Supreme Court No. 184665

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

EDUARDO MIL, JR.,

Defendant and Appellants.

◇

On Review of an Opinion and Decision of the Court of Appeal
Fifth Appellate District, No. F056605
Affirming the Judgment of the Superior Court
County of Kern Case No. BF11667B
Hon. Kenneth C. Twisselman, II, Judge

◇

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and respondent, vs. EDUARDO MIL, JR., Defendant and appellant.	No. S184665 Court of Appeal No. F056605 Superior Court No. BF116677B

Review of an Opinion and Decision of the Court of Appeal, Fifth Appellate District, No. F056605, affirming the Judgment of the Superior Court, County of Kern Case No. BF11667B.

OPENING BRIEF ON THE MERITS OF EDUARADO MIL, JR

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and respondent, vs. **EDUARDO MIL, JR.,** Defendant and appellant.	**No. S184665** Court of Appeal No. F056605 Superior Court No. BF116677B

OPENING BRIEF ON THE MERITS OF EDUARADO MIL, JR

QUESTIONS PRESENTED

Is harmless error analysis appropriate when the trial court omits multiple elements from a jury instruction on special circumstance murder, and if so, was the error harmless in this case?

INCORPORATION

The press release language adopted above is assumed to mean that is the single issue (with its subsidiary issue) on which briefing is desired. (Cal. Rules of Court, Rule 8.516.) The petition also listed two other issues relating to statements admitted in violation of federal and state law. On those, Mr. Mil incorporates his briefing in the Court of Appeal and in his petition for review (Rule 8.200) absent any indication that further briefing is desired. (Rule 8.516).

JURISDICTIONAL STATEMENT

This review is of an unpublished opinion of the Court of Appeal, Fifth Appellate District, affirming a final judgment of the Kern County Superior Court in a criminal action following a jury trial. (Cal. Const., art. VI, §§ 10, 12.)

STATEMENT OF THE CASE

Eduardo Mil was found guilty of the October 24, 2006, murder of Rolland Coe. The special circumstances of robbery and burglary were found to be true. (Pen. Code §§ 187(a), 190.2(a)(17)(A)&(G).) He previously had served two prison terms based on drug offenses. (Pen. Code § 667.5(b).) He was sentenced to life imprisonment without parole plus two years. (1CT 83-96.)

His co-defendant, Crystal Eyraud[1], had her charges, including the additional charge that she had personally used a deadly weapon (Pen. Code § 12022(b)(1)), dropped. She pleaded guilty to voluntary manslaughter and agreed to give truthful testimony for the prosecution at Mr. Mil's trial. She was not called upon to testify. (2RT 276-278.)

The Court of Appeal affirmed the judgment. The conviction was based on felony-murder in which the defendant did not have an intent to kill and acted as an aider and abetter. The Court of Appeal found the trial court erred by failing to instruct that to sustain the special-circumstance allegations the jury must find beyond a reasonable doubt the defendant (1) acted with reckless indifference to human life and (2) was a major

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[1] She was not a party to this appeal.

participant in the commission of the crime which resulted in the death. (Op. 20-21.) However, the appellate court found there was "overwhelming" evidence which showed appellant was a major participant in the robbery and burglary who acted with reckless indifference to human life. That is, "the jury returning the special circumstances finding could have no reasonable doubt the defendant possessed the necessary mental state (see, e.g., People v. Johnson (1993) 6 Cal.4th 1, 45-46....)." (Slip opinion pp. 19, 24.)

A petition for rehearing was denied.

STATEMENT OF FACTS

Prelude

Rolland Coe rented a motel room at the El Don Motel on Union Avenue in Bakersfield on October 22 or 23 of 2006, the day before he was killed there. (2RT 34-35.) Mr. Coe transferred some of his property from his blue van to the room. (2RT 34, 36, 37, 42.) The door to the room had no doorknob, but there was a string attached to open it from inside. It had a deadbolt lock outside. (2RT 64.)

Michael McLane was the motel manager. His daughter Kathleen Peaker, her boyfriend, "Manual," and Manual's brother, "Taco," lived in the room next to the one Coe rented. (2RT 86, 211-212.)

Carl Cowen, a parole violater, was permitted to stay at the hotel and do odd jobs by McLane, who was Cowen's best friend. McLane was aware Cowen had absconded in violation of his parole. Crystal Eyraud was the stepdaughter of Carl Cowen. When Cowen showed Coe to his room, Coe had told him the arrangement would be for Eyraud to be with Coe overnight in his room. (2RT 43-44, 73, 77-79, 186-188, 203.)

Mr. Mil was the boyfriend of Crystal Eyraud. (2RT 329.) He was seen around the motel talking to Crystal in an argumentative fashion the previous day before Coe's arrival and during the day and evening of October 23, 2006, but McLane and Cowen directed him to leave. (2RT 45, 47, 189-195.) According to McLane, on one of those occasions he saw Mil talking calmly to Eyraud toward the back of the motel around ten or eleven o'clock at night. As he walked past, McLane told Mil to leave. He overheard Mil say, "I'm going to rob the mother fucker." Since that was common, McLane paid no attention to it.[2] (2RT 48-51.)

Cowen testified that he saw Mil in front of Coe's room between midnight and two o'clock in the morning with a person who was introduced as "Kevin." He said he was looking for Crystal Eyraud. Mil told Cohen Mil had heard she was with a man in room 11, and, if so, Mil was going to beat the guy and rob him. Cowen told Mil to leave, and he left pushing his bicycle. (2RT 191-192.) An hour later, Cowen saw Mil talking to Cowen's stepdaughter Crystal Eyraud. He told Mil to leave. Cowen heard no planning. (2RT 194.) Cowen testified to a third occasion taking place a half-hour later. Mil repeated his statement he would rob and badly beat the man, Cowen told Mil to leave, and Mil left. (2RT 194, 195.)

Discovery of the Homicide

Cowen that night heard something which caused him to approach the room of Coe and Eyraud. The lights were all illuminated, and the door was partially open. He heard nothing, but went to the room next door, where Manuel, Peaker, and "Taco" were staying. He obtained a golf club, then

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[2] McLane denied telling Deputy Sheriff Lackey that it was Cowen rather than he who saw Mil at that time. (2RT 76, 82.) Deputy Sheriff Lackey testified to the contrary. (2RT 127-128.)

Manuel and he went to the next room. He returned within two minutes of the time he first noticed the open door. The door was now completely open, and Coe was laying in the doorway. Cowen left to notify McLane. (2RT 208, 210-214.) He arrived to find McLane just opening the door of his room. (2RT 215.) McLane had been awakened by yelling about 5:00 a.m., and Cowen and he went to where Coe was laying across the doorway. (2RT 55, 57-61.) No one else was there. Coe was still moving. (2RT 61.) McLane called the police because Cowen needed to leave due to his parole status. (2RT 67, 77.) The police arrived five minutes later. (2RT 77.)

Coe died of multiple stab wounds to the chest. (2RT 157.) He also had stab wounds to his leg and superficial bruising and abrasion on his face which could have been caused by a closed fist. (2RT 141, 142, 154-156, 157.) The wounds could have been caused by the knife in Exhibit 3. (2RT 199.)

That knife was found in a trash bin about a block away. It was later identified by Crystal Eyraud as the knife she had used to stab Mr. Coe. She took the officers to the trash bin where it had been found. (2RT 118-119,199. 123. 330-332.)

Detective Lackey was called to the scene around 5:30 to 5:50 a.m., before sunrise. The motel room was fourteen-by-fourteen with an attached six-by-four bathroom. There was a small closet. There were a bed, a chest, and a chair. He saw various items, including a television, cigarette butts, a backpack with women's toiletries and one with men's, and possibly a small puddle of blood outside. Papers belonging to Eyraud were under the pillow. There was blood on the bed, on the blanket, and on the carpet, as well as some in the bathroom. There were various blood spatters. (2RT 89-90, 85-104, 106, 108, 110-115.) It appeared someone was moving into the

room or storing things. (2RT 116.)

Eyraud's Interviews

Detective Bonsness interviewed Eyraud several times on October 24, 2006. (2RT 162-163.)[3] The detective's first interview with Eyraud was around 9:00 or 10:24 a.m. at headquarters. She told him Coe was the person with whom she had stayed but Mil was her boyfriend. (2RT 179, 3RT 328-329.) His second interview was as they were returning to the El Don. (3RT 329.) She confessed she was the one who stabbed Coe. Mil was present but was not the one who stabbed Coe. (3RT 330.) She showed him where she had disposed of the knife. (3RT 331-332.) Detective Bonsness and she walked back to the motel. Eyraud's mother was there, and Eyraud yelled to her, "I did it, I did it," and "I stabbed him, I stabbed him, Eddie [Mil] didn't do it." (3RT 333.)

The next interview was again at the station. Eyraud told the detective that when Mil was punching Coe, Eyraud jumped up to separate them. Coe kicked the pregnant Eyraud in the stomach. She thought he had hurt her baby and lost control. She had earlier stolen a knife she liked from Coe. She grabbed it from her bag and stabbed Coe between the hip and shoulder in a straight motion. This was the only time she had stabbed Coe. (3RT 333-336.)

Eyraud told Bonsness that she was stealing from Coe. (3RT 337.) She said it was Mil's idea to rob Coe. (3RT 337.) She was to leave a cigarette on the bumper of the van as a signal. (3RT 337.)

Deputy Sheriff Plugge (called by the defense) testified that on

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[3] The content of those interviews was introduced by the defense after conferring with the prosecution on what would be admitted. (2RT 301, 305-306.)

October 26, 2006, he re-interviewed Eyraud. She told him she had "flipped out" and was stabbing someone. She was in the room with Coe and awakened to see Mil punching him. She panicked and grabbed Coe's knife, popped it open, and stabbed him. (3RT 340.) She did not remember where she stabbed Coe. She did it to stop whatever was happening. Asked if she originally had said it was because she was kicked in the stomach, she said yes. (3RT 341.) She told them Mil should not be arrested. He had been the first to run out of the room when she stabbed Coe. She did not know if Coe was still in the chair when she ran out. (3RT 342.) She did not remember how many times she had stabbed Coe, although at another point she said she remembered one time, she told him she did not know where she had stabbed him or how many times. (3RT 343-344.)

Mil's Interview

Detective Bonsness October 24 interviewed Mil at 11:30 p.m. (2RT 177.)

Mil admitted he met Eyraud twice at the motel, the second time about an hour after the first. She told him a pregnant girl and she had already stolen things from Coe. They had placed them in a different room. She needed a car to take them away from the motel. He wanted drugs, but he refused to steal a car for the amount he expected her to provide. He just wanted her to come home. She agreed to leave a cigarette on the bumper of Coe's van if she got some money to share for her services, and she told him to return in an hour. She said she was going to drug Coe and leave. When he did return, he did not see the cigarette. He knocked on the door to the room anyway, because if she was not getting anything he still wanted her to come home. He had no intention of robbing Coe. The door was unlatched, and he pushed it open. Coe started rising from the chair, and Mil hit him.

Both men asked Eyraud what was going on as they fought. Coe managed to get up, and Eyraud got between them. Coe and Mil fell. Mil got up and said to run, and Eyraud and he did. He did not see Eyraud with a knife or know that she was going to stab Coe.

Crystal Eyraud was a fellow addict whom Mil had known for about six months as a female friend. They recently had a confrontation over his having caused another woman to become pregnant and Eyraud's desire to move back to the Eastern United States. (1SCT 28-41.) Mil saw Eyraud outside the El Don Motel at approximately midnight Monday [October 22]. (1SCT 41-43.)

Eyraud told Mil she would come back to their house if he wanted to stick around. She asked if he would "get" a car, but he told her he would not. (1SCT 44-45.) He asked her why, and she said she had a few things she wanted to get rid of. (1SCT 48.) He said, "I don't want to do that." (1SCT 48.) They argued. (1SCT 49.) She told him that, if he did not get a car, she would not share her drugs with him. (1SCT 50.) If he gave her the keys and the car started, she would give him the drugs and he could leave. He pointed out it was midnight and that in the past she had said she would come back but had not done so. (1SCT 52.) She said she had already gotten stuff from Coe, and that is why she wanted the car. (1SCT 86.) She had already taken it out of the room. (1SCT 96.)

Eyraud told him her "John" or "trick" or "mark" was in the room. She said she was going to drug him, and once he was asleep, she was going to "take his loot." Eyraud said that if Mil came back Coe would be drugged, Eyraud would have her things and some money, and they would quickly leave. By then, Eyraud knew Mil was not going to get a car but just wanted her to come home. (1SCT 68-69, 72, 141, 148-150.) He responded as

before. He did not want to go through all of the effort and risk of stealing a car just to get a "dime bag" of drugs. He told her that they could leave all the stuff and go home and sleep if she could not give him money, and if she could give him money to leave a cigarette and he would knock. (1SCT 87.)

Mil left her and went to Cowen, and Cowen said, "'Naw, she's not like that, she don't do that.'" (1SCT 53-54.) Mil was upset that she would not give him any drugs and got on his bicycle and left. (1SCT 55.) After riding around, he went back to the El Don twice to find her. (1SCT 69.) By now it was possibly four or five o'clock. (1SCT 55-57.) Mil had no plan to rob the man. (1SCT 86.) He just wanted Eyraud to give him some of the money that she would get from Coe. (1SCT 86.) Mil went up to the door and knocked gently, discovering that the door was not fully shut. (1SCT 64, 70.) He pushed it open, and Eyraud said to come inside. He thought Eyraud let him inside because she was going to get her bags and things and they were supposed to just leave. She said to come in and she would get Mil his dope. When Mil entered, Coe began to rise, and the fight started. (1SCT 68, 70-75.)

Eyraud was on the bed. Coe was seated on a couch-like chair. Coe looked at Mil, and asked, "Is this the guy? Is this the mother-fucker?" (1SCT 64.) Eyraud just looked at them. Coe reached for something and started to get up off the chair. Mil hit Coe first because Coe was getting up as soon as Mil walked into the room. Mil hit him with his hands as they both were yelled to Eyraud asking what was wrong with her, what was going on. The two men fought. Mil told her to tell the man to calm down and leave. (1SCT 65-67, 70-75.) Mil felt if he held Coe down Eyraud would take advantage of it to leave. (1SCT 95.)

Eyraud said, "Get the wallet! Get the wallet!" (1SCT 80.) Coe said

something to the effect of, "We don't really . . . you don't really have to do all of this for my wallet." (1SCT 76.) Mil was losing the battle. Eyraud got between them. Mil was confused but thought Eyraud was trying to get him off of Coe so that Coe could get to him. They may have been caused to fall because Coe may have kicked Eyraud. Eyraud said, "All right, mother-fucker." Mil was still "spooked" and wondering what was happening, he thought he was going to go in there and Eyraud was going to give him some dope money. (1SCT 75, 77-78, 82.)

Mil "thought that she was trying to get all she could and get up out of there." She went back toward the bed, and by this time Mil was getting up and pushing her out of the way. He had tunnel vision and just wanted her out of the way because he had to get out of there. (1SCT 79.) By now the fight was roughly an even contest. Coe said, "okay," and Mil got up and ran. Mil did not see Eyraud stab the man. (1SCT 44, 66, 75, 79, 94.)

Eyraud went toward her father's room, and Mil left on his bicycle. (1SCT 75, 84, 100.) He ran because he did not want to get arrested for fighting with Coe in his room. (1SCT 101.)

Told, falsely, that the victim had made a dying declaration, Mil continued to maintain his earlier position on what happened. (1SCT 137,141, 143-144, 149-150.)

The Jail Bus Statements.

The county's log for its bus transportation from jail to the courts showed Eyraud and a Raquel Rodriguez were placed on the bus on January 17, 2007, at about four o'clock in the morning. Cowen and Mil were transferred to the bus that afternoon. (2RT 232-233.)

According to Cowen, a few months after the event and after his arrest for violating his parole, he was on a bus in which Mil and Cowen's

daughter, Crystal Eyraud, were also being transported from the Lerdo Jail to the courthouse. Cowen could not recall when this was, but it was at most a few months after the stabbing. Mil and Eyraud were seated in separate cages in front of him and each other. (2RT 196-197.) Cowen overheard Mil tell Eyraud to take the blame because she was retarded and could get away with nine to twelve months in an institution whereas he was threatened with life in prison. Mil went into "great detail" about "how he beat the guy up and into unconsciousness." Cowen testified that Mil said he stabbed Coe several times to hide what had been done. (2RT 197-198.) He was not asking questions but making statements. (2RT 197-199.) As they got off the bus, Cowen told Mil that Mil was "a piece of crap," leading Mil to recognize him and to say he was trying to help Eyraud out. (2RT 200.)

Raquel Rodriquez met Eyraud while they were in the same pretrial pod at the Lerdo Jail, and she recalled being on a bus with her when she was talking with someone. She could not recall when this was or even if it was a year earlier. (2RT 220-221.) She could not say the other person was Mil but thought it could have been. (2RT 222.) She did not recall what sort of things they were talking about. She recalled that in June 2008 she spoke with another investigator, but she could not recall his name or the content of what was said. (2RT 222-225.) Investigator Garza, an investigator for the Kern County district attorney's office, testified he spoke with Rodriguez in the downtown jail where she was in custody. (2RT 227-228.) Rodriquez told him she was seated in the cage with Eyraud, and Mil was on the other side of the cage. She heard them speaking about a homicide. Mil said that Eyraud should plead because she had some mental issues and would go to Patton State Hospital, Mil was looking at death or life imprisonment. (2RT 229.) He told Eyraud he had gone crazy because he thought she was having

sex with the man, and he kept sticking and sticking the man and could not stop. (2RT 230.) Rodriquez also told Garza that Crystal's father, Cowen, was on the bus. When Cowen heard Mil telling Crystal what to do, he said not to lie and take responsibility. Garza testified Rodriquez said that at that point, Mil told Cowen "to shut up, that he would kill him, keep his mouth shut, not to say anything." (2RT 231.)

ARGUMENT

SUMMARY

Both this Court and the United States Supreme Court have held that where a single element of a charged offense (or sentencing allegation that is legally essential to punishment) has been removed from the jury's consideration of the charge, the omission constitutes a violation of the defendant's constitutional rights to due process and to a trial by a jury of his peers. (*U.S. v. Gaudin* (1995) 515 U.S. 506, 522-523; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278; *Blakely v. Washington* (2004) 542 U.S. 296, 303-3304, 313; *People v. Flood* (1998) 18 Cal.4th 470, 479-480.) Both this Court and the United States Supreme Court have also held that this violation, if limited to a single element, is subject to harmless-error review to determine whether it requires reversal, and that the appropriate standard of reversibility is that provided in *Chapman v. California* (1967) 386 U.S. 18, 24, *viz.*: the error requires reversal unless the government is able to establish beyond a reasonable doubt that the error did not contribute to the verdict.

Both this Court and United States Supreme Court also concur that, in applying *Chapman* to the removal of a single element, the reviewing court should not find the error harmless, but should reverse the judgment, if there

was evidence that the element was contested by the defense (or could have been contested if the error had not prevented the defendant from doing so). (*People v. Flood*, *supra*, 18 Cal.4th 470, 487; *Neder v. United States* (1999) 527 U.S. 1, 18-19.)

In concluding that the omission of a single element is subject to harmless-error review in this fashion, the High Court explained that, while there was also logic in concluding that the error should be deemed structural, the "uncontroverted evidence" approach adopted in *Neder* (and by this Court in *Flood*)

> reaches an appropriate balance between "society's interest in punishing the guilty [and] the method by which decisions of guilt are made." [Citation.] The harmless-error doctrine, we have said, "recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial." [Citation.] At the same time, we have recognized that trial by jury in serious criminal cases "was designed to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" [Citations.] In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee. (*Neder, supra*, at pp. 18-19.)

Although both this Court and the United States Supreme Court have held that an "uncontroverted evidence" application of *Chapman* is the proper standard of reversibility when the constitutional violation is the omission of a single element of an offense, neither has suggested that this

approach, nor *any* harmless-error analysis, is appropriate when, as here, more than one element of a charged offense has been removed from the jury's consideration.

In Part I of appellant's argument, he contends that the removal of more than one element of an offense from a jury's consideration so undermines the defendant's constitutional rights to due process and to a jury trial that it defies harmless-error analysis. Neither the defendant's constitutional rights to due process and trial by jury, nor public respect for the criminal process, is honored when the number of elements removed from a jury's determination exceeds a single element. Individual constitutional liberties and public respect for the courts are both diminished as the reviewing court takes on multiple findings the jury should make.

Also, the omission of more than one element may have unquantifiable effects which omission of one does not. As in the present case, the two omitted elements will often interrelate and overlap. "For example, 'even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.'" (*Tison v. Arizona* (1987) 481 U.S. 137, 158, fn. 12.) Individual treatment of multiple missing elements, especially overlapping or interrelated ones, would create a pragmatic barrier to accuracy and reliability. Thus, such omissions are the equivalent of removing substantially all reliability in, and reasons for, the jury's verdict. Whether labeled as a "miscarriage of justice" or as "structural error," multiple errors of this dimension necessitate reversal in themselves. While one omission may be subject to a fair determination of harmlessness, two or more are too many.

In Part II, appellant explains that the Court of Appeal applied

incorrect standards because it did not ask the correct preliminary questions, and particularly did not look to whether the omitted elements were contested. Rather than employing an "uncontroverted evidence" application of *Chapman*, the Court of Appeal applied a substantial-evidence analysis that, while proper to assess the sufficiency of evidence to sustain an error-free verdict, is wholly inadequate to measure the harm of removing an element (let alone multiple elements) from a jury's consideration.

When applied to this case (and to either of its two missing elements), the harmless-error analysis required by *Flood* and *Neder* for single-element omissions mandates reversal of the special-circumstance findings. Both of the elements omitted from the jury instructions regarding the special circumstances with respect to appellant's culpability as an accomplice to felony murder (i.e., whether he was a major participant in the underlying felonies and whether he acted with conscious disregard for human life) were the subject of evidence that was highly disputable and strongly contested by the defense. Thus, even if the omission of these two elements together does not constitute structural error requiring automatic reversal, they individually and collectively constitute prejudicial error requiring reversal.

For these reasons, Mr. Mil respectfully will request that the special circumstances be reversed.

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I. IS HARMLESS ERROR ANALYSIS APPROPRIATE WHEN THE TRIAL COURT OMITS MULTIPLE ELEMENTS FROM A JURY INSTRUCTION ON SPECIAL CIRCUMSTANCE MURDER?

A. The Omission of More Than One Element

The jury was instructed on murder, sudden quarrel or heat of passion manslaughter, robbery, burglary, and felony murder. (SCT 218-244.) The instructions on the special circumstances were brief: They notified the jurors of their duty to make unanimous findings on the charged robbery and burglary special circumstances if they found the defendant guilty of first degree murder; the allegations had to be proven beyond a reasonable doubt and found separately. (3RT 375-377.) The necessary things to find were then stated:

> "To find that the special circumstance referred to in these instructions as murder in the commission of robbery or burglary is true, it must be proved the murder was committed while the defendant was engaged in the commission or attempted commission of a robbery or a burglary." (3RT 376.)[4]

This instruction omitted necessary elements. When a person, not the actual killer[5], aids the direct perpetrator either with the intent to kill–which

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[4] Over objection, the judge based his instructions on CALJIC rather than CALCRIM forms. (3RT 442). This is not recommended. (Cal. Rules of Court, rule 2.1050(e); *People v. Thomas* (2007) 150 Cal.App.4th 461, 465-446; *People v. Reyes* (2008) 160 Cal. App. 4th 246, 251.) The more current CALCRIM would have alerted the court to the fact his special circumstance instruction was inadequate. (Compare CALCRIM No. 703.) Even under CALJIC versions the above was incorrect. (Compare CALJIC No. 8.80.1.)

[5] *People v. Letner and Tobin* (2010) 50 Cal 4th 99, 193-194 [non-applicable to actual killer].)

is not present in this case–or aids (1) with reckless indifference to human life and (2) as a major participant in the underlying felony, that person may be imprisoned without parole or put to death. (Pen. Code § 190.2(d).) These elements were omitted, and none of the other instructions had equivalent elements.[6]

During deliberation, the jury asked for a definition of aiding and abetting. At the time, the jurors had not received any written instructions, but aiding and abetting generally had been orally defined. They were supplied the written instructions and told the definition was in those. Afterward, the foreperson indicated they answered the jury's question. The aiding and abetting instruction mirrored the oral CALJIC 3.01 which had been given. A second note stating a verdict had been reached was sent fifteen minutes later. The verdicts found the defendant guilty of the murder with special circumstances. (3RT 446-448; 358-359, 1CT 215, 1SCT 262-263.)

B. California "miscarriage of justice."

The starting point for "harmless error" analysis is the federal Constitution. Where a single element is missing, this Court, citing primarily *Neder v. United States* (1999) 527 U.S. 1, *People v. Flood* (1998) 18 Cal.4th 470, *People v. Watson* (1956) 46 Cal.2d 46 Cal.2d 818, 836-837, and *Chapman v. California* (1967) 386 U.S. 1, 8-16, has found "a trial court's failure to instruct on an element of a crime is federal constitutional

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[6] The trial court instructed on the element of an intent to kill, but, as the Court of Appeal pointed out, it is clear the jury would not have found the allegation true and the prosecutor was not proceeding on that theory. (Slip opinion, pp. 19-20 & fn 4.) The Court of Appeal also acknowledged that the two missing elements were not covered by other instructions. (Slip opinion, p. 19.)

error that requires reversal of the conviction unless it can be shown beyond a reasonable doubt that the error did not contribute to the jury's verdict." (*People v. Cole* (2004) 33 Cal. 4th 1158, 1208-1209 [uncontested evidence of causation and defense concession of causation].)

The question posed here, though, is the effect of omitting multiple elements. While the above federal requirement sets the basic standard, the California Constitution is applied in this area in much the same way. Appellant will discuss the State's standard to demonstrate that in this particular area there is consistency in the application of a "miscarriage of justice" and "harmless beyond a reasonable doubt" standards.

"Harmless error" analysis under state law in this State is set forth in the California Constitution (Cal Const, Art. VI § 13) which provides in pertinent part: "No judgment shall be set aside. . . on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (*Ibid.*) "Misdirection" has been found to include omission of an element. (*People v. Flood* (1998) 18 Cal. 4th 470, 487 (*Flood*).)

In *Flood*, at page 491, this Court held that an omission violating California law must be evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*). That test is whether there is a reasonable probability the error or misconduct contributed to the outcome (*ibid.*), meaning "merely a *reasonable chance*, more than an *abstract possibility*," of such an effect *(College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, original emphasis; accord *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; see *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 68). That is not an automatic reversal

standard.

Application of the "miscarriage of justice" test presents challenges in cases where the effect of an error is unclear. However formulated, "the courts of California have adhered to the principle that a conviction should not be affirmed if in the court's mind there was reason to believe that error in the trial *may have* adversely affected the substantial rights of the defendant." (*People v. Camarillo* (1968) 266 Cal. App. 2d 523, 536, italics added.)

Although *Camarillo* ended applying the federal test set forth in *Chapman v. California* (1967) 386 U.S. 18, 23-24, its statement reflects the State test rather than the federal. As stated in *Watson*, "an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result . . . necessarily means that the court is of the opinion 'that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Watson, supra,* at p. 837.) That is, the constitutional provision has two aspects. The first part negated the pre-enactment presumption that error meant prejudice, and the second part emphasized protecting the constitutional requirements of a fair trial and due process. (*Id.,* at pp. 835-836.)

People v. Flood, supra, applied this balance. *Flood* did not presume automatic prejudice from the omission of a single element. It did recognize a way through use of the record facts in which it could find a greater-than-preponderance probability the error did not offend a fair trial and due process even in the absence of a jury finding.

> "[W]e find no reasonable probability that the outcome of defendant's trial would have been different had the trial court

> properly instructed the jury to determine whether Officers Bridgeman and Gurney were peace officers. The prosecution presented *unremarkable and uncontradicted evidence* that they were employed as police officers by the City of Richmond. In addition, throughout the trial these officers and other witnesses *corroborated that evidence* in the course of testifying regarding other issues. *At no point during the trial did defendant contest or even refer to the peace officer component of the distinctive uniform element of the crime.* Defendant argued at trial that the police car was not distinctively marked as required by the statute but *never disputed* that it was driven by peace officers. Fn13 Furthermore, *nothing in the record suggests . . . that he sought to present* . . evidence regarding the issue in question."

(*Flood, supra,* at p. 491, italics added, footnote omitted.)

In short, there was uncontradicted, solid, and corroborated evidence of the element (that the policemen were in fact peace officers), there was no reason to doubt this evidence, and the Court could, therefore, determine that "no rational juror, properly instructed, could have found that these police officers were not peace officers." (*Flood, supra,* at p. 491.)

However, when there are multiple elements missing, as here, that analysis becomes convoluted. The underlaying problem is the California Constitution also provides that trial by jury "is an inviolate right." (Cal. Const., Art. I, § 16.) *Flood* explains that:

> Because, under the due process guarantees of both the California and United States Constitutions, the prosecution has the burden of proving beyond a reasonable doubt each essential element of the crime (*People v. Figueroa* (1986) 41 Cal. 3d 714, 725-727 [224 Cal. Rptr. 719, 715 P.2d 680]), the jury may find for the defendant even if the only evidence regarding an element of the crime favors the prosecution, but that evidence nevertheless falls short of proving the element beyond a reasonable doubt. As discussed below, the existence

> of evidence from which the jury could find for the defendant is relevant in determining whether the instructional error is prejudicial, but the due process requirement under article I, section 15, of the California Constitution that the trial court give instructions regarding—and the jury determine—all essential elements of the offense does not depend upon the existence of evidence affirmatively favoring the defendant. Of course, if the asserted error consists of a failure to instruct on a lesser included offense, there must have been substantial evidence from which a jury reasonably could conclude that the defendant was guilty of the lesser offense, but not the greater offense. [Citation omitted.]

(*People v. Flood, supra,* 18 Cal. 4th at pp. 481-482.)

Due process requires the court to instruct on all elements and the jury to determine their existence. In rare cases there may be nothing to decide, and nothing that could have been decided, in the defendant's favor. The evidence allows no other possible conclusion because the finding on that element is directed by unquestioned and unquestionable evidence.

There are obviously grave risks involved. The determination that the evidence allows no other rational determination is perilously close to a judicial determination beyond a reasonable doubt on a matter placed within the exclusive province of the individual citizen *because* of the history of distrust of governmental control. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 151-156 [20 L. Ed. 2d 491, 88 S. Ct. 1444].)

The more elements are omitted, only to be filled in by an analysis by the reviewing court of evidence, the greater the risk that this right will be trenched upon until it disappears. If two omissions are proper, than why not three? In the present case, there was not even a determination by the judge, so the effect is the reviewing court must hypothesize decisions on multiple elements, treat them as real, and then review its own decisions to see if they

were harmless because no probability exists another decision could have been reached. Where multiple elements are involved, the more that are omitted from the jury's determination the closer is the appellate court to becoming the effective decision maker in contravention of the right to a jury trial and its historical objectives.

The answer is to be found in *Flood*. This Court not only noted and discussed its own evolution of law in the preceding thirty plus years, but also examined the evolving position of the United States Supreme Court. (*Flood* at p. 480.) The only question in *Flood* was "whether a trial court's instruction that *a particular element* of an offense has been established may be subject to harmless error analysis." (*Id.*, at p. 479, italics added.) Throughout *Flood*, all references were to the omission of a particular element in the singular. For example, the opinion explained that, although they had not dealt with the history, several earlier decisions analyzed the omitted element problem under the *Watson* standard. "[W]e conclude that these more recent decisions utilized the proper standard under California law for assessing prejudice arising from instructional omissions that withdraw *an* element of a crime from the jury's consideration." (*Flood* at p. 487, italics added.)

Among those cases was *People v. Cummings* (1993) 4 Cal. 4th 1233, 1312, fn. 54[7]. In *Cummings* the instructions omitted four of the five

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[7] Footnote 54 was an explanatory footnote for why the appellant in *Cummings* was proceeding under federal authorities. "Error in omitting an element of an offense in jury instructions is subject to harmless error analysis when considering the defendant's state constitutional due process right to have the jury determine every material issue presented by the evidence. (*People v. Odle*, *supra*, [1988] 45 Cal.3d 386, 415; *People v. Murtishaw* (1981) 29 Cal.3d 733, 765 [175 Cal.Rptr. 738, 631 P.2d 446].)"

elements of robbery. The concurring opinion in *Flood* expressly recognized the difference between a "single element" and the multiple elements in *Cummings.* (*Flood, supra,* at p. 511, concurring opinion of Werdegar, J.) *Cummings* actually held "These decisions make a clear distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element. Moreover, none suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*People v. Cummings, supra*, 4 Cal. 4th

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(*Cummings, supra.*) The opinion in *Cummings* later rejects these as authority because *Odle* involved a special circumstance (as does the present case) and *Murtishaw* simply did not discuss the issue. The *Odle* distinction justifying the use of harmless error under *Chapman, supra,* was that a jury determination was not constitutionally compelled. That, of course, is no longer the case. (*Ring v. Arizona* (2002) 536 U.S. 584, 609; see also *Washington v. Recuenco* (2006) 548 U.S. 212, 218-222.) *People v. Bolden* (2002) 29 Cal. 4th 515, 559-561, was in accord, but it applied a *Chapman* harmless error test without further discussion. *Ring* specifically did not analyze any question of prejudice. (*Ibid.,* at fn 7, citing *Neder v. United States* (1999) 527 U.S. 1, 25.) *Ring* also involved only one element which was implicit in the jury's other findings. (*Ibid.*) *Bolden* involved one element, intent to kill. *Recuenco, supra,* applied the *Chapman* beyond-a-reasonable- doubt standard to cases where the wrong fact-finder had found the element omitted from the jury's consideration. (*Id.*; see *Apprendi v. New Jersey* (2000) 530 U.S. 466; e.g. *Blakely v. Washington* (2004) 542 U.S. 296 [Sixth Amendment was violated by judicial, rather than jury, finding the crime was committed with "deliberate cruelty"]; *Ring, supra* [applying rule to special circumstance in death penalty case despite state statute to the contrary].) In any event, *Cummings* did not find that omitting multiple elements was harmless but, to the contrary, as explained in the main text, found nothing suggested harmless error could be applied in that situation.

1233, 1315[8].) Despite the fact the appellant had not disputed the existence of the predicate facts and "that the evidence overwhelmingly established all the elements," thirteen counts were reversed. (*Cummings, supra*, at 1314-1315.)

In brief, while a single element may be amendable to a reviewing court finding that the error is harmless under the California *Watson* test because it does not constitute a "miscarriage of justice," the same cannot be said for the omission of multiple elements. The policy benefit of maintaining public confidence in the courts where omission of one element can be said to be clearly harmless is inverted when the reviewing court begins to find multiple elements which were withheld from the jury.

In practical terms, the harmless error approach even to a single element depends to a large extent on the element not being one that is contested factually. For example, in *Flood, supra,* this Court found the error harmless because the prosecution evidence was "*unremarkable* and *uncontradicted*," "[a]t no point during the trial did defendant *contest* or even refer to [the omitted element]," and "nothing in the record suggests" the defendant *even tried* to introduce evidence on the omitted issue. (*Flood,* at pp. 490-491, emphasis added.) That is, the prosecution evidence was completely solid and uncontradicted by other prosecution or defense evidence, and the defendant did nothing that suggested he was contesting the existence of the element nor was there any suggestion that he could not

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[8] Referring, among others, to *Sandstrom v. Montana* (1979) 442 U.S. 510; *Pope v. Illinois* (1987) 481 U.S. 497 [95 L. Ed. 2d 439, 107 S. Ct. 1918]; *Rose v. Clark* (1986) 478 U.S. 570 [106 S. Ct. 3101, 3106-3108, 92 L. Ed. 2d 460]; *People v. Dyer* (1988) 45 Cal.3d 26; and *Carella v. California* (1989) 491 U.S. 263 [105 L. Ed. 2d 218, 109 S. Ct. 2419] (per curiam) .

have contested it.

This form of analysis becomes far more difficult when there are multiple elements. In effect there is a multiplication of variables. For examples: Whether the evidence presented by the prosecution was solid, unremarkable, on each omitted element; whether that evidence was uncontradicted on all of the omitted elements; whether any of the omitted elements was contested; whether the defense might have been prevented in some manner (strategic considerations, adverse but incorrect rulings, or the like) from introducing evidence that suggested the omitted element was being contested; whether there was a relationship between the omitted elements which the jurors needed to find. These are all considerations and combinations which become unmanageable when they are done with the understanding that the object is to ascertain whether any rational juror, properly instructed, could have had a reasonable doubt as to the existence of any one of the omitted elements. (See *People v. Flood, supra,* at p. 491.)

Section 13 of Article I does preclude a presumption of prejudice from a minor error, but, after an examination of the entire cause, including the evidence, it appears that multiple elements were not found by the jury, there is no longer a minor error but rather is one affecting the defendant's "inviolable right" to a jury determination. The risk to the fairness and justice of the proceedings, and to public confidence that the ultimate determination is being made by a jury, is so great that the court should "be of the opinion that the error complained of has necessarily resulted in a miscarriage of justice."

C. Federal "per se" prejudice

Neder v. United States (1999) 527 U.S. 1 (*Neder*), is the federal analogue of *People v. Flood, supra.* The comments above regarding *Flood*

also apply. In *Neder* the United States Supreme Court granted certiorari to determine "whether, and under what circumstances, the omission of an element from the judge's charge to the jury can be harmless error." The conclusion was much the same as the conclusion in *Flood*, and as in *Flood*, the *Neder* opinion also dealt with a single element and insisted it must be an uncontested element that the defendant also was apparently unable to contest.

> In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.
>
> Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.

(*Neder v. United States, supra*, 527 U.S. at p. 19.)

Justice Stevens observed in his separate concurring opinion that the jury verdict in that case actually did include the missing element, and he stated he could not join the portion which found the instructional error harmless because the petitioner "did not, and apparently could not, bring forth facts contesting the omitted element." Referencing his own dissent in *Pope v. Illinois*, *supra,* 481 U.S. at p. 509, he was of the view, the "'harmless-error doctrine may enable a court to remove a taint from proceedings in order to preserve a jury's findings, but it cannot

constitutionally supplement those findings.'" (*Neder, supra,* at p. 27.)

Justice Scalia, joined by Justice Souter and Justice Ginsburg, concurred and dissented. He expressed the philosophical foundation for their disagreement:

> The constitutionally required step that was omitted [by the majority opinion] here is distinctive, in that the basis for it is precisely that, absent voluntary waiver of the jury right, the Constitution does not trust judges to make determinations of criminal guilt. Perhaps the Court is so enamoured of judges in general, and federal judges in particular, that it forgets that they (we) are officers of the Government, and hence proper objects of that healthy suspicion of the power of government which possessed the Framers and is embodied in the Constitution. Who knows? -- 20 years of appointments of federal judges by oppressive administrations might produce judges willing to enforce oppressive criminal laws, and to interpret criminal laws oppressively -- at least in the view of the citizens in some vicinages where criminal prosecutions must be brought. And so the people reserved the function of determining criminal guilt to themselves, sitting as jurors. It is not within the power of us Justices to cancel that reservation -- neither by permitting trial judges to determine the guilt of a defendant who has not waived the jury right, nor (when a trial judge has done so anyway) by reviewing the facts ourselves and pronouncing the defendant without-a-doubt guilty. The Court's decision today is the only instance I know of (or could conceive of) in which the remedy for a constitutional violation by a trial judge (making the determination of criminal guilt reserved to the jury) is a repetition of the same constitutional violation by the appellate court (making the determination of criminal guilt reserved to the jury).

(*Id.*, at p. 32, concurring and dissenting opinion of Scalia, J.)

Justice Scalia's opinion is particularly important because he directly addresses the questions in the present case:

> A court cannot, no matter how clear the defendant's culpability, direct a guilty verdict. See *Carpenters v. United States*, 330 U.S. 395, 410, 91 L. Ed. 973, 67 S. Ct. 775 (1947); Rose v. Clark, 478 U.S. 570, 578, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986); *Arizona v. Fulminante*, 499 U.S. 279, 294, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) (White, J., dissenting). The question that this raises is why, if denying the right to conviction by jury is structural error, taking one of the elements of the crime away from the jury should be treated differently from taking all of them away -- since failure to prove one, no less than failure to prove all, utterly prevents conviction.
>
> The Court never asks, much less answers, this question. Indeed, we do not know, when the court's opinion is done, how many elements can be taken away from the jury with impunity, so long as appellate judges are persuaded that the defendant is surely guilty. What if, in the present case, besides keeping the materiality issue for itself, the District Court had also refused to instruct the jury to decide whether the defendant signed his tax return, see 26 U.S.C. § 7206(1)? If Neder had never contested that element of the offense, and the record contained a copy of his signed return, would his conviction be automatically reversed in that situation but not in this one, even though he would be just as obviously guilty? We do not know. We know that all elements cannot be taken from the jury, and that one can. How many is too many (or perhaps what proportion is too high) remains to be determined by future improvisation.

(*Id.*, at p. 33, concurring and dissenting opinion of Scalia, J.)

Justice Scalia's opinion points out that even with one element there is necessarily some speculative aspect, and he contrasts speculation that *confirms* a jury verdict that was reached and speculation which actually reaches a jury finding that was never made by the jurors. He (and Justice Souter and Justice Ginsburg) would enforce the right to a jury trial (U.S.

Const., Amend. VI) with automatic reversal even as to a jury's failure to make a finding as to a single element. Justice Stevens agreed separately.

The majority opinion's rationale greatly resembled the majority rationale of *Flood* in regard to whether a single element was amenable to harmless error treatment. In both cases reliance was placed upon previous cases where harmless error analysis was applied. (See *Arizona v. Fulminante, supra*, 499 U.S. 279; *Chapman v. California, supra*, 386 U.S. 18; *United States v. Olano* (1993) 507 U.S. 725, 736, 123 L. Ed. 2d 508, 113 S. Ct. 1770]; *Johnson v. United States* (1997) 520 U.S. 461 [117 S. Ct. 1544, 137 L. Ed. 2d 718]; *Rose v. Clark, supra,* 478 U.S. 570; *Yates v. Evatt* (1991) 500 U.S. 391 [114 L. Ed. 2d 432, 111 S. Ct. 1884]; *Pope v. Illinois, supra*, 481 U.S. 497; *California v. Roy* (1996) 519 U.S. 2, 5 [136 L. Ed. 2d 266, 117 S. Ct. 337] (per curiam); *Carella v. California, supra,* 491 U.S. 263; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S. Ct. 2078, 2080-2081, 124 L. Ed. 2d 182].) In none of these were multiple omissions of an element present.

As in *Flood*, the opinion in *Neder* was clear that it was dealing solely with the omission of a single element, for examples: "The error at issue here -- a jury instruction that omits *an element* of the offense -- differs markedly from the constitutional violations we have found to defy harmless-error review." (*Neder, supra,* at p. 8, italics added.) "[A]n instruction that omits *an element* of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Id.,* at p. 9, italics added.) We have often applied harmless-error analysis to cases involving *improper instructions on a single element* of the offense." (*Id.,* at p. 9, italics added.)

As Justice Scalia pointed out, there was no attempt in *Neder* to deal

with the multiple-omissions problem. Thus, to the extent that history plays a role, the history is there is no case approving harmless error analysis for the omission of more than one element. There are cases holding that when all or some significant number of elements are omitted or otherwise made unavailable for a jury finding beyond a reasonable doubt, (e.g., *Cummings, supra*; *Sullivan v. Louisiana, supra,* 508 U.S. 275, 281), a reviewing court would have to engage in pure speculation – its view of what a reasonable jury would have done – and this would amount to substitution of the reviewing court for the jury, resulting in the wrong entity making the decision. (*Sullivan, supra,* at p. 281.)

Where there is a single element omitted, that element has unremarkable evidence providing solid support for its existence, is uncontested, and nothing in the case tends to contradict it, nor does anyone contest it, *Neder* and *Flood* have found the omission not to require reversal.

The corollary is that when any of these factors are missing, the error *is* reversible.

Although there is no direct holding on multiple elements, the risk of public confidence waning due to reversal for "technical" error is, in the multiple-elements context, replaced by a risk of public confidence failing as it perceives an elitism and loss of control in the form of appellate judges making the decisions the state and federal constitutions reserve for local juries.

In discussing the federal "harmless error" legislative provision precluding reversal for technical errors, the Supreme Court has said

> "we cannot treat the manifest misdirection in the circumstances of this case as one of those 'technical errors' which 'do not affect the substantial rights of the parties' and must therefore be disregarded. 40 Stat. 1181, 28 U. S. C. §

> 391. All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. [Citation omitted.] Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. [Citations omitted.] From presuming too often all errors to be 'prejudicial,' the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

(*Bollenbach v. United States* (1946) 326 U.S. 607, 614-615.)

As Justice Scalia observed in his dissent in *Neder*, at page 33, and as Justice Werdegar did in her separate opinion in *Flood*, at page 511, directing a verdict on one element of several required to establish a criminal offense neither wholly withdrew from jury consideration substantially all of the elements of a charged substantive offense, nor so vitiated all of the jury's findings as to effectively deny defendant a jury trial on the entire charged offense altogether, but once there are multiple elements that are omitted, there does not appear to be a clear line between the function of the jury and that of the judge. The error may be said to be "structural" in that it substantially undermines the defendant's constitutional right to a jury determination, beyond a reasonable doubt, of every element of the charged offense.

Once one begins to count the number of omissions that are greater or less than "substantially all" the elements, the law becomes no more than a subjective determination by the judge."One" is discernable as a discrete integer. One omission does not involve counting individual "ones" and then subjectively determining whether–taken together and subtracted from the total elements the law identifies– there is or is not a "substantial" number remaining. Two or three or four missing elements are such that the court ultimately has no standard to tell if it will or will not be directing the verdict, relieving the prosecution of the burden of proof, or infringing on the right to a jury trial.

Taken together, all of the above factors not only create an unacceptable risk to a fair and reliable outcome but also are antithetical to the underlying reasons, purposes, and objectives at the core of the constitutional provisions.

Therefore, it is respectfully submitted, the judgment in this case should be reversed without engaging in a convoluted analysis of multiple elements in an attempt to determine if the error was or was not prejudicial.

II. IF HARMLESS ERROR ANALYSIS WERE APPROPRIATE, WOULD THE ERRORS BE HARMLESS IN THIS CASE?

As previously explained, the elements of special-circumstance murder removed from the jury's consideration in this case were (1) whether appellant was a major participant in the underlying felony and (2) whether he acted with reckless indifference to human life. (See pp. 16-17, *ante*.) Although jury findings that both of these elements had been proven beyond a reasonable doubt were legally essential to, and constitute the definition of non-killer aiding and abetting liability for, the imposition of life imprisonment without the possibility of parole, neither was submitted to nor found by appellant's jury. The Court of Appeal concluded that this error should be reviewed for harmlessness under the *Chapman* standard (i.e., reversal is required unless the People establish that it was harmless beyond a reasonable doubt). (Slip opinion, p. 19.) As argued in the previous section, appellant believes that the Court of Appeal erred in applying *Chapman*, because *Chapman* applies to the removal of a single element, and the removal of multiple elements, as occurred here, is structural error requiring automatic reversal.

However, even assuming that the error is reviewable for harmlessness under *Chapman*, the Court of Appeal erred in the manner in which it applied *Chapman*. As previously explained (see pp. 20-21, *ante*, quoting *People v. Flood, supra*), a proper application of *Chapman* to the removal of essential elements from the jury's consideration is not simply to assess whether there is substantial or even overwhelming evidence upon which the jury could have found the missing element(s) beyond a reasonable doubt, but whether the evidence regarding the missing element was, or could have been, in any way contested by the defense. When

applied in this fashion to the facts of this case, *Chapman* requires reversal of the special-circumstance findings because both of the omitted elements required for those findings were contested by the defense.

Had appellant's jurors been asked to decide whether the prosecution had proven beyond a reasonable doubt that appellant was a substantial participant in the underlying felonies and had acted with reckless indifference to human life, one or more of them could have reasonably concluded that the prosecution had not met that burden as to one or both of those elements. Accordingly, the Court of Appeal erred in finding the error harmless.

A. The analysis below was outdated.

The Court of Appeal used a form of analysis it found in *People v. Williams* (1997) 16 Cal.4th 635, 689 (cited at slip opinion p. 19[9].) That is, although the instructions did not require a finding of the omitted elements, the error could be found harmless "when the evidence that the defendant acted with the requisite mental state was overwhelming and the jury returning the special circumstances finding could have had no reasonable doubt the defendant possessed the necessary mental state (see, e.g., *People v. Johnson* (1993) 6 Cal.4th 1, 45-46.)" (Slip opinion, p. 19.) *Williams* found the error in failing to instruct on intent to kill to be prejudicial. It

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[9] Also cited was *People v. Osband* (1996) 13 Cal.4th 622, 681. (See Slip opinion at p. 19.) *Osband* relied on *People v. Johnson* (1993) 6 Cal.4th 1, discussed *post*) for its test and merely applied *Johnson* to its own facts. In *Osband*, the omitted element was a single element (intent to kill), the prosecution presented solid evidence (frail elderly helpless victim stabbed in a manner only consistent with intent to kill and attempt to murder second victim in same manner), and intent to kill was not a contested element at trial. *Osband* also was distinguished in *Williams* at page 690 because *Osband* involved a direct perpetrator.

distinguished *People v. Johnson, supra,* because the defendant in *Williams* was an aider and abetter such that the method of killing could not be used to supply solid evidence of the intent with which the homicide was committed.

The 1993 opinion in *Johnson* did not have the benefit of the 1998 opinion in *Flood* nor the 1999 opinion in *Neder*. Thus, while recognizing the federal nature of the error, the court could only apply the standard of *Chapman* generally as it was understood at the time. The court's application was largely in response to the dissenting opinion, and although the court presumed constitutional error, it is not entirely clear it felt special-circumstance elements were federally protected. Whether the court's view or that of dissenting Justice Mosk[10] best expressed the federal view at the time, it is now clear after *People v. Flood, supra,* and *Neder v. United States, supra*, there that the standard applied in *People v. Johnson, supra*, by analogy to the standard for presumptions and by the court below, is no longer proper when applied to omitted elements not found by the jury.

The Court of Appeal did not cite or discuss *Flood* or *Neder,*[11] or the standard each reached. As a result, its opinion used a standard other than the one approved by this Court and by the United States Supreme Court for omission of a single element.

B. <u>The correct standard.</u>

In *Flood* the prosecution evidence was completely solid and

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[10] See, e.g., *People v. Johnson, supra*, at p. 57, Mosk, J., dissenting ["By its very terms, of course, *Chapman* precludes a court from finding harmlessness based simply 'upon [its own] view of "overwhelming evidence."' (*Chapman v. California, supra*, 386 U.S. at p. 23 [17 L.Ed.2d at p. 710]."]

[11] These cases were cited by appellant (AOB 67, 72, 77 [*Flood*] 67, 71 [*Neder*]) and in the Petition for Rehearing, which was summarily denied.

uncontradicted by other prosecution or defense evidence, and the defendant did nothing that suggested he was contesting the existence of the element nor was there any suggestion that he could have contested it if he so desired or had evidence to do so. (*People v. Flood, supra,* at pp. 490-491.)

The same was true in *Neder*: If the defendant did not, and apparently could not, bring forth facts contesting the omitted element which has otherwise been established, the harmless error test may be appropriately applied. But, the Court said, "Of course, in terms of application, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." (*Neder v. United States, supra*, 527 U.S. at p. 19.)

C. Application

1. The Court of Appeal's finding of harmless error rests on an erroneous application of the substantial evidence rule.

The Court of Appeal applied what it characterized as an "overwhelming evidence" examination. Instead, it should have looked to see whether the element was contested before it looked to see whether the error was harmless. In regard to the question of whether the error required reversal, there needed to be a thorough examination of the record. The subject of that examination should have been whether the omitted elements were contested and, if so, whether the defense raised evidence "sufficient to support" a finding that a juror could find a doubt as to the existence of the

element. The Court of Appeal did not conduct this examination.

Instead, the court relied upon three cases which addressed whether there was sufficient evidence to support a finding that the accomplice was a major participant who acted with reckless indifference to human life: *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1751, 1754-1755; *People v. Proby* (1998) 60 Cal.App.4th 922, 929-930; and *People v. Hodgson* (2003) 111 Cal.App.4th 566, 568.

Before discussing these three cases, Mr. Mil points out that they did not address the failure to instruct on an element of special-circumstances murder, but instead were using a standard that looks at the evidence only in the light most favorable to the judgment (*People v. Johnson* (1980) 26 Cal.3d 557, 562; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1019) and presumes in support of the judgment the existence of any facts which a properly instructed jury might reasonably infer from the evidence. (See, e.g., *People v. Edelbacher, supra,* 47 Cal.3d at p. 1019; *People v. Bean* (1988) 46 Cal.3d 919, 934.)

Affirmance was required in such cases, if there is any evidence from which a reasonable juror *might* find or infer or infer guilt. This standard is used to insure that there is some solid evidence of guilt, not whether the evidence is overwhelming. "Substantial evidence" is evidence of "ponderable legal significance . . . reasonable in nature, credible and of solid value." (*People v. Johnson, supra*, 26 Cal.3d at p. 576; see *People v. Bassett* (1968) 69 Cal.2d 122, 139.) Whatever the benefits of this standard for a jury verdict uninfluenced by error, it is clearly inappropriate for use where federal constitutional error has occurred, and the burden is on the beneficiary of the error to show the error had no effect, was harmless, beyond a reasonable doubt. (*Chapman v. California, supra.*)

Even prejudice analysis for state error alone does not use such a standard. "It is true that in determining whether or not a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party." (*O'Meara v. Swortfiguer* (1923) 191 Cal. 12, 15; see *Mock v. Michigan Millers Mutual Ins. Co.* (1992) 4 Cal.App.4th 306, 322; see also *People v. Henry* (1972) 22 Cal.App.3d 951, 955 fn 3 ["it is no longer our obligation to consider the evidence, with all its inferences, in the light most favorable to respondent (i.e., the substantial evidence rule). (*Crawford v. Southern Pac. Co.* (1935) 3 Cal.2d 427, 429 [45 P.2d 183].)"]; *People v. Wheelwright* (1968) 262 Cal. App. 2d 63, 71 [same].) Nor is it an appropriate consideration for federal review, even for normal error and even under the lowest standards. "'There is a striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.' Roger Traynor, *The Riddle of Harmless Error*, 27 (1970)." (*Standen* v. *Whitley* (9th Cir. 1993) 994 F.2d 1417, 1423.)

The Court of Appeal's finding that the error here was harmless rests on an incorrect analysis.

2. <u>Analysis using the proper test requires reversal to avoid an unconstitutional entrenchment upon the right to a jury trial.</u>

Unlike the defendant in *People v. Bustos, supra,* Mr. Mil was not the

killer (3RT 333), he denied planning a robbery (1SCT 144), and when Mr. Mil left the room in haste he was without knowledge the victim had been stabbed by Eyraud (1SCT 49). Unlike the defendant in *People v. Hodgson, supra,* Mr. Mil was not aware of the presence of the knife (1SCT 49) and was not aware the victim was stabbed or mortally wounded (1SCT 66, 75, 79). Unlike the defendant in *People v. Proby, supra,* there was no evidence Mr. Mil provided the weapon, and he denied knowing the victim was wounded (1SCT 66) and denied he took any money (1SCT 72, 79, 141, 148).

This testimony was not necessarily rejected. For examples: Mil admitted he came to pick up Eyraud to get her bags and things after which they were to leave. (1SCT 68.) He thought Eyraud already had the money. (1SCT 141.) Nonetheless, although he applied force for a reason other than to take the money (1SCT 60-75), a juror might find he was acting in aid of Eyraud's arguable theft since he was assisting in the asportation (1SCT 68, 95, 141) and there were no accessory-after-the-fact instructions given.

While varying interpretations may be drawn, the overall thrust of his defense was that Mr. Mil thought Eyraud would acquire money, by prostitution or by theft, and hoped she would give him some so that he could buy drugs. Eyraud was planning on leaving peacefully, so far as Mil knew, by drugging or otherwise incapacitating Mr. Coe. Mil's role was not to aid in the taking but to assist her in leaving. He contested the omitted element of being a major participant.

He also contested that he acted in reckless disregard for human life. His fight was with non-lethal weapons and inspired by Coe's rising in an appearance of fighting belligerence. (1SCT 65-75.) He asked Eyraud to calm the man down and leave. (1SCT 67.) When they reached a point where

it was an even fight and Coe said "okay," Mil got up and ran. (1SCT 66.) He just wanted out. (1SCT 79.) He in fact ran out, got on his bicycle, and rode away. (1SCT 75.) He had tunnel vision about wanting Eyraud and himself out of there. (1SCT 79.)

The subjective mental state is not one determined as a matter of law; it is a factual question for the jury in the individual case. In *People v. Estrada* (1995) 11 Cal. 4th 568, this court discussed the provisions of Penal Code section 190.2, subdivision (d), which were derived from *Tison v. Arizona, supra,* (1987) 481 U.S. 137 [95 L. Ed. 2d 127, 107 S. Ct. 1676] (*Tison*). It found "*Tison* . . . instructs that the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death' (481 U.S. at p. 157 [95 L. Ed. 2d at p. 144]), and it is this meaning that we ascribe to the statutory phrase 'reckless indifference to human life' in section 190.2(d)." (*Estrada, supra*, at p. 577.) "[W]hen considered in its entirety--as the phrase is presented to the jury–'reckless indifference to human life' is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death. The common meaning of the term 'indifference,' referring to 'the state of being indifferent,' is that which is 'regarded as being of no significant importance or value.' (*Webster's New Internat. Dict.* (3d ed. 1981) p. 1151, col. 1.) To regard something, even to regard it as worthless, is to be aware of it. (See *id.* at p. 1911, col. 1 ['regard' is synonymous with 'consider, evaluate, judge'].)" (*Ibid.*) One cannot be indifferent to something of which he or she is subjectively unaware. (*Estrada, supra*, at p. 578.)

There is certainly sufficient evidence to raise a reasonable doubt in

the mind of a juror as to whether Mr. Mil had that highly culpable mental state. However, though contested, the instructions provided no reason for the juror to consider that as a necessary element for the prosecution to prove.

"[T]he phrase 'major participant' is commonly understood and is not used in a technical sense peculiar to the law." (*People v. Proby, supra,* 60 Cal.App.4th 933-934.) *Proby* found that the various dictionary meanings of "major" would suffice, and in its particular case included "'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.' (*Webster's New Internat. Dict., supra*, p. 1363.)" (*Ibid.*) Assuming, *arguendo*, that this Court would agree with *Proby* on the point, the facts in the present case included evidence that Mil was not involved in the taking which had already occurred. (E.g., 1SCT 141.) The evidence similarly included that he entered with the invitation of an inhabitant of the room (i.e., Eyraud) for the purpose of taking her and her possessions from there to get some drugs. (1SCT 64, 67-68.) The word "major" as an adjective generally conveys a relative size or importance, it is an evaluative word, and it is one for a jury to determine. Synonyms include "important," "vital," "critical," "significant," "great," "serious," "radical," "crucial," "outstanding," "grave," "extensive," "notable," "weighty," "pre-eminent," "main", "greater", "bigger," "superior," "uppermost," "significant," "key," "sweeping," "substantial," and others. (*Collins Thesaurus of the English Language – Complete and Unabridged 2nd Edition*. 2002 © HarperCollins Publishers 1995, 2002.) As a required element, it limits the reach of one of the greatest penalties society can impose, and in some cases could make the difference between life and death.

The modified word, "participant," refers to taking part in the underlying crime, and the rationale of *Tison, supra,* is that "[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished." (*Tison v. Arizona, supra*, 481 U.S. at p. 156.)

As mentioned in Part I, above, one problem with omitting more than one element is that there is often a relationship between individual elements which may increase or decrease the value or doubt in a juror's mind. For example, this is illustrated in the case of aiding and abetting liability for special-circumstance murder by one who does not intend to kill. As *Tison* notes, the two elements act synergistically. "[E]ven in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." (*Id.,* at p. 158, fn 12.) The converse is that where a juror finds there is little evidence of reckless indifference or of being a major participant, there may not be sufficient proof to establish the other element beyond a reasonable doubt in the juror's mind. The weakness may cause doubt as to the existence of the other element. Where multiple elements are omitted, as here, the juror's view of the evidence as a whole is colored because the facts related to those do not need examination under the charge omitting their significance.

As explained earlier, there was little solid evidence of reckless indifference and more importantly there was contradictory evidence. Major participation in the felony was also contradicted by the evidence that, although arguably present for asportation, Mil was not the one who instigated or engaged in any actual taking nor was his role planned to be

such. He had no major role in the stabbing, and the evidence was that he did not see Eyraud with the knife. To some extent his version of events was corroborated by Cowen when he went to investigate a noise at the apartment. He noticed the lights were all illuminated, and the door was partially open. He apparently did not see Coe's body, suggesting it was not yet down. He obtained a golf club from the unit next door, and returned within two minutes of the time he first noticed the open door. The door was now completely open, and Coe was laying in the doorway. Cowen left to notify McLane. (2RT 208, 210-214.) McLane arrived to find Coe still alive at that point. (1RT 61.) Thus, Mil's version of the events, including his overriding desire to leave at the time of the draw in the fight and including his lack of awareness of what Eyraud did or was about to do, was corroborated to some extent by the fact Coe was apparently still mobile even after Eyraud's action, whenever it may have occurred.

The prosecution's evidence was also not invincibly solid and was remarkable. It largely relied on the defendant's statements. Those had problems because the one to the police included exculpatory information, and the statements allegedly involving the bus were inherently doubtful (requiring that the women were placed on the bus in early morning and the bus waited with them confined there until the afternoon loading of the men before the drive to the courthouse), consisted of unexamined inconsistent statements where the independent witness Rodriguez had no recall (and whose prior statements, appellant contends, should have been excluded as violating the Confrontation Clause, because the trial judge lacked a basis for finding they were all inconsistent), and relied upon the heavily biased and dubious absconding parolee Mr. Cowen (whose story did not jibe with the statement of Rodriguez, and who was Eyraud's step-father). A juror

would have many reservations regarding how much of such a case to accept.

In addition to evidence contesting and contradicting the omitted elements, the defense argued that Mil was not supposed to be there to rob or assault Mr. Coe; he was just there to get money from Eyraud to buy drugs. (3RT 413.) Coe was stabbed by Eyraud; all Mil engaged in was an altercation with fists. (3RT 414.) Defense counsel also argued the lack of causation and temporal relationships necessary for felony murder; and he then pointed out that even if the jury did find Mil to be involved in the murder, they had to find a causal or temporal relationship between Mil and the death before they could find a special circumstance. (3RT 417.) Although these arguments addressed primarily guilt of the substantive offense, which was also the only thing argued by the prosecution, they also, and particularly the last of them at page 417, addressed evidence relating to the omitted elements of the special circumstances.

The defendant contested the omitted element and raised evidence sufficient to support a contrary finding. Reversal is required under *Neder v. United States, supra.*

The same is true under the California "miscarriage of justice" test. There is a reasonable probability (*Watson, supra*) that the prosecution evidence was less than completely solid and uncontradicted by other prosecution or defense evidence, and the defendant did suggest through the evidence and argument that he was contesting the existence of the elements.

Also, there was a suggestion that the defense could have contested the omitted elements further, and may well have done so, had the instructions afforded him a basis for litigating those elements. There was a basis for pro-defense findings on the omitted elements, and the jury was

effectively prevented from making such findings.

As a result, Mr. Mil was denied his constitutional rights to a jury determination on what, for aider-and-abetter liability for special-circumstances murder, is the central question after guilt in a felony-murder case. Thus, regardless of whether the omission of these two crucial elements was structural error, reversal is required.

CONCLUSION

For the foregoing reasons, it is respectfully requested the judgment be reversed.

Date: January 12, 2011.

Respectfully submitted,

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Certification: This brief does not exceed 14,000 words (Cal. Rules of Court, Rule 8.204). It contains 13,422 words by computer count, excluding covers, tables, this certification, and the proof of service.

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DECLARATION OF SERVICE

I, the undersigned, declare as follows:I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is PMB 513, Suite D, 44489 Town Center Way, Palm Desert, CA 92260. On January 14, 2011, I served the attached material in an envelope addressed shown below, by the United States Mail in Palm Desert, California, with postage prepaid.

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