No. S153881

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CUITLAHUAC TAHUA RIVERA, Defendant and Appellant.	Colusa County Superior Court Case No. CR 46819 Hon. S. William Abel, Judge _____ Automatic Appeal From A Judgment and Sentence of Death

Appellant's Supplemental Brief

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Introduction

Appellant respectfully submits this response to Respondent's Supplemental Brief (hereinafter, "RSB"), filed February 11, 2019, addressing the application of *People v. Salazar* (2016) 63 Cal.4th 214 and *People v. Merritt* (2017) 2 Cal.5th 819 to Arguments 2 and 8, respectively, in Appellant's Opening Brief.

Argument

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

Appellant explained in his opening brief that the trial court gave a flawed version of CALJIC No. 8.71 [Doubt Whether First or Second Degree Murder], which suggested that a juror was to give appellant the benefit of the doubt as to the degree of the offense only if *all jurors unanimously* had a reasonable doubt as to the degree, thereby making first degree murder the de facto default finding. (AOB 56-66; see *People v. Moore* (2011) 51 Cal.4th 386, 409-411.)

In the supplemental brief, respondent argues that *People v. Salazar*, *supra*, 63 Cal.4th 214 compels the conclusion that "the instructions were not erroneous." (RSB 6.) Respondent is mistaken.

In *Salazar*, this Court analyzed whether CALJIC No. 8.71 created a presumption in favor of first degree murder in the context of the entire charge and *the record in that case*. (*People v. Salazar*, *supra*, 63 Cal.4th at p. 248

["alleged ambiguity in instructions must be viewed in light of the instructions as a whole and the entire record"], citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

The charge in *Salazar* included CALJIC No. 17.10. (*People v. Salazar*, *supra*, 63 Cal.4th at pp. 246-249). But CALJIC No. 17.10 was *omitted* in this case. (CT 48:13774-13850.) The omitted instruction states, in part: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him] [her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime." CALJIC No. 17.10 further instructs that the jury has the "discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it." (CALJIC No. 17.10.) CALJIC No. 17.10 does *not* include the erroneous unanimity requirement set forth in CALJIC No. 8.71.

Not only did the court fail to give the CALJIC No. 17.10, the court failed to include CALJIC No. 17.11, the pattern instruction which states: "If you find the defendant guilty of the crime of [], but have a reasonable doubt as to whether it is of the first or second degree, you must find [him] [her] guilty of that crime in the second degree." (CALJIC No. 17.11.) CALJIC No. 17.11 does *not* include the erroneous unanimity requirement set forth in CALJIC No. 8.71. If CALJIC No. 17.11 had been given, it could have clarified that an individual juror could give appellant the benefit of the doubt (and vote for second degree murder) without

the requirement that such doubt only be afforded after the jury unanimously agreed that there was a reasonable doubt regarding the degree of the crime.

Moreover, *Salazar's* reliance on CALJIC No. 17.40 is misplaced. CALJIC No. 17.40 is a *general instruction on the law*, which does not even refer to first or second degree murder. CALJIC No. 8.71 is a very specific instruction on the manner in which second degree murder can be considered, and thus is the controlling instruction on the issue. (See *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 823 [common sense principle: the specific controls over the general]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975; *Nickell v. Rosenfield* (1927) 82 Cal.App. 369, 377 ["Every trial judge knows from experience that many general instructions are quite puzzling to the average juror."].)

In view of the charge in this case and the entire record – which includes the prosecutor's repeated statements to the jury in closing argument that gang members "don't deserve second-degree murder" (RT 11:2276, 2360) – the jury reasonably understood that they were to follow the flawed version of CALJIC No. 8.71 regarding consideration of second degree murder. Reduction of appellant's conviction in count 1 to second degree murder thus is warranted for instructional error.

2. The failure to define the elements of assault for purposes of the offense of assault with a semiautomatic firearm–and in view of the fact that the parties did not describe the elements of assault to the jury and defense counsel did not concede that an assault occurred–violated appellant's constitutional rights, requiring per se reversal of his convictions in counts 5 and 6 and also warranting reversal under the harmless-error standard.

Respondent acknowledges that in connection with the charge of assault with a semiautomatic firearm (counts 5 & 6), the jury was *not* instructed on any of the three elements of assault – i.e., (1) an attempt to apply force, (2) unlawfully, (3) where the defendant has the ability to do so. (RSB 7; see RB 69 [agreeing that the instructions omitted "'*substantially all of the elements of the offense'*" because although instructed "that the assault be committed with a semiautomatic firearm–the jury was *not instructed on what constituted an assault, the gravamen of the offense*."], italics added.)

Appellant argued in his opening brief that the failure to define the elements of assault violated his constitutional rights, requiring reversal of his convictions in counts 5 and 6 for structural error or, alternatively, under the *Chapman*[1] standard of prejudice. (AOB 125-130.) Appellant relied, in part, on the per se reversal rule announced in *People v. Cummings* (1993) 4 Cal.4th 1233, which held that an instructional error that withdraws from the jury "substantially all of the elements of an offense" is not subject to harmless error analysis. (*Id*. at

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[1] *Chapman v. California* (1967) 386 U.S. 18, 24.

p. 1315.) This point in *Cummings* was overruled by *People v. Merritt, supra*, 2 Cal.5th at pp. 821-822.)

Respondent argues that the instructional error is *not* structural, but instead is harmless beyond a reasonable doubt, citing *People v. Merritt, supra*, 2 Cal.5th 819. (RSB 7-13; see RB 67-73.) In *Merritt*, this Court held that error in instructing on the elements of a crime is harmless "so long as the error does not vitiate *all* of the jury's findings" (*People v. Merritt, supra*, 2 Cal.5th at p. 829), i.e., if "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*Id*. at p. 831.)

The rule announced in *Merritt* should not apply here because *Merritt* was a noncapital case *not* implicating the constitutional right of heightened verdict reliability. This is a capital case in which the verdicts on counts 5 and 6 were considered by the jury as aggravating factors in connection with the death verdict. Heightened verdict reliability is required in capital cases at both the guilt and penalty phases of trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 627-646; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 76, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342.) The heightened verdict reliability requirement is a significant constitutional protection in capital cases warranting a per se reversal rule where the instructions omit all of the elements of an offense, as here.

If a verdict can be affirmed on appeal through harmless error analysis in a case where the jury was not instructed on any of the elements of the offense, then perforce *the jury has not determined* that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. But there can be no dispute that appellant's constitutional right to a jury trial on counts 5 and 6 included the right to "a *jury determination* that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 510, italic added; accord, *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) In other words, if the error does not result in per se reversal in this case, then the constitutional right to a jury trial – as applied to appellant on counts 5 and 6 – is an empty promise. (See *People v. Merritt*, *supra*, 2 Cal.5th at p. 843 (dis. opn. of Cuéllar, J.); see also *Carella v. California* (1989) 491 U.S. 263, 265; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; *Neder v. United States* (1999) 527 U.S. 1, 11; *Estelle v. McGuire* (1991) 502 U.S. 62, 69.)

In *Merritt* this Court "agree[d] with the dissent that an instructional error or omission that amounts to the *total* deprivation of a jury trial would be structural error, that is, reversible per se." (*People v. Merritt, supra*, 2 Cal.5th at p. 830, italics in original.) The court stated that is not "what occurred here[,]" noting that "*[b]oth attorneys described the elements of robbery to the jury*, and

did so accurately and completely." (*Ibid*., italics added; see *id*. at p. 831 ["The jury was not entirely ignorant of the elements of robbery. Although the court did not instruct on the elements (except the mental state), *attorneys for both parties accurately described the elements of robbery in front of the jury*."], italics added.)

Justice Liu described the holding in *Merritt* as follows:

> In any event, today's opinion is a narrow one. It does not hold that a reviewing court may find that a trial court's failure to instruct on all elements of a crime is harmless solely or primarily on the strength of the evidence. Rather, in finding the error harmless in this case, the opinion considers the evidence together with several other factors: defense counsel expressly conceded a robbery had occurred, both parties correctly explained the elements of robbery to the jury, the jury had been instructed on the mental state of robbery, and the jury found that defendant used a firearm during the commission of the offense. (Maj. opn., *ante*, at pp. 830-831.) It is "[f]or *all* of these reasons" that the court "find[s] the error harmless beyond a reasonable doubt. Because *all* of these circumstances exist in this case, and *combined* they show the error to be harmless, we express no opinion on what other circumstances in other cases might or might not permit a finding of harmless error." (Id. at pp. 16-17, italics added.)

(*People v. Merritt, supra*, 2 Cal.5th at p. 835 (conc. opn. of Liu, J.).)

In contrast to *Merritt*, here the parties did *not* described the elements of assault to the jury; the word "assault" is not even mentioned in closing argument. (See RT 11:2257-2364.) Nor did trial defense counsel concede that an assault had occurred. (RT 11:2294-2340; see *People v. Flood* (1998) 18 Cal.4th 470, 504 ["One situation in which instructional error removing an element of the crime

from the jury's consideration has been deemed harmless is where the defendant concedes or admits that element."].)

Nor was the jury instructed on the mental state element of assault. Respondent suggests that the jury was instructed on the mental state element of assault. (RSB 10 ["The jury was also instructed that the offense of assault with a semiautomatic firearm required a general criminal intent and that a person acts with general criminal intent if he 'intentionally does that which the law declares to be a crime.'"].) But respondent is mistaken. The instruction given to the jury, in the language of CALJIC No. 3.30, states, in part: "When a person intentionally does that which the *law declares to be a crime,* he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (CT 48:13812, italics added.) Absent instruction on the actual elements of the crime of assault – i.e., what the law declares to be a crime – the mental state instruction is devoid of meaning.

The instant case thus is distinguishable from *Merritt*, and is one involving the *total* deprivation of a jury trial on the charge of assault in counts 5 and 6. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281 [instructional error that "'vitiat[es] *all* the jury's findings'" is not subject to harmless error analysis].) For these reasons, the error is structural, requiring per se reversal. But even if harmless-error analysis is applied the instructional error cannot be deemed

harmless beyond a reasonable doubt because here, unlike *Merritt*, the parties never described the elements of assault to the jury, defense counsel did not concede that an assault occurred, and the instructions omitted the mental state element of the crime.

Conclusion

For the reasons set forth above, appellant's conviction in count 1 should be reduced to second degree murder for instructional error and his convictions in counts 5 and 6 should be reversed for instructional error.

Respectfully submitted,

/s/ Stephen M. Lathrop
Stephen M. Lathrop

Attorney for Defendant/Appellant
Cuitlahuac Tahua Rivera

Certificate of Compliance

I certify that this brief contains 2,150 words.

/s/ Stephen M. Lathrop
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