SUPREME COURT NO. S186661

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

SETH CRAVENS,
Defendant and Appellant.

Court of Appeal
No. D054613

Superior Court
No. SCD206917

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable John S. Einhorn, Judge

ANSWER TO PETITION FOR REVIEW; STATEMENT OF ADDITIONAL ISSUES SHOULD REVIEW BE GRANTED

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.,
independent case program

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SUPREME COURT NO. _____

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Honorable John S. Einhorn, Judge

ANSWER TO PETITION FOR REVIEW; STATEMENT OF ADDITIONAL ISSUES SHOULD REVIEW BE GRANTED

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to rule 8.500(a)(2) of the California Rules of Court, appellant below, Seth Cravens, respectfully files this answer to the Attorney General's petition for review, along with a statement of additional issues should review be granted. Appellant Cravens is not otherwise asking this court to review his case.

I

ANSWER TO PETITION FOR REVIEW

A. The Court of Appeal's Finding Insufficient Evidence of Implied Malice When Appellant Threw a Single Punch With his Non-dominant Hand at a Professional Athlete Presents No Issue for This Court to Review

Respondent[1] phrases the issue presented as whether the Court of Appeal "abused its limited authority" when it found no evidence of implied malice and "then fashioned an 'expanded' version of voluntary manslaughter to affix liability." (Petition for Review [hereafter, PTR], p. 1.) Respondent elsewhere asserts, "The appellate court's betrayal of its duty to view the evidence in the light most favorable to the verdict is further evidenced by its overreach in expanding the law of voluntary manslaughter in order to reach a level of conviction the appellate court thought proper." (PTR p. 12.) This is not, however, one issue, but two entirely separate questions. If there was insufficient evidence of implied malice, the second degree murder conviction must be reversed, regardless of whether the Court of Appeal may or may not have erred when it "fashioned an 'expanded' version of voluntary manslaughter." Since it appears clear the gravamen of respondent's complaint is the appellate

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[1]The parties will be referred to as "appellant" and "respondent" as they were before the Court of Appeal.

court's finding insufficient evidence of implied malice to sustain the murder conviction, appellant will address that issue in this answer.

Respondent asserts review should be granted to determine "whether an appellate court can overrule a jury's determination and find insufficient evidence of second degree murder, based on implied malice . . . ." (PTR p. 7.) The simple and uncontroversial answer is, "Of course it can." As will be demonstrated below, *nowhere* does respondent demonstrate the Court of Appeal employed an incorrect legal standard in finding insufficient evidence of implied malice. The Court of Appeal's conclusion was the result of a fact-driven inquiry, and is simply the conclusion respondent would prefer the court had not reached.

Under the circumstances, review by this court is hardly "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) The policy of preserving scarce judicial resources extends to appellate resources (*In re Z.N.* (2009) 181 Cal.App.4th 282, 302), and there is no good reason for this court to waste its scarce resources reviewing this unpublished opinion.

B. Respondent Appears to Concede the Court of Appeal Employed the Correct Legal Standards in Analyzing the Sufficiency of Evidence of Implied Malice

The ultimate rationale behind respondent's position is that once a

jury has found sufficient evidence of a given offense, an appellate court can *never* reach a contrary determination. This must be respondent's position, because in the petition for review, respondent fails to demonstrate the Court of Appeal made any legal error in analyzing the evidence of implied malice presented at appellant's trial, and fails to adduce any facts the Court of Appeal neglected to consider in reaching its conclusion. The reason for respondent's omissions is simple: the court made no legal error and considered all the evidence.

In its opinion, the Court of Appeal engaged in an extensive discussion of the rules governing appellate review of evidentiary sufficiency and especially of case law concerning implied malice, with special attention rightly given to this court's opinion in *People v. Knoller* (2007) 41 Cal.4th 139. (Opn., pp. 27-32.) Nowhere does respondent contend the court misstated the law regarding implied malice, and, while respondent claims the court's "decision represents a de novo review of the evidence and does not give proper deference to the factual determinations made by the jury" (PTR p. 12), nowhere does respondent claim the Court of Appeal misstated the law governing its review of evidentiary

sufficiency.[2]

The Court of Appeal correctly concluded there was no evidence appellant consciously disregarded a risk to the victim's life when he threw a single punch. Respondent states, "To conclude, as did the court of Appeal, that there was basically no evidence of implied malice, is the equivalent of arguing that gravity does not exist because it cannot be seen." (PTR p. 12.) The comparison is inapt but telling. It can be stated with certainty that gravity exists because evidence of its existence is everywhere.

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[2]At first glance, the only thing that may be potentially confusing regarding the legal standards the court employed in analyzing the evidence of implied malice is where respondent states, "the Court of Appeal re-examined the evidence and concluded that the single blow to the head delivered by appellant did not involve a high probability of death simply because it occurred on a pavement . . . ." (PTR p. 6.) The opinion does in fact refer to a "high degree of probability" of death (the so-called *Thomas* test discussed in *Knoller)* (Opn. pp. 29-31), though not in the context of repeating the incorrect test for implied malice employed by the trial court in granting a new trial motion in *Knoller*--which was whether the defendant subjectively knew there was a high probability her conduct would result in death (*People v. Knoller, supra,* 41 Cal.4th at p. 157)--and respondent does not claim that it did. The opinion correctly states while *Knoller* clarified that a defendant need not know as a *subjective* matter there was a high probability the conduct would result in death, *Knoller* "did not disapprove use of the 'high probability of death' test for the *objective* component of implied malice." (Opn., p. 31, italics in original.) The Court of Appeal's *Knoller* discussion is accurate, and in any event, whatever quantum of probability may be required for the objective component of implied malice, it has to be far more than the statistically insignificant possibility that a young male throwing a single punch at another young male, a professional athlete, will result in a death.

It can also be stated with certainty that evidence of implied malice did not exist in appellant's trial because evidence of it was nowhere--and respondent fails to point to any here. The ultimate premise behind the Attorney General's position is that an appellate court can *never* legitimately find insufficient evidence of an element of a criminal offense when a jury has found otherwise, but that is fortunately not the state of the law.

C. There Are Numerous Factual Errors of Both Commission and Omission in the Petition for Review

As indicated above, the Court of Appeal's conclusion was based on a fact-driven inquiry regarding the sufficiency of the evidence. Because of this, it is important to correct potentially misleading statements in the petition, and to add vital facts respondent omits.

At trial and on appeal, the People repeatedly argued appellant's commission of other assaults somehow constituted evidence of implied malice supporting a murder conviction,[3] a refrain continued in the petition for review: "Along with these attacks came words that indicated Cravens intended to do serious harm to people or even kill them" (PTR p. 1); "Appellant and his friends would beat people to the ground and stomp on

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[3]Appellant does, however, believe evidence concerning these other assaults--none of which had resulted in arrest, much less prosecution--prejudiced the jury into returning a murder verdict despite the lack of evidence to support it. See issue III (A) below.

their faces" (PTR p. 2); "In more than one instance, appellant delivered powerful sucker punches to the heads of his opponents in circumstances that demonstrated he had conscious disregard for their lives" (PTR p. 2); "Appellant . . . had a long history of committing serious bodily injuries on various individuals . . . ." (PTR p. 7).

Had even one of these victims ended up with even a remotely life-threatening injury, respondent might have a point, but just the opposite is true. The *worst* injury appellant had previously inflicted was an apparently broken nose--and even that was unclear because the victim left the hospital before a CAT scan could be taken (13 RT 1407)--and *none* of injuries were, as correctly noted in the opinion, "even close to being life-threatening." (Opn., p. 34.) In other words, as the opinion concludes, "The evidence that Cravens had previously punched multiple people in the face *without inflicting any life-threatening injury* tends to negate an inference of subjective knowledge of life endangerment; it does not support a reasonable inference that when Cravens punched Kauanui in the face, he subjectively knew he was endangering Kauanui's life." (Opn., p. 34, italics in original.)

In addition, as did the People at trial and during appeal, respondent here wastes no opportunity to assert the victim was subject to some kind of

group attack before appellant punched him.[4] (See, e.g., PTR pp. 3, 7, 8, 9, 10, 11, 12, 13.) There was clearly a fight between Eric House and victim Kauanui that resulted in the loss of House's tooth, a continuation of the spat over the earlier spilled beer at the La Jolla Brew House. (6 RT 248-251; 14 RT 1601-1602.) *At trial, however, the People presented diametrically opposing testimony regarding whether any group attack occurred.* Jennifer Grosso, the victim's girlfriend who was present in the thick of things and knew the participants, testified to a one-on-one fight between House and Kauanui, following which Kauanui approached appellant and appellant hit him. (6 RT 248-251, 256-257.) The prosecutor even vouched for Grosso's testimony during argument to the jury: "Jenny Grosso. Her testimony is 100 percent corroborated for every aspect of it." (16 RT 1894.) Other prosecution witnesses, especially a neighbor viewing the scene from across the street in poor lighting, claimed otherwise. (6 RT 341, 343, 362-363; 7 RT 387-388.)

But it matters not, because *what respondent omits is that even if there was some kind of group assault on Kauanui that preceded*

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[4]Given this emphasis, it is surely remarkable that in their change of plea forms, none of appellant's friends present that evening--with the exception of the toothless Eric House--admitted so much as touching Emery Kauanui. (2 CT 318-330.)

appellant's throwing the punch, it was so inconsequential it left absolutely no physical evidence. Other than the fatal wound resulting from the impact of his skull on the sidewalk, the victim's other injuries consisted only of minor scrapes and abrasions (13 RT 1433-1437)--the result of rolling around in the street, shirtless and in shorts, during the fight with House--that were described by the pathologist as "medically trivial" or "medically insignificant" (13 RT 1439, 1474). Common sense dictates any kind of "group beating" worthy of the term, especially by young men, all of them former football players, would leave evidence along the lines of cracked ribs or internal bleeding, or at the very least severe bruising. Respondent would no doubt prefer this court believe the Court of Appeal ignored evidence appellant administered the coup de grace to a virtually helpless victim (see, e.g., PTR p. 12), but the reality is the victim had just triumphed in another fight and felt emboldened enough to approach and swear at appellant, who then hit him a single time.

Which brings us to more factual omissions in the petition, important because they belie respondent's insistence on the alleged overwhelming force with which appellant hit Kauanui. (PTR pp. 4, 7-8, 10, 12.) It has been uncontroverted during these proceedings that appellant, who was right-handed, delivered the punch with his non-dominant left hand. (6 RT

290; 14 RT 1657.) It has also been uncontroverted that the pathologist could not even tell on which side of the face the victim had been punched. (13 RT 1475.) These facts--and they are facts, not opinions--rationally imply Kauanui's death was a freak result of the punch appellant threw at him; it was not the impact of appellant's fist that killed Emery Kauanui, but the impact with the sidewalk when Kauanui fell. That several of the other assaults took place on a concrete surface without any further substantial injury (counts 7, 10, 11) only underscores that appellant was not consciously disregarding the possibility of the victim's death when he hit him.

And, as did the People during trial and on appeal, respondent here makes much of appellant's statements before and after several of the assaults, including the fatal one: "Along with these attacks came words that indicated Cravens intended to do serious harm to people or even kill them." (PTR p. 1); "Appellant would curse and yell 'I'm going to kill you.'" (PTR p. 2); "The next day, appellant laughed about Kauanui's situation and boasted that he had knocked him out with one punch and put him to sleep." (PTR p. 4.) For better or worse, however, the hyperbolic use of terms like "kill" or "murder" is part of everyday language. And, in any event, the actual statements appellant made and the circumstances under which they

were made, belie any sinister interpretation:

1) Erik Wright--not appellant--threatened to "fucking kill" Eric Sorensen in count 1. (10 RT 915.) Appellant was convicted of aiding and abetting a criminal threat, and did not touch Sorensen.

2) During the party crashing attempt on New Year's Eve in count 7, Logan Henry said appellant ""looked me in the face and told me that he was going to F'ing kill me, F'ing kill me." Henry told appellant to "Do it, you know. Bring it." Appellant did nothing. (11 RT 1141, 1149.)

3) Two days after the assault on Michael Johnson in count 11, appellant sent a MySpace message reading: "What the fuck. When are we going to chill. I can't go to the Shack for a while because I murdered someone. Ha, ha, ha, ha, No biggie. Call me up and let's get krunk [sic][5]." (13 RT 1419.) Appellant obviously had not murdered Johnson; the worst he had done is possibly broken his nose.

4) When Nicole Sparks called Hank Hendricks the day after appellant hit Kauanui to find out what had happened, she heard appellant, who was driving with Hendricks, say, "We put him to sleep." (9 RT 693-694.) Sparks did not know Kauanui was in the hospital, nor was the

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[5]"Krunk" probably means "crazy drunk."(www.urbandictionary.com/define.php?term=krunk.)

hospital mentioned during the conversation. (9 RT 698.) Around the same time--it is unclear whether before or after the call with Sparks--Kristin Link told appellant Kauanui was still in the hospital and appellant began crying. (9 RT 675-676.)

D. Conclusion to Answer

"Inquiry into the substantiality of the evidence . . . is a principal appellate function as is inquiry into other claims of error." (*People v. Roehler* (1985) 167 Cal.App.3d 353, 358.) On appeal, appellant asked the Court of Appeal to review whether there had been sufficient evidence presented of implied malice, meaning whether there was any credible evidence that when he threw the single punch at Emery Kauanui with his non-dominant hand, he consciously disregarded the possibility Kauanui might die. Employing the correct legal standards, the Court of Appeal reviewed the evidence and concluded there was none. Because this conclusion was the correct one, and respondent has proffered no valid legal or factual reason to the contrary, appellant submits this court should deny respondent's petition for review.

II

STATEMENT OF ADDITIONAL ISSUES SHOULD REVIEW BE GRANTED

Appellant is not asking this court to grant review of his case. If, however, the court does so, appellant would ask the court to consider these additional issues pursuant to California Rules of Court, rule 8.500(a)(2).

A. Whether Appellant's Conviction Should Have Been Reduced to Involuntary Rather Than Voluntary Manslaughter

In *People v. Garcia* (2008) 162 Cal.App.4th 18, the defendant struck one man in the head with a handgun, knocking him down; struck another man in the head with the butt of a shotgun, knocking him down and killing him; and pointed the shotgun at two people who attempted to come to the aid of the man he had just mortally wounded. (*Id.* at p. 23.) The *Garcia* court held there was insufficient evidence to support a jury instruction on involuntary manslaughter, enunciating along the way a new theory of voluntary manslaughter that might be termed "felony manslaughter," according to which an unintentional killing during the commission of an inherently dangerous assaultive felony is voluntary manslaughter. (*Id.*, at pp. 31-33.)

On appeal, appellant asserted the trial court should have instructed the jury sua sponte on this theory of voluntary manslaughter. Following

oral argument, however, the Court of Appeal requested briefing on the question of, assuming the court concluded there was insufficient evidence supporting appellant's second degree murder conviction, to what lesser offense the conviction would properly be reduced, and asked the parties to address the applicability of *People v. Garcia, supra,* 162 Cal.App.4th 18 to the issue. Appellant--or more precisely his counsel--reconsidered *Garcia* and concluded Garcia should not be applied to appellant's case for several reasons. Appellant first noted two things needed to be established before he came within the purview of *Garcia:* 1) he committed a felony rather than misdemeanor when he threw the single punch at Emery Kauanui, and 2) this felony was "inherently dangerous" pursuant to *Garcia*'s definition of the term, which utilized the inherently dangerous felony test employed in the second degree felony-murder rule.

The Court of Appeal concluded appellant committed a felony rather than misdemeanor when he threw the punch, and decided to "expand the holding in *Garcia* by concluding that an unintentional killing, without malice, resulting from the commission of a felony assault or battery constitutes voluntary manslaughter, regardless whether it satisfies the test for an inherently dangerous felony used in applying the second degree felony murder rule." (Opn, p. 42.) It thus reduced his conviction to

voluntary rather than involuntary manslaughter.

If this court grants review, appellant would ask this court to consider the following questions regarding the Court of Appeal's conclusions:

1) Was the single punch thrown by appellant with his non-dominant hand, and which left no physical trace regarding its point of impact, a felony?

In facts somewhat similar to the present case, in *People v. Cox* (2000) 23 Cal.4th 665, the defendant slapped the victim, who had not hit the defendant, with his open left hand, then punched him with a "solid blow," whereupon the victim "fell to the pavement and appeared to have been knocked unconscious." He regained consciousness but later died. (*Id.*, at p. 668.) The issue this court considered was whether the trial court had correctly instructed the jury battery was an inherently dangerous misdemeanor and thus a predicate for involuntary manslaughter[6] (*id.*, at pp. 669-670), though for present purposes, the significance of *Cox* is that this court took as a given a blow sufficient to knock someone down, lose consciousness, and die was a misdemeanor battery, a conclusion consistent

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[6]For purposes of misdemeanor-manslaughter, "[T]he offense must be dangerous under the circumstances of its commission" (*People v. Wells* (1996) 12 Cal.4th 979, 988), the opposite of the analysis employed with second-degree felony murder: "[T]he court looks to the elements of the felony in the abstract, 'not the "particular" facts of the case,' i.e., not to the defendant's specific conduct" (*People v. Howard* (2005) 34 Cal.4th 1129, 1135).

with California cases over the years. (See, e.g., *People v. Munn* (1884) 65 Cal.211, 211-213; *People v. Mullen* (1908) 7 Cal.App. 547, 549; *People v. Jackson* (1962) 202 Cal.App.2d 179, 183; *People v. Spring* (1984) 153 Cal.App.3d 1199, 1206-1207.)

In addition, appellant's other counts of conviction for felony assault (counts 5, 7, 10, and 11) may be factually distinguished from the single punch thrown at Emery Kauanui in that they all involved *repeated* blows or kicks by appellant or those he aided and abetted. (11 RT 1040-1041, 1139-1141; 12 RT 1295; 13 RT 1373). Also, unlike Kauanui, each of these victims had recognizable marks denoting where he had been struck. (11 RT 1045, 1140; 12 RT 1290; 13 RT 1412).

This court should consider whether the single punch an unarmed appellant threw at Emery Kauanui with his non-dominant hand (6 RT 290, 14 RT 1657), and which, while it knocked Kauanui down, did not even leave any evidence as to where it had landed (13 RT 1475), constituted misdemeanor battery.

2) <u>If it was a felony, was it "inherently dangerous" within the legal definition?</u>

As quoted above, the Court of Appeal recognized it had to expand *Garcia*'s definition of an inherently dangerous felony in order to apply the "felony manslaughter" theory to appellant. For purposes of its "felony-

manslaughter" rule, *Garcia* adopts the definition of an inherently dangerous felony used in the second degree felony-murder rule, which is that the felony "by its very nature . . . cannot be committed without creating a substantial risk that someone will be killed." (*People v. Howard, supra,* 34 Cal.4th at p.1135.) *Garcia* found that assault with a deadly weapon is an inherently dangerous felony considered in the abstract, presumably because the offense of assault with a *deadly weapon* by definition creates "a substantial risk that someone will be killed." (*People v. Garcia, supra*, 162 Cal.App.4th at p. 28, fn. 4.)

If an inherently dangerous felony is one that creates "a substantial risk that someone will be killed," the most that can be said for felony assault is that it creates "a substantial risk that someone will suffer great bodily injury." As this court noted a different context in *Knoller,* however, the risk of death and the risk of serious bodily injury are not the same thing. (*People v. Knoller, supra,* 41 Cal.4th at pp.143, 156.) To put the difference between a risk of death and risk of great bodily injury in perspective, in the present case the loss of Eric House's tooth in the fight with Emery Kauanui arguably constituted great bodily injury. (*People v. Belton* (2008) 168 Cal.App.4th 432, 439-440.) Examples of felonies held inherently dangerous to human life, on the other hand, include shooting at an inhabited

dwelling, poisoning with intent to injure, arson of a motor vehicle, grossly negligent discharge of a firearm, manufacturing methamphetamine, kidnaping, and reckless or malicious possession of a destructive device. (*People v. Howard, supra,* 34 Cal.4th at p. 1136.) Assuming the act constituted a felony, throwing a single punch at a professional athlete does not belong in this list.

The Court of Appeal acknowledged there was no California case holding assault by means of force likely to produce great bodily injury was an inherently dangerous felony. (Opn., p. 43.) The Court of Appeal also acknowledged case law holding the elements of manslaughter in section 192 were non-exclusive, meaning involuntary manslaughter may result from the commission of a non-inherently dangerous felony committed without due caution and circumspection (i.e., involuntary manslaughter is not limited to misdemeanor manslaughter). (Opn., p. 45.) Appellant submits this court should review the question of whether assault by means of force likely to produce great bodily injury is an inherently dangerous felony.

3) Are there other reasons not to apply *Garcia* to appellant's case?

To begin with, the entire "felony-manslaughter" discussion in *Garcia* appears to be dicta. There are two actual holdings in *Garcia,* one that there was insufficient evidence to support an involuntary manslaughter

instruction (*id.*, at p. 24), the other that the court's imposition of the upper term for voluntary manslaughter did not violate his right to a jury trial (*id.*, at p. 33). "It is axiomatic that . . . . [a]n appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citation.]" (*People v. Knoller, supra,* 41 Cal.4th at p. 154-155.) The Court of Appeal thus expanded dicta, not a case holding, when it applied the "felony-manslaughter" theory to appellant.

The "felony-manslaughter" theory in *Garcia* is, furthermore, a judicially created doctrine with no statutory basis. Voluntary manslaughter is statutorily defined as "the unlawful killing of a human being without malice. . . . upon a sudden quarrel or heat of passion." (Pen. Code, § 192, subd. (a).) In *People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1180-1181, this court considered the defendant's claim the second degree felony-murder rule was "unconstitutional on separation of power grounds as a judicially created doctrine with no statutory basis." Noting "there are no nonstatutory crimes in this state," the court held "the second degree felony-murder rule, although derived from the common law, is based on statute; it is simply another interpretation of section 188's abandoned and malignant heart language." (*Id.*, at p. 1183.) It is pretty much impossible to similarly tease the *Garcia* "felony-manslaughter" rule from the statutory "unlawful

killing . . . upon a sudden quarrel or heat of passion" definition of voluntary manslaughter. (Somewhat ironically, while the Court of Appeal elsewhere acknowledged the elements of section 192 were non-exclusive (Opn., p. 45), the opinion cites the involuntary manslaughter statute, section 192, subdivision (b), defining a killing "in the commission of an unlawful act, not a felony," to buttress its conclusion a killing in the commission of a felony must be an offense other than involuntary manslaughter. (Opn., p. 42.))

The voluntary manslaughter theory in *Garcia* is further anomalous given this court's definition of the offense as either an intentional killing or an unintentional killing done with conscious disregard for life. (*People v. Blakeley* (2000) 23 Cal.4th 82, 88-89; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) "A defendant . . . is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'--the unreasonable but good faith belief in having to act in self-defense." (*People v. Blakeley, supra,* 23 Cal.4th at pp. 87-88; see also *People v. Lasko, supra,* 23 Cal.4th at p. 108.) The version of voluntary manslaughter employed both by *Garcia* and adopted by the Court of Appeal here, on the other hand, is premised on the assumption

a defendant neither intended to kill nor did so with conscious disregard for life--otherwise the defendant would have been convicted of murder.

Finally, the "felony-manslaughter" rule of *Garcia* functions much like the second degree felony-murder rule: once a defendant has been found guilty of committing an inherently dangerous but non-assaultive felony resulting in death, the inquiry ends and the defendant is guilty of second degree murder. The second degree felony-murder doctrine has been criticized by legal scholars as "an artificial concept of strict criminal liability that 'erodes the relationship between criminal liability and moral culpability.'" (*People v. Howard, supra*, 34 Cal.4th at p. 1135.) Because of this erosion, this court has "repeatedly stressed that the rule 'deserves no extension beyond its required application.'" (*Ibid.*) "Felony manslaughter" is a similar "artificial concept of strict criminal liability."

If this court grants respondent's petition for review, appellant requests it also review the above questions surrounding "felony manslaughter."

B. Whether the Modified Version of CALCRIM NO. 375 Misstated the Beyond-a-Reasonable-Doubt Standard of Proof

On appeal, appellant argued the trial court committed a fundamental error by using a modified version of the pattern jury instruction, CALCRIM No. 375, "Evidence of Uncharged Offense to Prove Common Plan and or

Habit and Custom," to instruct the jury how it should view evidence of the other offenses vis-a-vis count 12.[7] In this case, the other offenses were charged, not uncharged, and the instruction told the jury it need find them true by a preponderance of the evidence only rather than beyond a reasonable doubt, thereby violating appellant's 5th and 14th Amendment rights to due process of law and 6th Amendment right to jury trial.

The first sentence of the instruction refers both to "other crimes charged" and then "the uncharged offenses," which need be proven by a preponderance of the evidence only. The instruction additionally refers to "the offenses" without specifying whether charged or uncharged, to the "similarity or lack of similarity between the uncharged offenses and the charged offenses," and to "the offenses in Counts 1, 2, 5, 6, 7, 8, 9, 10, and 11." The instruction told the jury it need find the remaining counts other than count 12 true by only a preponderance of the evidence, further instructing them such proof was different from proof beyond a reasonable doubt," then stated, "The People must still prove each charge and allegation beyond a reasonable doubt." CALCRIM Nos. 103 and 220, defining reasonable doubt, were also given. (5 RT 172-173; 15 RT 1759-1760.)

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[7]The modified instruction is quoted on pages 60-61 of the Court of Appeal opinion.

The jury was thus told two different things at the same time. As noted by this court in *People v. Dail* (1943) 22 Cal.2d 642, 653, however, "Inconsistent instructions have frequently been held to constitute reversible error where it was impossible to tell which of the conflicting rules was followed by the jury." Even worse, the reasonable doubt instruction itself--CALCRIM No. 220--allowed the jury to resolve any apparent discrepancy and find the other offenses true by the preponderance of evidence standard: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt *unless I specifically tell you otherwise*." (15 RT 1760; italics added.)

"Specifically tell you otherwise" is precisely what the court did when it read to the jury its version of CALCRIM No. 375. The court specifically told the jury the prosecution need prove the other offenses by a preponderance of the evidence only.

"In state criminal trials, the Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Cage v. Louisiana* (1990) 498 US 39, 39 [111 S.Ct. 328; 112 L.Ed.2d 339].) In other words, "The beyond a reasonable doubt standard is a requirement of due process . . . ," and, considered as a

whole, jury instructions "must correctly convey the concept of reasonable doubt to the jury." (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583].)

"The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska, supra,* 511 U.S. at p. 22.) Here, unfortunately, the trial court's modified version of CALCRIM No. 375 allowed the jury to convict on proof by a preponderance of evidence, a far cry from the reasonable doubt standard required by the Constitution.

The Court of Appeal agreed the instruction was "careless," but found it not reasonably likely the instruction confused the jury. (Opn., pp. 63-65.) Appellant respectfully disagrees, and submits the opinion's citation of *People v. Yeoman* (2003) 31 Cal.4th 93, 139, to the effect that jurors are presumed to follow the court's instructions (Opn., pp. 62-63) supports his position: The jurors should be presumed to have believed they could convict on a preponderance of evidence standard. Because there was a material misinstruction on the reasonable doubt standard, the instructional error here is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 280 [113

S.Ct. 2078, 124 L.Ed.2d 275].)

C. Whether Appellant's Mere Presence at the Scene Constituted Sufficient Evidence He Aided and Abetted Erik Wright's Criminal Threat in Count One

Penal Code section 422 was designed to punish non-constitutionally protected speech. (*People v. Franz* (2001) 88 Cal.App.4th 1426, 1441-1442.) As the prosecutor conceded, there was no evidence appellant personally threatened Eric Sorensen; prosecution witness Erik Wright did so.[8] There was scant evidence appellant was even present when Wright threatened Sorensen, and absolutely none that appellant knew Wright intended to threaten to "fucking kill" Eric Sorensen, and specifically intended to aid, facilitate, promote, encourage, or instigate the threat.

According to Eduardo Apodaca, one of the members of the group that approached the Walsh/Sorensen residence was "a big guy," but Apodaca said "it was too dark to identify nationalities or ethnicities or anything like that." (9 RT 770.) During a live lineup, Eduardo said

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[8]Wright was initially charged with assault with force likely to produce great bodily injury for the earlier assault on Sorensen's roommate Brian Walsh--appellant was not present, and Walsh was seriously injured (see Opn., p. 17)--and with making a criminal threat and attempted burglary for the incident four days later. For some reason, these charges were dismissed against Wright, an admitted perjurer in addition to whatever else he might have been, in exchange for guilty pleas to misdemeanor trespassing and misdemeanor vandalism. (9 RT 837-839.)

appellant had a body type and voice that were similar to someone present, though at the lineup he did not identify anyone, and he did not recognize appellant from the incident. (9 RT 771, 773, 775, 777.) Fernando Apodaca stated he could not describe the participants in any detail; they "just looked like normal guys" and surfers. (9 RT 793-794.)

During his testimony, in which he claimed appellant was present in the truck when he went to the Sorensen residence, Erik Wright said the guilty plea he entered under oath was not true, and admitted he lied under oath. (9 RT 838-840, 842, 844.) Wright, who testified his brother Tony was not present during the incident (9 RT 824), had previously told a detective his younger brother Tony was present in the truck. (9 RT 861-862.)

Eric Sorensen did not identify appellant as present at the scene, indicating only there was "somebody that matches his physical description at the event." (10 RT 914.) During trial, defense counsel showed Sorensen a photograph and asked whether the person had "the same build that you saw on July 8th," to which Sorensen responded in the affirmative. The photograph was of someone other than appellant. (10 RT 915.)

Even the trial court had difficulty with the prosecution's evidence. While discussing the court's proposed response to a jury question, the court

asked the prosecutor, "[T]ell me under what factual scenario is . . . Cravens an aider and abettor in the 422, the making of the criminal threat. Is his mere presence during the course of that contact and statement made by Wright sufficient?" The best the prosecutor could respond was "that all of the individuals were engaging in aggressive behavior," and that "the show of force that is produced by the group is in and of itself sufficient to show that he intended to aid, to instigate, to offer encouragement, to assist Mr. Wright in the commission of the crime." (16 RT 1927.) Unfortunately, the Court of Appeal appears to have bought into this rationale, stating the "yelling, banging on the house, and kicking over Sorensen's motorcycle" constituted "conduct that would put reasonable persons in fear for their safety," such that the jury could conclude "the attackers, including Cravens, shared the intent to threaten Sorensen." (Opn., pp. 67-68.)

It cannot be true that everyone present--including appellant--was guilty of aiding and abetting Wright's criminal threat simply by virtue of their participation in the melee. Penal Code section 422 is a specific intent crime. (*People v. Toledo* (2001) 26 Cal.4th 221, 228.) For appellant to have aided and abetted Wright's commission of it, there had to be evidence presented appellant knew Wright intended to issue a criminal threat against Sorensen, and intended to assist him in the perpetration of that threat. Even

if there were incontrovertible evidence appellant participated in the incident, say by "yelling, banging on the house, and kicking over Sorensen's motorcycle," there would not be sufficient evidence he aided and abetted Wright's criminal threat. He might well be guilty of other criminal offenses, but once again, words are at issue here, and the specific intent to assist the utterance of those words, not whether appellant played a role in assaulting the residence.

In the event this court grants review of the case, it should also review whether, assuming appellant participated in the assault on the Sorensen residence, his participation alone is sufficient evidence he aided and abetted a criminal threat.

III

STATEMENT OF ADDITIONAL ISSUES SHOULD THE COURT OF APPEAL BE REVERSED FOLLOWING A GRANT OF REVIEW

Appellant requests this court review the following two issues only if it somehow finds insufficient evidence of implied malice and reinstates the murder conviction following a grant of review.

A. Whether the Improper Joinder of the Other counts Resulted in the Murder Conviction

The trial court, stating the other offenses were "cross-admissible not only among themselves but as they may relate to count 12," denied the severance motion on the ground the other offenses were admissible under common plan and design under Evidence Code section 1101, subdivision (b), as well as habit and custom under section 1105. (4 RT 80.) The reason why appellant was convicted of murder despite insufficient evidence is not particularly mysterious, because the prosecution was allowed to present evidence of these other offenses that, with the possible exception of count 11, never would have been prosecuted had it not been for Emery Kauanui's death.[9] (See 9 Preliminary Hearing Transcript 1601-1602.) It is furthermore telling that of the 11 offenses charged against appellant, the jury acquitted him of three of them and the court found insufficient

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[9]Evidence concerning the other counts is summarized on pages 17-27, and in footnote 19 on pages 49-50, of the Court of Appeal opinion.

evidence for another to even go to the jury. Appellant's muirder conviction is an unfortunate illustration of the old saying that when you throw enough mud at a wall, some of it will stick.

Although joinder of offenses under Penal Code section 954 "is generally proper when the offenses would be cross-admissible in separate trials, since an inference of prejudice is thus dispelled" (*People v. Arias* (1996) 13 Cal.4th 92, 126), Penal Code section 954.1 states cross-admissibility is not a requirement for joinder. Even a joinder ruling correct at the time can, however, result in such "gross unfairness . . . as to deprive the defendant of a fair trial or due process of the law." (*Id.*, at pp. 508-509.) While misjoinder does not per se violate the Constitution, it does "when it results in prejudice denying a defendant his Fifth Amendment right to a fair trial." (*United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 [106 S.Ct. 725, 88 L.Ed.2d 814].)

Count one was improperly joined. Penal Code section 954 permits joinder of "two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses." Robbery and murder, for example, are "deemed to be of the 'same class,' insofar as both offenses share common characteristics as assaultive crimes against the person." (*People v. Lucky* (1988) 45 Cal.3d

259, 276.) Here, the criminal threat was of a different class from the assaultive conduct joined in the other counts. Assaultive crimes fall under Title 8 of the Penal Code, Crimes Against the Person, whereas criminal threats are in an entirely different category, Title 11.5.[10] Penal Code section 422 was designed to punish non-constitutionally protected speech (*People v. Franz, supra,* 88 Cal.App.4th at pp. 1441-1442), and intent to carry out the threat is not even an element of the offense (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1220-1221.) The Court of Appeal's citation of a civil case to support its conclusion section 422 "is in the same class of offense as assault because both are crimes against the person, regardless of how they are classified in the Penal Code" (Opn., p. 55) is unpersuasive.

Nor were the offenses connected together in their commission and "linked by a 'common element of substantial importance.'" (*People v. Lucky, supra,* 45 Cal.3d at p. 276.) The twelve counts alleged in the information spanned nearly two years, and no "single thread" connected count one with the other offenses; the Court of Appeal's statement the common element is "the intent to intimidate, terrorize, and bully the victims" (Opn., p. 55) cannot be sustained, especially in light of the

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[10]Criminal threats in Title 11.5 are more closely related to Titles 11 (crimes against the public peace), 11.6 (civil rights), and 11.7 (California Freedom of Access to Clinic and Church Entrances Act), than to Title 8 offenses.

prosecution's complete failure to produce evidence concerning what appellant actually did during the commission of count one.

In addition, none of the other counts was cross-admissible under Evidence Code section 1101, subdivision (b) as common scheme or plan. For common scheme or plan, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts." (*People v. Davis* (2009) 46 Cal.4th 539, 602.) Stating the trial court's "common scheme or plan" ruling "did not exceed the bounds of reason," the Court of Appeal concluded the trial court "could reasonably view Cravens's conduct underlying the nonhomicide counts as showing that he enjoyed assaulting people, that he particularly enjoyed punching them in the head and face, and that he engaged in the common scheme or plan of looking for or creating the least excuse to do so." (Opn., pp. 57-58.) What both the trial and appellate courts did was confuse an unfortunate character trait of appellant's--i.e., his tendency to resort to his fists at the drop of a hat, a "series of similar spontaneous acts" if ever there was one--with the presence of a design or plan to do so.

The evidence was also not admissible as habit or custom under Evidence Code section 1105. "'Habit' and 'custom' are defined as 'a regular response to a repeated specific situation,'" with "habit" generally

referring to this regular response of an individual and "custom" to that of a group or organization. (2 Jefferson, Cal. Evidence Benchbook (4th ed. 2009) § 35.61, pp. 850-851.) It is, however, important to distinguish between a person's habit and a person's character or character trait, because while relevant habit evidence is admissible, Evidence Code section 1101, subdivision (a), with certain exceptions, "precludes admissibility to evidence of a person's character or character trait offered to prove conduct in conformity with that character trait on a particular occasion . . . ." (*Id.*, § 35.63, at p. 851.) Here, both the trial court and Court of Appeal confused an unfortunate character trait of appellant's with habit, just as they confused the same unfortunate character trait with a common plan or scheme: "[T]he court could reasonably view Cravens's punching people as a consistent, semi-automatic response to the repeated situation of his instigating or escalating confrontations with perceived adversaries, or even innocent victims, for the purpose of assaulting them." (Opn., p. 59.)

The Court of Appeal went a step further, however, and found the evidence cross-admissible on the issue of intent as well. The court recognized the trial court "specifically ruled that the other counts were not to be considered on the issue of intent," correctly noting the court and parties "were focused on '*intent to kill,*' rather than intent to assault or

batter." (Opn., p. 57, italics in original.) Asserting the evidence "was admissible to negate the self-defense theory Cravens raised at trial," and citing *People v. Brown* (2004) 33 Cal.4th 892, the court concluded "it is immaterial whether the court made that ruling for the wrong reason." (Opn., p. 57.)

The *Brown* exception does not apply here, however, because the evidence as to this theory of admissibility was not "fully developed in the trial court," and did not give appellant's counsel notice of the new theory and thus an opportunity to present evidence in opposition. (*People v. Brown, supra*, 33 Cal.4th at p. 901.) In addition, the court's new "intent" theory of admissibility would perhaps be persuasive if appellant had asserted self defense in the numerous other assaultive encounters, or if he asserted he intended only to frighten rather than hit the victim when he threw the punch, but he did not. When appellant threw the punch at Emery Kauanui, he intended to hit him, and never claimed otherwise.

Finally, regarding appellant's contention he was denied due process even if the counts were properly joined in the first instance, the opinion correctly notes, "To the extent Cravens contends he was prejudiced by being convicted of second degree murder instead of a lesser included offense, our modification of the conviction to voluntary manslaughter

renders that point moot." (Opn., p. 60.) Should this court reinstate the murder conviction, however, the point will not be moot, and this court should consider appellant's contentions regarding severance.

B. Whether the Trial Court Erred in Failing to Instruct the Jury on the Theory of "Felony Manslaughter" Enunciated in *People v. Garcia*

The request that this court review this issue presupposes that this court finds appellant committed a felony, and that assault by means of force likely to produce great bodily injury is an inherently dangerous felony, as well as this court's reinstatement of the murder conviction.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) On appeal, appellant argued the trial court should have instructed the jury if it found appellant committed an inherently dangerous felony, but found he had done so without implied malice, it could, according to the theory of "felony manslaughter" enunciated in *People v. Garcia, supra*, 162 Cal.App.4th 18, convict him of voluntary manslaughter. The *Garcia* case was discussed at some length above (see II (A)), and appellant respectfully directs this court's attention to that discussion.

Because the Court of Appeal reduced appellant's conviction to voluntary manslaughter, this argument was moot and the court did not

consider it. (Opn., p. 49, fn. 18.) If, however, this court somehow finds sufficient evidence appellant consciously disregarded the possibility he might kill Emery Kauanui when he hit him a single time with his non-dominant hand and reinstates the murder conviction, it should also consider this argument. Error in failing to instruct on all lesser included offenses in a non-capital case is prejudicial if "it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Breverman, supra,* 19 Cal.4th at p. 178.) Appellant submits the Court of Appeal's finding appellant was convicted of murder despite insufficient evidence is a persuasive indication the jury might easily have reached a different conclusion had it been given other options.

CONCLUSION

For the foregoing reasons, appellant submits this court should deny respondent's petition for review. If, however, this court does grant review, appellant asks this court to consider the additional issues delineated above.

Dated: 10/08/10

Respectfully submitted,

Randall Bookout

Randall Bookout
Attorney for Defendant and Appellant,
SETH CRAVENS

CERTIFICATION OF WORD COUNT

I, Randall B. Bookout, hereby certify that, according to the computer program used to prepare this document, Answer to Petition for Review; Statement of Additional Issues Should Review Be Granted, contains 7,856 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 8th day of October 2010, at Coronado, California.

Randall Bookout

Randall Bookout
Attorney at Law

DECLARATION OF SERVICE

Case Name: *People v. Seth Cravens* Supreme Court No. _____

I declare: I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is Post Office Box 181050, Coronado, California, 92178.

On October 8, 2010, I served the attached

ANSWER TO PETITION FOR REVIEW; STATEMENT OF ADDITIONAL ISSUES SHOULD REVIEW BE GRANTED

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Coronado, California on October 8, 2010.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at Coronado, California, on October 8, 2010.

RANDALL BOOKOUT
(Typed Name)

Randall Bookout
(Signature)