubayashi by surprise and shot

them. The jury was properly instructed on the special circumstance of lying in wait. Assuming arguendo the instructions were erroneous, the error was harmless under either standard.

XII. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE ADEQUATELY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

Mataele contends the lying-in-wait special circumstance violates the Eighth Amendment because it fails to adequately narrow the class of persons eligible for the death penalty. (AOB 236-245.) He argues that rather than narrowing the class of persons eligible for the death penalty, the lying-in-wait special circumstance "applies to virtually any first degree murder." (AOB 236.) This Court has repeatedly rejected this claim. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1095-1096.) Mataele provides no compelling arguments to overturn existing precedent.

Mataele presents the factual scenarios of three recent opinions by this Court upholding lying-in-wait special circumstances and argues an examination of the facts strengthens the claim that it encompasses virtually any first-degree premeditated murder. (AOB 242.) Although Mataele characterizes each of these cases as "radically different situations," each murder took place while the defendant was lying in wait, distinguishing the case from other first-degree murders.

He first relies on *People v. Streeter*, *supra*, 54 Cal.4th 205, and claims it was error to uphold the lying-in-wait special circumstance because "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." (AOB 242.) This series of discrete events acknowledged by this Court were "preparatory steps" in furtherance of the murder. (*Streeter*, *supra*, 54 Cal.4th at p. 248-249.) But most importantly, "the jury could

reasonably find no lapse in defendant's mental state between the homicide and the period of watchful waiting." (*Id* at p. 249.)

In *People v. Livingston*, *supra*, 53 Cal.4th 1145, there was substantial evidence the defendant armed himself with an assault rifle and cased a security-guard shack by repeatedly driving by with his headlights off and waiting for an opportune time when all four security guards were present. (*Id.* at pp. 1173-1174.) Following this substantial period of watching and waiting, he suddenly appeared at the door and immediately fired into the guard shack with a semiautomatic firearm. (*Ibid.*)

Lastly, Mataele relies on *People v. Mendoza*, *supra*, 52 Cal.4th 1056. In *Mendoza*, the defendant and two companions (Sparky and Flores) were walking when a police officer in a patrol car approached them. (*Id.* at p. 1064.) The defendant was on parole and had a gun in his possession. (*Id.* at pp. 1063-1064.) The officer ordered the defendant and Flores to sit on the curb while he patted down Sparky. (*Id.* at p. 1065.) As Sparky was being searched, the defendant maneuvered Flores in front of him and slowly pushed her toward the officer. (*Ibid.*) When they were within six or seven feet, the defendant pushed Flores aside, took a step and shot the officer in the face. (*Ibid.*)

This Court found substantial evidence of lying in wait as the defendant watched the officer for a substantial period of time as he positioned himself and his weapon and "affirmatively engineered, the opportune moment to launch a surprise attack." (*People v. Mendoza*, *supra*, 52 Cal.4th at p. 1074.) Moreover, the evidence showed the defendant concealed his purpose and completely took the officer by surprise. (*Ibid.*)

Mataele has failed to demonstrate how the above cases rely on overly expansive interpretations of the lying-in-wait special circumstance and do not meaningfully distinguish death eligible defendants from those not death

eligible. All three cases present unique facts wherein the defendant committed murder while lying in wait. This Court has "rejected these contentions before and continue to do so." (*People v. Streeter*, *supra*, 54 Cal.4th at p. 253; *People v. Stevens*, *supra*, 41 Cal.4th at pp. 203-204; *People v. Nakahara*, *supra*, 30 Cal.4th 705, 721; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1148-1149.) Mataele offers no compelling reason for this Court to alter its position on the matter.

XIII. THERE WAS NO CUMULATIVE ERROR IN THE GUILT PHASE

Mataele contends that he was prejudiced at the guilt phase by the cumulative impact of the alleged errors raised in Arguments I through XII. (AOB 246-252.) However, he cannot show that he was denied a fair trial because he failed to show error or that he suffered prejudice as a result of any particular error or combined errors.

As set forth in detail, the trial court properly excused Prospective Jurors N. and H. for cause (see Args. I & II); the substantial impairment standard for excusing jurors is not unconstitutional (see Arg. III); the court properly denied the motion for prefiling delay (see Arg. IV); statements made by Towne and Swift Eagle were inadmissible (see Args. V & VI); Masubayashi's testimony regarding Mataele's statement to Perdon was admissible (see Arg. VII); failure to instruct on admissions and confessions was harmless error (see Arg. VIII); there was no error as to CALJIC No. 8.71 (see Arg. IX); and the lying-in-wait special circumstance is constitutional, was supported by substantial evidence, and properly instructed on (see Args. X-XII). As further noted in each argument, even if there were error, Mataele failed to show prejudice as to any of the foregoing claims.

Because Mataele has failed to show error or that he suffered prejudice as a result of any particular error or combined errors, he has failed to show he was denied a fair trial or otherwise prejudiced as a result of any

cumulative error. As stated by this Court, defendants are entitled to "a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Box*, *supra*, 23 Cal.4th at pp. 1214, 1219; see also *People v. Horning* (2004) 34 Cal.4th 871, 913 [no denial of right to a fair trial where there was "little, if any, error to accumulate"].) Accordingly, there was no cumulative error at the guilt phase.

XIV. THE TRIAL COURT PROPERLY REFUSED TO ALLOW THE DEFENSE TO CALL MATTHEW TOWNE AS A WITNESS AT THE PENALTY PHASE

Mataele intended to call witness Matthew Towne to testify at the guilt phase of his trial, but had lost contact with Towne and could not locate him. (See, *supra*, Arg. V.) The defense eventually located Towne after the guilt phase verdicts and wanted to present his testimony in the penalty phase. Mataele argues the trial court erred in excluding Towne's testimony at the penalty phase regarding the stature of the shooter as evidence of lingering doubt. (AOB 253-265.) Towne's testimony was properly excluded because it was not relevant to the penalty phase. Any possible error was harmless.

A. Background

Mataele sought to present the testimony of Matthew Towne at the penalty phase to show lingering doubt. Towne's affidavit provided he would have testified in relevant part as follows:

> On November 12, 1997, around midnight I was sitting outside about to go home and I was talking to John Fowler and Jose Rodriguez who were fellow employees.
>
> I heard a single gun shot [sic]. As I looked towards the parking lot across the street, I saw a male 5'8" to 6' tall, thin build wearing a cap on his head walking eastbound through the parking lot away from the driver's side door of a black compact car. This unknown male fired 3-4 more shots in an eastbound direction towards Euclid while walking eastbound. I didn't see

anything else because I ducked behind the wall and ran inside the clinic.

Within five minutes the police arrived and I gave them a statement which I have reviewed. That statement has a Bates number 000018 on the lower right hand corner. That statement is still true and correct.

The man I saw shooting definitely had a thin build. The man was definitely not anywhere near 300 pounds. Based on his build I would estimate his weight to be 160-170 pounds.

(6 CT 1643-1644.)

The prosecutor maintained Towne's testimony was merely an attempt to relitigate the issue of Mataele's guilt and thus inadmissible during the penalty phase. (34 RT 7710-7713.) Defense counsel stated Towne's testimony regarding the stature of the shooter was not being presented to challenge the jury's guilty verdict, but to create lingering doubt for purposes of the penalty phase. (34 RT 7717-7718.) The trial court tentatively found it to be new evidence on the issue of guilt, and precluded the testimony. (34 RT 7719.)

The next day the trial court reaffirmed its ruling and excluded Towne's testimony finding it went to the area of reasonable doubt, not Mataele's character or the circumstances of the offense. (35 RT 7846-7849.) In support of this ruling, the trial court cited to *People v. Zapien, supra,* 4 Cal.4th 929, and *In re Gay* (1998) 19 Cal.4th 771. (35 RT 7846-7849.) Mataele raised the issue again in his motion for new trial. (6 CT 1614-1626.) The trial court denied the motion on the same grounds. (42 RT 9385-9386.)

B. Towne's Testimony Was Not Admissible at the Penalty Phase

"Although a capital defendant has no federal constitutional right to have the jury consider lingering doubt in choosing the appropriate penalty,"

this Court in *People v. Gay* (2008) 42 Cal.4th 1195, held that "evidence of the circumstances of the offense, including evidence that may create a lingering doubt as to the defendant's guilt of the offense, is admissible at a *penalty retrial* as a factor in mitigation under [Penal Code] section 190.3." (*People v. Hamilton* (2009) 45 Cal.4th 863, 911-912, citing *People v. Gay, supra*, 42 Cal.4th at pp. 1218-1220, italics added.) "The 'circumstances of the crime' as used in [Penal Code] section 190.3, factor (a), 'does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to "[t]hat which surrounds materially, morally, or logically" the crime.'" (*People v. Hamilton, supra*, 45 Cal.4th at p. 912, quoting *People v. Blair, supra*, 36 Cal.4th at p. 749.)

> A defendant, however, has no right to introduce evidence not otherwise admissible at the penalty phase for the purpose of creating a doubt as to his or her guilt. [Citations.] "'The test for admissibility is not whether the evidence tends to prove the defendant did not commit the crime, but, whether it relates to the circumstances of the crime or the aggravating or mitigating circumstances.' [Citation.]" [Citation.] The evidence must not be unreliable [citation], incompetent, irrelevant, lack probative value, or solely attack the legality of the prior adjudication ([citations].)

(*People v. Hamilton, supra*, 45 Cal.4th at p. 912.)

"Thus, at least in cases in which the jury that decides the penalty did not adjudicate the defendant's guilt, we have said it '"is certainly the rule that if the evidence would have been admissible on the trial of the guilt issue, it is admissible on the trial aimed at fixing the penalty."'" (*People v. Banks* (2014) 59 Cal.4th 1113, 1195, quoting *People v. Gay, supra*, 42 Cal.4th at p. 1221; *People v. Terry* (1964) 61 Cal.2d 137, 143, fn. 1.) "Evidence that is not relevant to the defendant's character, prior record or the circumstances of the case need not be admitted (*Lockett v. Ohio* [(1978) 438 U.S. 586, 604, fn. 12 [98 S.Ct. 2954, 57 L.Ed.2d 973]), and in

California is not admissible. (*People v. Zapien, supra*, 4 Cal.4th at p. 989.)" (*In re Gay, supra*, 19 Cal.4th at p. 814.)

With the exception of a retrial of the penalty phase–which was not the case here–evidence is not admissible at the penalty phase for the purpose of creating reasonable doubt. (*People v. Hamilton, supra*, 45 Cal.4th at p. 912.) This is precisely what Mataele was trying to accomplish by presenting Towne's testimony. Although Mataele characterizes Towne's testimony as mitigating evidence concerning the circumstances of the murder, in reality, the testimony is only relevant to the issue of identity. This was resolved at the guilt phase when the jury determined Mataele was the shooter.

The case of *People v. Gay, supra*, 42 Cal.4th 1195, is inapposite. In *Gay*, the trial court excluded evidence in a penalty phase retrial designed to show that Raynard Cummings (codefendant), and not the defendant, had shot the victim, Officer Verna. (*Id.* at pp. 1214-1217.) After finding evidence that the defendant was not the shooter was admissible at the penalty retrial under Penal Code section 190.3 as a circumstance of the offense, this Court determined that the trial court's rulings to the contrary were prejudicial. (*Id.* at pp. 1217-1228.) Specifically, this Court found that "the trial court's rulings effectively limited the defense to a single eyewitness . . . and excluded the defense from presenting testimony from the four other eyewitnesses . . .who were also present and who would have described the shooter's complexion as inconsistent with defendant's but consistent with Raynard Cummings's." (*Id.* at p. 1224.)

This Court further found that "although the defense was permitted to offer isolated pieces of a circumstantial theory that Pamela Cummings was lying to cover up her husband's involvement and was attempting to shift the blame to defendant instead . . . the defense was precluded from presenting the far more powerful evidence that Raynard himself, on at least four

occasions, had admitted firing all of the shots." (*Ibid.*) "[B]ecause the error was compounded by the trial court's instruction to the jury, following opening statement, that defendant's responsibility for the shooting had been conclusively proven and that there would be no evidence presented in this case to the contrary," this Court declined to "decide whether the evidentiary rulings alone were prejudicial." (*People v. Gay*, *supra*, 42 Cal.4th at p. 1224.)

The trial court in *People v. Gay* also "instructed the jury at the close of evidence that '[i]t is appropriate for a juror to consider in mitigation any lingering doubt he or she may have concerning defendant's guilt' and then defined lingering doubt[.]" (*People v. Gay, supra*, 42 Cal.4th at p. 1225.) The jury also requested clarification of the instructions on lingering doubt. (*Id.* at p. 1226.) Thus, this Court held that "[t]he combination of the evidentiary and instructional errors presents an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt. The defense could have had particular potency in this case, given the absence of physical evidence linking defendant to the shooting and the inconsistent physical and clothing descriptions given by the prosecution eyewitnesses." (*Ibid.*)

This matter is starkly different. Foremost, the same jury that returned a guilty verdict also decided the penalty, with the exception of one alternate. (34 RT 7688-7689.) But, that alternate was present for the entirety of the proceedings and familiar with all evidence admitted at trial. Also, the proffered evidence was completely irrelevant to any aggravating or mitigating circumstances or that of the crime. It had no impact whatsoever on the series of events surrounding the crimes and how they took place. Towne's testimony was properly excluded in the penalty phase.

C. There Is No Reasonable Possibility the Exclusion of Towne's Testimony Affected the Penalty Verdict

The exclusion of evidence at a penalty trial is not one of federal constitutional dimension. (See *People v. Hamilton, supra*, 45 Cal.4th at 911; *Oregon v. Guzek* (2006) 546 U.S. 517, 525-526 [126 S.Ct. 1226, 163 L.Ed.2d 1112,].) "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.' [Citations.]" (*Hamilton, supra*, 45 Cal.4th at p. 912; *People v. Gay, supra*, 42 Cal.4th at p. 1223.)

If the facts offered to show lingering doubt at the penalty phase would not have affected the verdict, the exclusion of the proffered evidence was harmless. Therefore, this Court must consider the facts Mataele sought to admit. (Cf. *People v. Allen* (2008) 44 Cal.4th 843, 872 [assessing error from preclusion of defendant testifying in context of other evidence presented and facts defendant sought to establish].) "To preserve a contention that evidence should have been admitted, a party's offer of proof must make clear the substance of the proffered testimony. [Citation.]" (*Id.* at p. 872, fn. 19.)

In the present case, defense counsel sought to establish lingering doubt as to the identity of the shooter- - that it was Carrillo, not Mataele. But, there is no reasonable possibility, under the circumstances of this case, that the penalty verdict would have been different if the proffered testimony had been admitted. The only exculpatory value would have been testimony that the shooter had a "thin build" and was wearing a cap. As defense counsel pointed out, Towne's testimony "would be duplicating pretty much what Fowler said." (34 RT 7715.) Towne was with Rodriguez and Fowler at the time, and saw the shooter under similar circumstances, i.e., from the Urgent Care Clinic across the street, in poor lighting, shortly after midnight, for just a few seconds, and almost eight years earlier. In addition, there was

evidence Towne and Fowler spoke with each other before being interviewed by officers.

The exclusion of the proffered testimony was not prejudicial because it had minimal probative value and was cumulative. The fact that Towne may have described the shooter as having a thin build and wearing a cap would not have cast any doubt on the verdict especially since it was dark outside, the shooter was seen from the side, and the shooter was wearing dark clothing. Moreover, numerous other sources identified Mataele as the shooter, including the victim, Masubayashi. Therefore, the penalty verdict would not have been affected by the proffered duplicative testimony that the shooter had a thin build and was wearing a cap.[20] In sum, the exclusion of the proffered evidence would not have made a difference as the proposed evidence designed to establish lingering doubt was marginal and not strong. (Compare *People v. Gay*, *supra*, 42 Cal.4th at p. 1224 [defense was precluded from presenting powerful evidence of lingering doubt].)

XV. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE TO ACCEPT THE GUILT PHASE VERDICTS

Mataele argues reversal of the death verdict is necessary because the trial court's instruction provided to the jury when an alternate was placed on the panel for the penalty phase restricted the scope of deliberations and denied him his constitutional rights to a fair penalty trial and a reliable sentencing decision. (AOB 266-271.) He acknowledges this issue was addressed and denied in *People v. Cain* (1995) 10 Cal.4th 1, and asks this Court to reconsider the holding. (AOB 270-271.) This Court should reaffirm *Cain* as Mataele has presented nothing to undermine its validity.

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[20] In contrast, defense investigator David Carpenter included in his affidavit that when he asked Towne about the color of the man he saw, Towne said he was black. (6 CT 1662.) This detail was not included in Towne's affidavit and was more consistent with Mataele's appearance.

Following the guilt phase verdicts, Juror Number 160 was excused and replaced with Juror Number 302 for the penalty phase. (33 RT 7536-7539.) The trial court indicated, without objection, it would instruct the jury with CALJIC No. 17.51.1. (34 RT 7679-7680, 7686.) The alternate juror was sworn in. (34 RT 7688-7689.) The jury was instructed as follows:

> Members of the jury, a juror has been replaced by an alternate juror. The alternate juror was present during the presentation of all the evidence, arguments of counsel, and reading of instructions during the guilt phase of the trial. However, the alternate juror did not participate in the jury deliberations which resulted in the verdicts and findings returned by you to this point.
>
> 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. Your function now is to determine along with the other jurors in light of the prior verdict or verdicts and findings and the evidence and law what penalties should be imposed on defendant Tupoutoe Mataele.
>
> Each of you must participate fully in the deliberations, including any review as may be necessary of the evidence presented in the guilt phase of the trial.

(34 RT 7695; 42 RT 9316-9317.)

Mataele maintains the instruction requiring the alternate juror to accept the guilty verdicts denied him his constitutional rights by denying the alternate juror the opportunity to participate in a renewed and full discussion with the other 11 jurors of all the issues raised and determined in the guilt phase. Mataele failed to object to the given instruction, and this claim should be forfeited. (*People v. Capistrano* (2014) 59 Cal.4th 830, 875, fn. 11.)

In addition, this argument was rejected in *People v. Cain*, under strikingly similar circumstances. (*People v. Cain, supra*, 10 Cal.4th at pp.

65-66.) In *Cain*, a juror was discharged and substituted with an alternate at the commencement of the penalty phase. The trial court gave a special instruction containing language substantively the same as CALJIC No. 17.51.1, given here. (*Id.* at pp. 64-65.)

The court in *Cain* concluded the special instruction did not violate the principle that the jury must reach its verdict through common, shared deliberations:

> If the guilt phase is not retried, the penalty phase jury, including the new juror, must perforce 'accept' the guilt phase verdicts and findings, as they were instructed to do in this case. Those findings determined guilt and truth of the special circumstances beyond a reasonable doubt. It follows that reasonable doubt is not at issue in the penalty phase: the new juror must accept the previous findings were made beyond a reasonable doubt, and the jury as a whole has no cause to deliberate further on whether any of them harbor reasonable doubt as to guilt or truth of the special circumstances. (See *People v. DeSantis* (1992) 2 Cal. 4th 1198, 1238 [9 Cal. Rptr. 2d 628, 831 P.2d 1210] [at penalty phase the defendant's guilt is conclusively presumed].) The challenged portions of the special instruction did no more than inform the jury of these limitations on its penalty phase duties.

(*Cain*, *supra*, at p. 66.)

People v. Cain was binding on the trial court. "The guilt phase jury determined defendant's guilt and the truth of the special circumstance allegation beyond a reasonable doubt. As a matter of law, the penalty phase jury must conclusively accept these findings." (*People v. Harrison* (2005) 35 Cal.4th 208, 256.) "Unlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual'" and "properly considers 'personal religious, philosophical, or secular normative values' in making a penalty determination." (*People v. Nunez and Satele* (2013) 57 Cal.4th 1, 60, quoting *People v. Hawthorne* (1992) 4 Cal.4th 43, 79, and *People v. Danks* (2004) 32 Cal.4th 269, 311.) The two distinct

questions posed to a jury in the guilt and penalty phases does not mandate all of the jurors deliberate throughout the entire trial in order to assure a reliable penalty verdict.

Moreover, the instruction did not interfere or inhibit subsequent jury deliberations.

> The special instruction did not purport to limit the guilt phase evidence that could be considered by the jury whether in assessing the circumstances of the crime (§ 190.3, factor (a)) or in considering the existence of lingering doubt. Nor did it suggest the substituted juror should play less than an equal role in assessing the evidence from the guilt phase for either of these purposes. To the contrary, the instruction stated the alternate juror was to 'participate[] fully in the deliberations, *including such review as may be necessary of the evidence presented in the guilt phase of the trial.*'

(*Cain, supra*, at p. 66, original italics.)

In *People v. Kaurish* (1990) 52 Cal.3d 648, a juror was replaced by an alternate during the penalty phase deliberations and the trial court instructed the jury as a whole to disregard earlier deliberations and begin deliberating anew. (*Id.* at p. 708.) The defendant argued the trial court failed to instruct the replacement juror that she was not bound by the other jurors' earlier determination of guilt, but could vote against the death penalty if she doubted defendant's guilt. (*Ibid.*) The court in *Kaurish* found this additional instruction unnecessary because the jury was instructed on the appropriateness of considering lingering doubt as a mitigating factor and made it clear that the replacement juror could vote against the death penalty if she disagreed with the guilt phase verdict. (*Ibid.*)

Mataele contends the instruction is at odds with *Kaurish* because the alternate was not permitted to vote against the death penalty if he or she disagreed with the guilt phase verdict. (AOB 270-271.) This is not so. Similar to *Kaurish*, the jury here was provided a lingering doubt instruction at the request of defense counsel. This instruction informed the jury that "if

any individual juror has a lingering or residual doubt about whether the defendant killed the victim, he or she must consider it as a mitigating factor and assign to it the weight you deem appropriate." (6 CT 1515; 42 RT 9307.)

The instruction on substituting a juror in the penalty phase was proper. The instruction correctly informed the alternate that it was to accept the findings of guilt in order to proceed to the penalty phase. It also instructed the jury that each member was to be a part of the deliberation process and to discuss anything necessary from the guilt phase. Furthermore, additional instructions informed the jury, and in particular the alternate, that any lingering doubt must be considered as a mitigating factor. Additional penalty phase instructions directed the jury that it was "free to assign [whatever] moral or sympathetic value" that juror deems "appropriate to each and all of the various factors" in aggravation and mitigation. (See CALJIC No. 8.88; 6 CT 1536; 42 RT 9319.) The jurors in this case were also instructed that they could consider: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." (CALJIC No. 8.85, factor (k); 6 CT 1510-1511; 42 RT 9304-9305.)

Contrary to Mataele's arguments, the instruction did not place any restrictions on the scope of the jury's deliberations, but rather directed them to the issue that was currently at hand, i.e., the appropriate penalty. In fact it mandated all the jurors deliberate and encouraged discussion of the guilt phase.

XVI. THE JURY'S CONSIDERATION OF MATAELE'S PRIOR JUVENILE CRIMINAL ACTIVITY DID NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Mataele contends that recent United States Supreme Court jurisprudence applying the Eighth Amendment to juveniles undercuts the use of juvenile criminal activity as an aggravating factor in determining the death penalty. (AOB 272-282.) Mataele relies on a series of United States Supreme Court cases that have recognized the lesser culpability of juveniles in the context of the death penalty or life imprisonment without parole: *Roper v. Simmons* (2005) 543 U.S. 551 [125 S.Ct. 1183, 161 L.Ed.2d 1] [8th Amendment prohibits death penalty for minors]; *Graham v. Florida* (2010) 560 U.S. 48 [130 S.Ct. 2011, 176 L.Ed.2d 825] [8th Amendment prohibits sentence of life without parole for minors who do not commit homicide]; *Miller v. Alabama* (2012) _ U.S. _ [132 S.Ct. 2455, 183 L.Ed.2d 407] [8th Amendment prohibits mandatory life in prison without the possibility of parole for minors]. These Supreme Court opinions recognize there are substantial differences between juveniles and adults, and in light of these differences, limit the traditional concepts of deterrence to juveniles. (AOB 274.) Mataele reasons the rationale that juveniles need to be protected from their immaturity should likewise prohibit consideration of prior violent juvenile conduct as a penalty factor in a capital case. (AOB 276.) Mataele's reasoning is not persuasive because he is not being punished more severely for his juvenile conduct. He was being punished for committing special-circumstance murder as an adult and the jury was appropriately allowed to consider his prior violent conduct to assess his character.

In the penalty phase, the prosecution presented evidence that when Mataele was 13 years old he exposed himself to, and touched two fellow female students on the buttocks and breasts. (35 RT 777, 7789-7790.)

Also, at age 16, Mataele physically assaulted Kinsey in the course of robbing him. (35 RT 7795-7796, 7823-7827, 7829-7830, 7833, 7850.)

"[A]lthough the fact of a juvenile adjudication is inadmissible as a factor in aggravation, juvenile criminal activity involving force or violence is admissible as aggravating evidence under factor (b)." (*People v. Taylor* (2010) 48 Cal.4th 574, 652.) The "admission of such evidence passes constitutional muster." (*People v. Lee*, *supra,* 51 Cal.4th at p 648.) As this Court has held, "*Roper* 'says nothing about the propriety of permitting a capital jury, trying an adult, to consider evidence of violent offenses committed when the defendant was a juvenile.'" (*Lee*, *supra*, at p. 649, quoting *People v. Bramit* (2009) 46 Cal.4th 1221, 1239.)

The subsequent United States Supreme Court decisions in *Graham v. Florida* and *Miller v. Alabama*, likewise do not limit the ability to consider violent juvenile criminal activity when assessing an individual's character and history in order to determine the appropriate punishment. Rather, these holdings only prevent the imposition of a sentence of death and life without parole on a juvenile for his or her conduct as a juvenile. *Miller* and *Graham* are not concerned with persons who are being punished for their adult crimes. Graham prohibited a sentence of life without parole for nonhomicide offenses for those under 18 at the time of their crimes (*Graham*, *supra*, 560 U.S. at p. 82), and *Miller* extended that rule to those who commit homicide before they turn 18 (*Miller*, *supra*, 567 U.S. at p. __ (132 S.Ct. at p. 2460). Both decisions are premised on studies showing that, as compared to adults, juveniles are developmentally and neurologically immature, prone to rash action, less likely to be irretrievably depraved, and have better prospects for reformation. (See *Miller*, *supra*, 132 S.Ct. at pp. 2464-2465.) Neither opinion stands for the proposition that conduct as a minor may not be taken into account in sentencing an adult recidivist. Here, Mataele is not being punished for his juvenile conduct, but

for the premeditated murder, attempted murder and lying-in-wait special circumstance he committed as an adult at age 23.

The purpose of the Penal Code section 190.3 sentencing factors is to direct the penalty phase jury to evidence relevant to the penalty determination. This encompasses both aggravating and mitigating factors. A sentencing determination needs to consider the entire picture of the defendant, and should not be limited to conduct committed after becoming an adult. Mataele was not sentenced to death for his juvenile conduct, but for the murder and attempted murder he committed as an adult. The jury came to this conclusion by considering all relevant factors. *Roper*, *Miller* and *Graham* provide no basis to find an adult's prior juvenile conduct cannot be considered for the purpose of assessing his character and an appropriate punishment. His juvenile conduct was not used to prove the underlying capital offenses, but a means of assessing his character.

The controlling law on the issue of the use of juvenile priors is *People v. Nguyen* (2009) 46 Cal.4th 1007, 1025, in which this Court held:

> Sentence enhancement based on recidivism flows from the premise that the defendant's current criminal conduct is more serious because he or she previously was found to have committed criminal conduct and did not thereafter reform. A prior juvenile adjudication, like a prior adult conviction, is a rational basis for increased punishment on the basis of recidivism. Indeed, a juvenile prior demonstrates that the defendant did not respond to the state's attempt at early intervention to prevent a descent into further criminality. The high court has never held that the Constitution places a direct restriction on the use of prior juvenile adjudications for this purpose.

Since Mataele's juvenile conduct was highly relevant to the determination of his sentence, but was not the basis of his conviction, it was not in violation of his Eighth and Fourteenth Amendments Rights. Rather, it was appropriately considered by the jury, as one of the numerous relevant

mitigating and aggravating factors to assist the jury in determining the appropriate penalty.

Moreover, when evidence has been improperly admitted under Penal Code section 190.3, subdivision (c), "the error may be harmless when the evidence is trivial in comparison with the other properly admitted evidence in aggravation." (*People v. Williams* (2010) 49 Cal.4th 405, 461.) The question is whether, in light of the properly admitted evidence of Mataele's criminal history and the circumstances of the crimes in this case, there is a reasonable possibility that the jury's penalty verdict was affected by the inadmissible evidence. (*People v. Burton* (1989) 48 Cal.3d 843, 864.) "[S]tate law error at the penalty phase of a capital case requires reversal only when there is a 'reasonable (i.e., realistic) possibility' the error affected the verdict." (*People v. Cowan, supra*, 50 Cal.4th at p. 491.) This standard is "essentially the same, in substance and effect, as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California*. . . ." (*Ibid.*)

Here, Mataele's juvenile convictions were not the most significant aggravation evidence. They paled in comparison to the appalling nature of Johnson's murder, the attempted murder of Masubayashi, and the armed robbery of Hagan. "On this record, given the properly admitted evidence of defendant's substantial criminal history and the circumstances of the instant offenses, there simply is no reasonable possibility the jury's penalty verdict was affected by the inadmissible evidence." (*People v. Burton*, supra, 48 Cal.3d at p. 864.)

XVII. MATAELE HAS FORFEITED HIS CLAIM OF INSUFFICIENT EVIDENCE HE ROBBED KINSEY AND ANY FAILURE IN PROVIDING ADDITIONAL INSTRUCTION ON AIDING AND ABETTING WAS HARMLESS BEYOND A REASONABLE DOUBT

The prosecution presented evidence under Penal Code section 190.3, factor (b), that Mataele robbed Kinsey. Mataele does not challenge the

admission of the evidence. Instead, he reasons that because the evidence shows Mataele committed robbery as an aider and abettor and the jury was not fully instructed on aiding and abetting, his death judgment must be reversed on account of instructional error and insufficient evidence. (AOB 283-293.) Mataele's arguments fail to consider that evidence of violent criminal activity as an aggravating factor must meet a threshold standard to be admitted as it is not resulting in a conviction or judgment. Therefore, a claim of insufficient evidence is untenable and has been forfeited. Once evidence of unadjudicated crimes is admitted, there is only a duty to provide complete instruction by the trial court. Here, the incomplete instruction on aider and abettor liability was harmless error. Accordingly, there was no error surrounding the admission of the Kinsey evidence, and any possible instructional error was harmless beyond a reasonable doubt.

A. Penal Code section 190.3, Factor (b) Evidence that Mataele Robbed Kinsey Was Properly Admitted and His Claim of Insufficient Evidence Is Forfeited

Evidence showing "the defendant engaged in criminal activity that violated a penal statute and involved 'the use or attempted use of force or violence or the express or implied threat to use force or violence ... directed at a person'" is generally admissible under Penal Code section 190.3, factor (b). (*People v. Jackson* (2014) 58 Cal.4th 724, 759, quoting *People v. Thomas* (2011) 52 Cal.4th 336, 363.) "The evidence must be sufficient to 'allow a rational trier of fact to find the existence of such activity beyond a reasonable doubt.'" (*People v. Jackson, supra*, 58 Cal.4th at p. 759, quoting *People v. Griffin* (2004) 33 Cal.4th 536, 584.)

This Court held in *People v. Phillips* (1985) 41 Cal.3d 29, that "'in many cases it may be advisable for the trial court to conduct a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element' of other violent crimes the prosecution

intends to introduce in aggravation under section 190.3, factor (b).... 'Moreover, a trial court's decision to admit "other crimes" evidence at the penalty phase is reviewed for abuse of discretion, and no abuse of discretion will be found where, in fact, the evidence in question was legally sufficient.' [Citation.]" (*People v. Tully* (2012) 54 Cal.4th 952, 1027; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 225.)

A *Phillips* hearing was held and the prosecution presented an offer of proof in order to admit evidence under Penal Code section 190.3, factor (b), that Mataele robbed Kinsey. The trial court found sufficient evidence of second-degree robbery by force and fear. The court pointed out there was physical contact when Mataele's associate grabbed the briefcase, and also when Mataele pushed Kinsey. Mataele did not object or claim the evidence was insufficient to go to the jury. (34 RT 7564-7569.)

At the penalty phase, the prosecution presented evidence Mataele committed criminal activity involving force or violence when he robbed Kinsey. Kinsey testified that on June 14, 1991, he was walking in Hollywood, carrying a briefcase, when he was approached by Mataele and three other individuals. (35 RT 7794, 7797, 7824.) One of them offered to sell Kinsey rock cocaine. (35 RT 7817-7818.) Mataele approached Kinsey and said, "That's a nice case. How much you want for it?" (35 RT 7794, 7831-7832.) Kinsey clutched the briefcase to his chest. (35 RT 7832.) One of them then took the case from Kinsey and fled. (35 RT 7795, 7833.) Then Mataele pushed Kinsey, backing him up, and demanded money from him. (35 RT 7795, 7826, 7829-7830.) Mataele said, "Where's the rest of -- where's your other money?" (35 RT 7833.) Mataele made threatening statements to Kinsey as he was backing him up, saying several times, "I'm going to fuck you up." (35 RT 7850.) He also pulled back his fist like he was going to punch Kinsey. (35 RT 7826, 7829-7830.) Kinsey was afraid

when his briefcase was taken and the individuals demanded money from him. (35 RT 7798.)

Los Angeles Police Officer David Dooros was on patrol in Hollywood when he saw three men, including Mataele, surrounding and cornering Kinsey, and diffused the situation. (35 RT 7795-7796, 7823-7825, 7827, 7831.)

Mataele testified that he did not rob Kinsey in 1991. He said Kinsey approached him and tried to trade his bag for crack. (41 RT 9096-9097.) Mataele told him to "take your bag down the street, gay boy." (41 RT 9096-9097, 9166.) Kinsey and another guy got into a fight and Mataele was just there watching when the officers arrived. (41 RT 9098.) He said Kinsey and the officer lied about him pushing Kinsey or throwing punches. (41 RT 9098.)

Mataele argues there is insufficient evidence he robbed Kinsey because of incomplete instruction on aider and abettor liability. (AOB 286.) Mataele has forfeited a claim of insufficient evidence because he failed to object to the introduction of the evidence at the *Phillips* hearing.

As this Court explained

> Even if defendant need do nothing at trial to preserve an appellate claim that evidence supporting his conviction is legally insufficient, a different rule is appropriate for evidence presented at the penalty phase of a capital trial. There the ultimate issue is the appropriate punishment for the capital crime, and evidence on that issue may include one or more other discrete criminal incidents. [Citation.] If the accused thinks evidence on any such discrete crime is too insubstantial for jury consideration, he should be obliged in general terms to object, or to move to exclude or strike the evidence, on that ground. [Citations.]

(*People v. Livingston, supra*, 53 Cal.4th at p. 1175, quoting *People v. Montiel* (1993) 5 Cal.4th 877, 928, fn. 23; see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1059-1060 [defendant's claim that "there was insufficient evidence" for the jury to find the crimes presented during the

penalty phase constituted aggravating evidence was not cognizable on appeal because he failed to object or otherwise raise the issue at trial]; see *also People v. Hamilton, supra,* 45 Cal.4th at pp. 933-934 [defendant forfeited claim challenging the sufficiency of the evidence of the crimes presented during the penalty phase because defendant did not challenge the sufficiency of the evidence at trial, and did not object to the evidence when it was introduced]; *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1052-1054 [defendant's claim that the acts presented during the penalty phase did not satisfy the "crime" and/or "violence" requirements of section 190.3, factor (b) were forfeited under both statutory and constitutional law because he failed to object to the evidence].)

Mataele did not object to the sufficiency of the Kinsey robbery evidence and does not contend the trial court abused its discretion in admitting evidence that Mataele robbed Kinsey. Mataele never challenged admission of the evidence on sufficiency grounds, and cannot do so now on appeal. This claim is forfeited.

B. Assuming the Instructions Provided on Robbery Were Incomplete, the Error Was Harmless Beyond a Reasonable Doubt

Mataele argues the evidence only supported a finding of his involvement in Kinsey's robbery as an aider and abettor because he did not physically take the briefcase from Kinsey. Thus, the trial court should have instructed on essential elements of aider and abettor liability provided in CALJIC No. 3.00 and CALJIC No. 3.01. (AOB 288.) CALJIC No. 3.00 defines "principals," and explains all persons involved in committing or attempting to commit a crime, either directly or by aiding and abetting, are equally guilty. CALJIC No. 3.01 defines the elements of aiding and abetting. To put it succinctly, a person aids and abets when he or she has knowledge of the unlawful purpose of the perpetrator, acts with the intent

or purpose of committing or encouraging or facilitating the commission of the crime, and by act or advice aids, promotes, encourages or instigates the commission of the crime. (See CALJIC No. 3.01.) Any omission in the instructions was harmless beyond a reasonable doubt.

"Although 'there is no sua sponte duty at the penalty phase to instruct on the elements of "other crimes" introduced in aggravation [citation], when such instructions are given, they should be accurate and complete.'" (*People v. Prieto* (2003) 30 Cal.4th 226, 268, quoting *People v. Montiel, supra,* 5 Cal.4th at p. 942.) "The 'right to correct instructions on crimes introduced in aggravation at the penalty phase stems from the right to have the penalty jury consider such crimes only if it finds them true beyond a reasonable doubt.'" (*People v. Prieto, supra,* at p. 268, *quoting People v. Montiel, supra,* at p. 942.)

The jury was instructed that in determining which penalty to impose, if applicable, it shall consider, "the presence or absence of criminal activity by the defendant, other than the crimes for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (CALJIC No. 8.85; 6 CT 1510; 42 RT 9303.) It was also instructed, "Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal activity: 2nd degree robbery of Thomas Kinsey . . . Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal activity." (CALJIC No. 8.87; 6 CT 1513; 42 RT 9305-9306.) The jury was also instructed on the reasonable doubt burden of proof. (CALJIC No. 2.90; 6 CT 1514; 42 RT 9306-9307.)

The jury was instructed with CALJIC No. 9.40 on the elements of robbery;

Every person who takes 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 that person of the property, is guilty of the crime of robbery in violation of Penal Code § 211.

The words 'takes' or 'taking' require proof of (1) taking possession of the personal property, and (2) carrying it away for some distance, slight or otherwise.

'Immediate presence' means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property.

'Against the will' means without consent.

In order to prove this crime, each of the following elements must be proved:

1. A person had possession of property of some value however slight;

2. The property was taken from that person or from his immediate presence;

3. The property was taken against the will of that person;

4. The taking was accomplished either by force or fear; and

5. The property was taken with the specific intent permanently to deprive that person of the property.

(6 CT 1519.)

Additional instruction provided on the crime of robbery, included: "The element of fear in the crime of robbery may be either: 1 The fear of an unlawful injury to the person or property of the person robbed, or to any of his relatives or family members; or 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (6 CT 1522; CALJIC No. 9.40.)

The jury was also instructed, "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." (6 CT 1520; CALJIC No. 9.40.1, italics added.) And, "To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed." (6 CT 1521; CALJIC No. 9.40.2; 42 RT 9309-9312.)

Assuming it was error not to instruct the jury with CALJIC Nos. 3.00 and 3.01, the resulting error was harmless. Generally, a reviewing court "assess[es] prejudice from the court's failure to instruct on accomplice liability principles under the state error standard of *People v. Watson* [(1956) 46 Cal.2d 818, 836.]" (*People v. Delgado* (2013) 56 Cal.4th 480, 492.) Reversal is required only if, "considering the entire record, there was any reasonable probability of a more favorable result had such instructions been given." (*Ibid.*) However, "the omission of aiding and abetting instructions might constitute a violation of due process" "[i]f the conceptual gap so created was likely to be filled in a manner that reduced the People's burden of proof." (*People v. Delgado*, *supra*, 56 Cal.4th at p. 491.) "As with an ambiguous instruction, [a reviewing court] asks whether there is a reasonable likelihood [citation] the jury applied the instructions in a manner that deprived defendant of his constitutional rights"—that is, "in a manner that excused the prosecution from proving the facts essential to an aiding and abetting theory." (*Id.* at pp. 491-492.) In such cases, the error is

evaluated under the "harmless beyond a reasonable doubt" standard of *Chapman v. California, supra*, 386 U.S. at pp.18, 24. (See *ibid.*)

Here, the proper standard is the state error standard, because there is no reasonable likelihood that the jury applied the provided robbery instructions "in a manner that excused the prosecution from proving the facts essential to an aiding and abetting theory." (*People v. Delgado, supra*, 56 Cal.4th at pp. 491-492.) Assuming the jury "relied on a theory of complicity to satisfy the [taking] element, it is not reasonably likely it did so without finding [Mataele] agreed to assist or intentionally assisted" his companion in taking Kinsey's briefcase. (*Id.* at p. 491.) Mataele was with companions when they approached Kinsey and Mataele made a comment about the briefcase. (35 RT 7794, 7797, 7824, 7831-7832.) Mataele's companion grabbed the briefcase from Kinsey, fled, and Mataele pushed Kinsey, made verbal and physical threats, and demanded more money from him. (35 RT 7795, 7826, 7829-7830, 7833, 7850.) There was no reasonable likelihood, given the evidence, "that the jury filled the gap created by the absence of complicity instructions in a manner that excused the prosecution from proving the facts essential to an aiding and abetting theory." (*Delgado, supra*, at pp. 491-492.) Accordingly, the trial court's error did not implicate appellant's constitutional due process rights, and the state error standard applies.

However, any possible error was harmless under either standard. The jurors were instructed to consider evidence of Kinsey's robbery only if they found Mataele committed second-degree robbery beyond a reasonable doubt. (CALJIC No. 8.87; 6 CT 1513; 42 RT 9305-9306.) It is presumed jurors follow instructions given, and here, would not consider the Kinsey robbery unless all of the elements were met. At the same time, the overwhelming evidence established that Mataele intended to steal Kinsey's briefcase, and the taking was accomplished by Mataele's acts of force or

fear. Moreover, there was compelling circumstantial evidence that Mataele and his companion intentionally cooperated with each other to take the briefcase from Kinsey. Based on the evidence it is not possible the individual jurors would have rendered a more favorable result had they been instructed on aider and abettor liability. Additional instruction would only have bolstered Mataele's involvement and responsibility for the robbery of Kinsey.

Also, the circumstances of the Kinsey robbery paled in comparison to the cold-blooded murder of Johnson and attempted murder of Matsubayashi, and evidence of other aggravating factors. The Kinsey robbery was relatively minor compared to Mataele's other crimes in that he did not use a gun to commit the robbery and did not threaten to kill him. Whereas, the Hagan armed robbery involved Mataele holding a gun to Hagan's head and threatening to kill him. Or, Johnson's murder where Mataele shot him in the head from a few inches away. The Kinsey robbery was not nearly as violent as Masubayashi's attempted murder which involved Mataele shooting Masubayashi in the chest, then chasing after him with a gun and shooting at him, and finally chasing him in a car in order to finish the job.

In sum, there was substantial evidence Mataele robbed Kinsey and it was properly before the jury at the penalty phase as a potential aggravating factor. The absence of additional aiding and abetting instruction was harmless because either the jury found the prosecution had not proved the robbery beyond a reasonable doubt and did not consider it, or, in the alternative, the overwhelming evidence that Mataele robbed Kinsey rendered the error harmless beyond a reasonable doubt. In light of more severe and heinous conduct committed by Mataele, it is not reasonably probable additional instruction would have inured to his benefit. Furthermore, had the robbery of Kinsey not been admitted, there is no

doubt the jury would have reached the same penalty verdict. (*People v. Moore*, *supra,* 51 Cal.4th at pp. 1137-1138 [Harmless error admitting evidence that did not amount to "criminal activity" under Penal Code section 190.3, factor (b).].)

XVIII. CALIFORNIA'S DEATH PENALTY SCHEME, AS INTERPRETED BY THIS COURT AND APPLIED AT MATAELE'S TRIAL, DOES NOT VIOLATE THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW; VARIOUS CHALLENGES TO MURDER AND GUILT-PHASE INSTRUCTIONS ARE WITHOUT MERIT

Mataele contends that many features of California's capital punishment scheme violate the United States Constitution and international law. He correctly acknowledges that this Court has repeatedly rejected each of these claims, but raises these challenges to urge their reconsideration and preserve them for federal review. (AOB 294.) Accordingly, his contentions fail. (*People v. Jackson* (2009) 45 Cal.4th 662, 699-702.)

A. Application of Penal Code section 190.3, subdivision (a) Did Not Violate Mataele's Constitutional Rights

Mataele contends that Penal Code section 190.3, factor (a), is too broadly applied such that the concept of "aggravating factors" has been applied to almost all features of every murder, violating the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (AOB 294-296.) Appellant acknowledges, however, that this Court has rejected this claim. (AOB 296.)

Allowing the jury to consider the circumstances of the crime (Pen. Code, § 190.3, factor (a)) does not lead to the imposition of the death penalty in an arbitrary or capricious manner. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) This case presents no compelling reason to reconsider this holding. "Nor is section

190.3, factor (a) applied in an unconstitutionally arbitrary or capricious manner merely because prosecutors in different cases may argue that seemingly disparate circumstances, or circumstances present in almost any murder, are aggravating under factor (a)." (*People v. Carrington* (2009) 47 Cal.4th 145, 200.) Instead, "'each case is judged on its facts, each defendant on the particulars of his [or her] offense.'" (*Ibid.*, *quoting People v. Brown*, *supra*, 33 Cal.4th at p. 401, alteration in original.)

This Court determined, "California's death penalty statute 'does not fail to perform the constitutionally required narrowing function by virtue of the number of special circumstances it provides or the manner in which they have been construed.'" (*People v. Beames* (2007) 40 Cal.4th 907, 933, quoting *People v. Morrison, supra,* 34 Cal.4th at p. 730.) Also, this Court held that the California death-penalty scheme meets Eighth-Amendment requirements and is not overbroad based on the number of special circumstances. (*People v. Cornwell* (2005) 37 Cal.4th 50, 102.) Thus, this Court should reject this claim.

B. The Instructions Provided to the Jury at the Penalty Phase Were Constitutional and Complete

Mataele presents six challenges to California's death penalty statute and accompanying jury instructions given and omitted. (AOB 296-305.) None of his claims have merit.

1. The Penalty is Constitutional and Does Not Require a Higher Burden of Proof

Mataele argues that his death sentence is unconstitutional because it is not premised on findings made beyond a reasonable doubt. This Court has held otherwise.

> The death penalty law is not unconstitutional for failing to impose a burden of proof—whether beyond a reasonable doubt or by a preponderance of the evidence—as to the existence of aggravating circumstances, the greater weight of aggravating

> circumstances over mitigating circumstances, or the appropriateness of a death sentence.

(*People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1066.) Because the California death-penalty law requires a beyond-a-reasonable-doubt standard for proving special circumstances, and then requires the jury to consider and take into account all mitigating and aggravating circumstances in determining whether to impose the death penalty, it is constitutional. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1429.)

> Under the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense . . . ¶ Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' (*Apprendi*, *supra*, 530 U.S. at p. 490), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings.

(*People v. Prieto*, *supra*, 30 Cal 4th at p. 263, italics in original.)

Mataele acknowledges the holding in *Prieto* but urges this Court to reconsider it in light of *Apprendi v. New Jersey, supra*, 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington*, *supra*, 542 U.S. 296, and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856]. (AOB 298.) But this Court has already done so, and has concluded, "[t]he recent decisions of the United States Supreme Court interpreting the Sixth Amendment's jury trial guarantee do not compel a different result." (*People v. Bramit, supra,* 46 Cal.4th at p. 1250, footnote omitted.)

This Court should also reject Mataele's request to reconsider its holding in *People v. Blair, supra,* 36 Cal.4th at page 753, (AOB 298), that: "neither the cruel and unusual punishment clause of the Eighth

Amendment, nor the due process clause of the Fourteenth Amendment, requires a jury to find beyond a reasonable doubt that aggravating circumstances exist or that aggravating circumstances outweigh mitigating circumstances or that death is the appropriate penalty." This claim should be rejected.

2. Capital Sentencing Is Not Susceptible to Burdens of Proof

Mataele contends that his jury should have been instructed that the State had the burden of persuasion regarding the existence and weighing of aggravating and mitigating factors, the appropriateness of the death penalty, and a presumption of life without parole. (AOB 299.) However, he acknowledges that this Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (AOB 299-300; *People v. Jackson*, *supra*, 45 Cal.4th at p. 694; *People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) Thus, there is no requirement that the court instruct the jury that it had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors and that death was the appropriate penalty. (*People v. Contreras* (2013) 58 Cal.4th 123, 173; *People v. Medina* (1995) 11 Cal.4th 694, 782; *People v. Berryman* (1993) 6 Cal.4th at 1048, 1101; *People v. Diaz* (1992) 3 Cal.4th 495, 569.)

Mataele also posits that the trial court should have articulated to the jury that the prosecution had no burden of proof. (AOB 300; *People v. Williams* (1988) 44 Cal.3d 883, 960-961.) This Court has also settled this issue. Since California does not specify any burden of proof, except for other-crimes evidence, the trial court should not instruct at all on the burden of proving mitigating or aggravating circumstances. (*People v. Holt*, *supra*, 15 Cal.4th at pp. 682-684; *People v. Carpenter*, *supra*, 15 Cal.4th at pp. 417-418.) Thus, the trial court need not instruct that "no party bears the

burden of proof on the matter of punishment." (*People v. Lewis, supra*, 46 Cal.4th at p. 1319; accord *People v. McKinnon, supra*, 52 Cal.4th at pp. 697-698.) This claim, too, should fail.

3. The Penalty Does Not Have to Be Based on Unanimous Jury Findings Regarding Aggravation Factors

Mataele contends that because his death verdict was not premised on unanimous jury findings regarding aggravating factors, the verdict violates the Sixth, Eighth, and Fourteenth Amendments. (AOB 300-301.) There is no requirement that the jury unanimously agree on the aggravating circumstances that support the death penalty, since aggravating circumstances are not elements of an offense. (*People v. Jackson, supra*, 45 Cal.4th at p. 701; *People v. Hoyos, supra*, 41 Cal.4th at p. 926; *People v. Stanley* (2006) 39 Cal.4th 913, 963; *People v. Medina, supra*, 11 Cal.4th at p. 782.) Mataele acknowledges that this Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. at page 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275; AOB 301.) He presents no compelling reason to revisit the decision.

Mataele also argues the failure to require a finding of unanimity on the aggravating factors violates the Equal Protection clause of the Fourteenth Amendment by providing more protection to a noncapital defendant than to a capital defendant. (AOB 301-302.) He reasons that because under California law when a criminal defendant has been charged with certain special allegations that may increase the severity of the sentence, the jury must render a separate and unanimous verdict on the truth of the allegations, then capital defendants are likewise guaranteed this additional protection. (AOB 301-302.) Mataele's claim fails as this Court has consistently held that "capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating

constitutional guarantees of equal protection of the laws or due process of law." (*People v. Manriquez* (2005) 37 Cal.4th 547, 590, citing *People v. Johnson, supra*, 3 Cal.4th at pp. 1242–1243.)

> The availability of certain procedural protections in noncapital sentencing—such as a burden of proof, written findings, jury unanimity and disparate sentence review—when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles. [Citations.]

People v. Pearson (2013) 56 Cal.4th 393, 478-479, quoting *People v. Cowan, supra*, 50 Cal.4th at p. 510.) There is no need to reconsider this Court's holdings in *People v. Taylor* (1990) 52 Cal.3d 719, 749 and *People v. Prieto, supra*, 30 Cal.4th at page 275.

4. The Standard for the Penalty Determination was not Impermissibly Vague and Ambiguous

Mataele argues that the death penalty determination hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warranted death instead of life without parole." (AOB 302-303.) He argues that the phrase "so substantial" is impermissibly broad and does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. (AOB 301-302.) He acknowledges, however, that this Court found use of this phrase does not render the instruction constitutionally deficient in *People v. Breaux* (1991) 1 Cal.4th 281, 316, footnote 14. (AOB 302.) He provides no reason for this Court to reconsider the *Breaux* opinion or the many others holding that the requirement that the jury find the aggravating circumstances "so substantial" in comparison with the mitigating circumstances that it "warrants death" is not vague or directionless. (*People v. Chatman* (2006)

38 Cal.4th 344, 409; *People v. Arias* (1996) 13 Cal.4th 92, 170.) As such, this claim fails.

5. The Instructions Provided Properly Informed the Jury to Determine Whether Death is the Appropriate Penalty

Mataele argues that CALJIC No. 8.88 failed to adequately instruct the jury that the ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty instead of life without parole and instead instructs them to return a death verdict if the aggravating evidence warrants it. (AOB 303-304.) He acknowledges that this Court previously rejected this challenge to CALJIC No. 8.88 in *People v. Arias, supra,* 13 Cal.4th at page 171. (AOB 304.) Mataele offers no reasons for this Court to reconsider its finding that CALJIC No. 8.88 is not defective in requiring the jury to determine whether death is "warranted" as opposed to "appropriate." (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1361; *People v. Rogers* (2009) 46 Cal.4th 1136, 1179; *People v. Watson* (2008) 43 Cal.4th 652, 702.) Accordingly, this claim fails.

6. There is no Requirement that the Trial Court Instruct the Penalty Jury on the Presumption of Life

Mataele claims the trial court erred and violated his right to due process of law by not instructing the jury as to the presumption that life without the possibility of parole is the appropriate sentence. (AOB 304-305.) As he acknowledges, this Court has rejected the argument that such an instruction is required in capital cases. (AOB 305; *People v. Arias, supra,* 13 Cal.4th at p. 190; see *People v. Abilez* (2007) 41 Cal.4th 472, 532.) CALJIC No. 8.88 is "not unconstitutional for failing to inform the jury there is a presumption of life." (*People v. Moon, supra,* 37 Cal.4th at p. 43, citing *People v. Maury, supra,* 30 Cal.4th at pp. 440.) There is no requirement that the jury be instructed on a presumption of life in the

penalty phase of a capital trial that is analogous to the presumption of innocence at the guilt trial. (*People v. Contreras, supra,* 58 Cal.4th at p. 173; *People v. Jackson, supra,* 45 Cal.4th at p. 701; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp* (2001) 26 Cal.4th 1100, 1137.) Accordingly, this claim should be rejected.

C. The Trial Court Was Not Required to Omit Inapplicable Sentencing Factors

Mataele contends the trial court's failure to omit from CALJIC No. 8.85 factors that were inapplicable to his case likely confused jurors or prevented them from making a reliable penalty determination, and asks this Court to reconsider its decision in *People v. Cook* (2006) 39 Cal.4th 566, 618, rejecting this same contention. (AOB 305.) Reconsideration of the *Cook* holding is not warranted in this case as this Court has held jurors are presumed to follow the trial court's instruction, and here, the jury was instructed with CALJIC No. 8.85 to consider and be guided by the factors "if applicable." (*People v. McKinzie, supra,* 54 Cal.4th at pp. 1364-1365, quoting *People v. Maury, supra,* 30 Cal.4th at pp. 439-440.) Nothing more was required. Mataele's claim should be rejected. (*People v. Bivert, supra,* 52 Cal.4th at p. 124.)

D. Intercase Proportionality Is Not Required

Mataele argues that the prohibition of intercase proportionality review in capital sentencing and failure to conduct such a review guarantees arbitrary and disproportionate impositions of the death penalty. (AOB 306.) Intercase proportionality review is not required and Mataele has presented no persuasive reasoning to reconsider this Court's prior decisions. (*People v. McKinzie, supra,* 54 Cal.4th at p. 1365.) "Comparative intercase proportionality review by the trial or appellate courts is not constitutionally required." (*People v. Snow* (2003) 30 Cal.4th 43, 126; accord *People v. Demetrulias* (2006) 39 Cal.4th 44; *People v.*

Gray (2005) 37 Cal.4th 168, 237; *People v. Blair, supra*, 36 Cal.4th at p. 753; *People v. Stitely* (2005) 35 Cal.4th 514, 574; *People v. Anderson* (2001) 25 Cal.4th 543, 602.)

E. California's Death Penalty Statute Does Not Violate Equal Protection

Mataele contends that California's death penalty statute violates equal protection because it "provides significantly fewer procedural protections" than those afforded to non-capital defendants, and asks this Court to reconsider its ruling in *People v. Manriquez, supra,* 37 Cal.4th at page 590. (AOB 306-307.) To prevail on an equal protection claim, a defendant must establish that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Smith* (2007) 40 Cal.4th 483, 527, quotations and citations omitted.) Mataele has not met his necessary burden.

This Court has rejected the claim that procedural differences in capital and non-capital cases, including the availability of certain "safeguards" such as intercase proportionality review, violate equal protection principles under the Fourteenth Amendment. (See *People v. Blair, supra*, 36 Cal.4th at p. 754; *People v. Ramos* (1997) 15 Cal.4th 1133, 1182.) As this Court has observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. (*Blair, supra*, at p. 754.) "[B]y definition, a defendant in a non-capital case is not similarly situated to his capital case counterpart for the obvious reason that the former's life is not on the line." (*People v. Smith, supra*, 40 Cal.4th at p. 527, quotation and citation omitted). "Thus, California's death penalty law does not violate equal protection because it does not require juror unanimity on aggravating circumstances, impose a burden of proof on the prosecution, or require a statement of reasons for a death sentence. (*People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 333; *People v. Carey* (2007) 41

Cal.4th 109, 136-137; *People v. Smith, supra*, 40 Cal.4th at p. 527; *People v. Davis* (2005) 36 Cal.4th 510, 571; see also *People v. Zamudio* (2008) 43 Cal.4th 327, 373 [death penalty law does not violate equal protection because sentencing procedures for capital and noncapital defendants are different].)

F. Use of the Death Penalty Does Not Violate International Law

Mataele argues that use of the death penalty violates international law, the Eighth and Fourteenth Amendments of the United States Constitution, and "evolving standards of decency." (AOB 307.) He acknowledges this Court's rejection of these claims, but urges reconsideration in light of the decision in *Roper v. Simmons* (2005) 543 U.S. 551, 554, that cites international law to support its prohibition of capital punishment against defendants that committed their crimes as juveniles. (AOB 307.) This Court has recently considered and rejected Mataele's claim:

> California's death penalty scheme does not violate international law and norms. (E.g., *People v. Houston* (2012) 54 Cal.4th 1186, 1232 [144 Cal.Rptr.3d 716, 281 P.3d 799].) We are not persuaded otherwise by *Roper v. Simmons* (2005) 543 U.S. 551 [161 L. Ed. 2d 1, 125 S. Ct. 1183], in which the high court cited evolving international standards as 'respected and significant' support for its holding that the Eighth Amendment prohibits imposition of the death penalty against persons who committed their crimes as juveniles. (*Roper*, at p. 578.)

(*People v. Mai* (2013) 57 Cal.4th 986, 1058.)

Moreover, international law does not require California to eliminate capital punishment. (*People v. Blacksher, supra,* 52 Cal.4th at p. 849; *People v. Martinez, supra,* 47 Cal.4th at p. 968; *People v. Doolin* (2009) 45 Cal.4th 390, 456.) Furthermore, California does not impose the death penalty as regular punishment in California for numerous offenses. (*Ibid.*) Instead, "[t]he death penalty is available only for the crime of first degree

murder, and only when a special circumstance is found true; furthermore, administration of the penalty is governed by constitutional and statutory provisions different from those applying to 'regular punishment' for felonies. (E.g., Cal. Const., art. VI, § 11; §§ 190.1-190.9, 1239, subd. (b).)" (*People v. Doolin, supra*, 45 Cal.4th at p. 456, quoting *People v. Demetrulias, supra,* 39 Cal.4th at p. 44.) Thus, California's death penalty law does not violate international law or the federal Constitution.

G. California's Death Penalty Scheme Is Not Constitutionally Infirm

Mataele asks this Court to reconsider its holding in *People v. Garcia* (2011) 52 Cal.4th 706, 765, and find the cumulative impact of the alleged deficiencies renders California's Death Penalty law constitutionally infirm. (AOB 309.) As he has not demonstrated any basis for this Court to find error, then there is no reason to formulate cumulative error. This claim lacks merit.

XIX. THERE IS NO REVERSIBLE CUMULATIVE ERROR

Mataele contends that even if none of the errors he identified prejudiced him standing alone, the cumulative effect of the errors undermines confidence in the integrity of both phases of his capital trial. (AOB 310-314.) But, where, as here, the claims of error are defective, the defendant has presented nothing to cumulate. (*People v. Staten* (2000) 24 Cal.4th 434, 464; *People v. Rountree* (2013) 56 Cal.4th 823, 860.) Even a capital defendant is entitled only to a fair trial, not a perfect one. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1009; *People v. Box, supra*, 23 Cal.4th at pp. 1214, 1219.) Here, Mataele's claims of errors have failed, and he cannot prevail on his argument that the cumulative effect of errors made during trial deprived him of his right to a fair trial. Accordingly, his claim fails and reversal is not warranted.

CONCLUSION

Accordingly, respondent respectfully asks this Court to affirm the judgment.

Dated: February 12, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
HOLLY D. WILKENS
Supervising Deputy Attorney General
ANNIE FEATHERMAN FRASER
Deputy Attorney General

KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

KKC:sam
SD2005701341
81013846.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 50,127 words.

Dated: February 12, 2015

KAMALA D. HARRIS
Attorney General of California

KRISTEN KINNAIRD CHENELIA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

KKC:sam
SD2005701341
81016325.doc

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: ***People v. Tupoutoe Mataele***
No.: **S138052**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **February 12, 2015**, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Stephen M. Lathrop
Attorney at Law
904 Silver Spur Road, #430
Rolling Hills Estates, CA 90274
(2 Copies)

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

California Appellate Project (SF)
101 Second Street, Suite 600
San Francisco, CA 94105-3647

Clerk of the Court
Central Justice Center
Orange County Superior Court
700 Civic Center Drive West
Santa Ana, CA 92701

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **February 12, 2015**, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to **Appellant's attorney's (Stephen M. Lathrop) electronic service address lathrop@appellatecounsel.com** by 5:00 p.m. on the close of business day.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **February 12, 2015**, at San Diego, California.

S. McBrearty
Declarant

S. McBrearty
Signature

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