IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY ARANDA, JR., Defendant and Appellant.	)	No. S188204

On Appeal from a Judgment of
the Superior Court of the State of California
in and for the County of Riverside

The Honorable Albert J. Wojcik
Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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STATEMENT OF ISSUES

As specified in the Court's January 26, 2011 order granting review, the issue to be briefed and argued in this case is as follows: "Is the trial court's failure to give a standard reasonable doubt instruction (CALJIC No. 2.90) reversible per se or is such failure subject to harmless error review? If so, should harmless error be assessed under *People v. Watson* (1956) 46 Cal.2d 818, or *Chapman v. California* (1967) 386 U.S. 18?"

STATEMENT OF APPEALABILITY

This appeal is from an order which finally disposes of all issues between the parties and is authorized by Penal Code section 1237.[1]

STATEMENT OF THE CASE

An amended information filed November 1, 2006, charged appellant with murder (§ 187, subd. (a)) (count 1), carrying a concealed firearm (§ 12025, subd. (b)(3)) (count 2), and active participation in a criminal street gang (§ 186.22, subd. (a)) (count 3). In connection with the murder charge, it was further alleged that appellant personally used a firearm (§ 12022.5, subd. (a)) and personally and intentionally discharged a firearm proximately causing death (§ 12022.53, subd. (d)), and that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Finally, it was also alleged that appellant had served three prior prison terms (§ 667.5, subd. (b)). (2 Clerk's Transcript [CT] 327-329.)

A jury was sworn to try the cause on January 8, 2009, and evidence opened on January 12, 2009. (2 CT 453, 456-457.) On January 22, 2009, count 2 was dismissed at the request of the People. (4 CT 774; 3 Reporter's Transcript [RT] 705.)

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[1] Subsequent unspecified statutory references are to the Penal Code.

Jury deliberations commenced at 1:55 p.m. on January 22, 2009. (4 CT 775, 854-855.) At 10:40 a.m. on January 26, 2009, the third day of deliberations, the jury notified the court it had reached a verdict. (4 CT 859.) The jury found appellant not guilty of murder (count 1), but convicted him of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)), and found the firearm enhancements true and the gang enhancement not true.[2] (4 CT 860, 873-874, 876-878.) The jury also convicted appellant of count 3. (4 CT 860, 875.) Appellant subsequently admitted the three prison priors. (2 CT 389; 4 RT 771-775.)

On February 27, 2009, the trial court sentenced appellant to a state prison term of 24 years and 8 months. (4 RT 795-796.)

Appellant filed a timely notice of appeal on March 13, 2009. (4 CT 922.)

In a published opinion filed October 6, 2010, the Court of Appeal reversed count 3, but otherwise affirmed the judgment. (*People v. Aranda* (2010) formerly pub. at 188 Cal.App.4th 1490.)

On January 26, 2011, this Court granted appellant's petition for review.

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[2] The trial court struck the jury's finding on the section 12022.53, subdivision (d) allegation, as it is inapplicable to the crime of voluntary manslaughter. (4 CT 860; 4 RT 763-764.)

STATEMENT OF FACTS

On Friday evening, September 10, 2004, appellant went to a party at Amber Bergine's house in Hemet with his friends Sean Tisdale and Leo Lopez in Tisdale's van. (1 RT 64-65; 2 RT 399-400; 3 RT 597.) Appellant was a member of the Hemet Trece street gang. (2 RT 307-308, 383, 387; 3 RT 594.) Several of the people at the party were members of the Southside Criminals (SSC) street gang. (1 RT 67-70, 154-155; 2 RT 379-383, 396, 419-420, 429, 443.) Members of SSC and Hemet Trece were known to get along with one another. (2 RT 422, 446.) Tisdale and Lopez were not gang members. (2 RT 399-400; 3 RT 600.)

The eventual victim, Luis Gonzalez (Luis), his girlfriend, Angela Gonzalez (Angela), and Angela's older brother, Adam Gonzalez (Adam), also attended the party that night. (1 RT 64-65, 153.) Adam was on parole at the time and had just gotten out of prison a month or two earlier. (1 RT 64, 148-149, 151.) Adam had been in and out of prison about five times and had a history of violent assault, including felony convictions for assault with force likely to produce great bodily injury in 1996 and 2001, and felony assault on an inmate in 2003. (1 RT 147-148; 2 RT 220.) Luis was a member of the 18th Street gang. (1 RT 60-61, 150-151; 3 RT 463-467.) Angela and Adam testified that Luis was no longer an active gang member

at the time of the incident (1 RT 60-61, 150-151); however, Luis had gang-related tattoos, and at the party Luis made it known he was from 18th Street. (1 RT 62; 2 RT 186, 402-404.) A gang expert testified that only more committed gang members have gang tattoos and that 18th Street, and, in particular, the Columbia Little Cycos, the subgroup to which Luis belonged, was reputedly one of the most violent gangs in the nation. (3 RT 465-467.)

Luis, Angela, and Adam were drinking alcohol and smoking marijuana, as were others at the party. (1 RT 70, 116, 118, 125, 154, 156; 2 RT 244-246.) They left the party after about two or three hours. (1 RT 70-71.) Someone at the party (not appellant) had given Adam $30 to buy methamphetamine. (1 RT 75-76, 157; 2 RT 232, 386-387, 389.) Luis and Angela refused to take Adam to purchase drugs, and instead went directly home. (1 RT 113-114, 158.)

After arriving home, Adam received a telephone call from Bergine. (1 RT 72-73, 159.) Bergine told Adam that people at the party were mad and that if he did not return the money, they would come and get it. (1 RT 159; 2 RT 236; 389, 425.) Adam could hear people in the background making threatening statements and saying they knew where he lived. (1 RT 159.) Adam was loud and "hyped up" about the call and felt he was being

disrespected. (1 RT 115, 124, 160, 162.) Luis and Angela agreed to take Adam back to the party to return the money. (1 RT 74-77,160-161; 2 RT 236, 251-252.)

When they arrived at Bergine's house, Adam went into the backyard and started yelling things like, "Why are you calling my house?" or "Who's disrespecting my house?" (1 RT 78-80, 163; 2 RT 224-225.) Adam approached appellant, whom he knew casually.[3] (1 RT 164.) Fearing he was about to be jumped from behind, Adam pushed his way forward through appellant, grabbing appellant by the shirt as he did so. (1 RT 166; 2 RT 224-226.) Adam and appellant started fighting, and that fight precipitated a larger brawl involving others, including Luis. (1 RT 81, 166-168; 2 RT 428.)

Although he was being hit by several different people, Adam kept his attention on appellant throughout the fight. (2 RT 203.) Adam took out a utility knife equipped with a razor. (1 RT 167-168; 2 RT 202-204, 217-218, 227-229, 392, 425.) Adam was on top of appellant. (1 RT 168; 2 RT 228.) Adam was not sure if he succeeded in cutting appellant with the knife, but testified that he was probably trying to do so. (2 RT 218.)

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[3] About six years earlier, Adam and appellant had lived in the same apartment complex. (1 RT 164-165.)

Someone hit Adam in the head, and appellant was able to get out from underneath him and escape. (2 RT 204, 238-239.)

A few minutes later, Adam saw appellant standing out in front of the house holding a gun. (2 RT 205-206, 234-235, 239-240.) Appellant pointed the gun at Adam, but did not fire. (2 RT 205-206.) Adam and appellant exchanged words, and appellant turned and walked away. (2 RT 206, 235.)

About thirty seconds later, a single gunshot was heard. (2 RT 209, 393, 428.) Luis was found lying on his back in the street. (1 RT 90-91; 2 RT 211-212.) Angela and Adam took Luis to the hospital, where he later died. (1 RT 92-94; 2 RT 212-213.) The cause of death was internal bleeding. (2 RT 180-181.) The bullet struck Luis in the hip and perforated a vein. (2 RT 179-180.) The gun was fired from a distance of at least three feet away. (2 RT 327-328.) On the street near where Luis' shirt was found, the police collected a blood-stained rock. (2 RT 266, 272.)

After the shooting, appellant told his friend Angela Flores: "I didn't mean to do that, I wasn't expecting to do that, Lord, I didn't mean to." (2 RT 399, 405.) Appellant told another friend, Regina Nartates, something to the effect of, "I had to do it, the guy wouldn't get off of me." (2 RT 432-433.) Appellant also left messages on Nartates' voicemail making

statements like, "I didn't mean to do this, what happened, I thought it was going to be cool." (3 RT 471.)

Appellant testified and was impeached with several prior convictions, including possession of stolen property in 1993, spousal abuse in 1996 and 1998, and giving false identification to a peace officer, a misdemeanor, in 2002. (3 RT 594-595.)

According to appellant, Adam and Luis approached him during the party and asked where he was from. (3 RT 600-601.) Appellant answered he was from Hemet. (3 RT 601.) Luis said he was from 18th Street and identified himself by his gang moniker, "Joker." (3 RT 465, 601.) Adam and Luis left the party about thirty minutes later. (3 RT 601-602.) At the time, appellant was unaware of the drug deal Adam had made. (3 RT 601.)

Later that night, Adam and Luis came running up to appellant in the backyard asking who was "disrespecting their pad." (3 RT 602-603.) Adam and Luis were jumping up and down and were "hyped up." (3 RT 603.) Adam grabbed appellant, they struggled, and Adam threw appellant to the ground. (*Ibid.*) Adam was straddled on top of appellant holding the knife. (3 RT 604-605.) Adam's attention became diverted, and appellant broke free. (3 RT 604-605.) Appellant thought "[t]hey were trying to kill" him and wanted to "get the fuck out of there." (3 RT 605.)

Appellant found his friend Lopez, and they ran to the front of the house. (3 RT 605-607.) There, appellant saw Adam arguing with a girl. (3 RT 606-607.) Adam and the girl were blocking appellant's path to Tisdale's van. (3 RT 607-608.) The girl appeared to be trying to calm Adam down. (3 RT 607.) Adam was still "hyper" and was still holding the knife. (3 RT 608, 637.) Appellant tried to move past Adam, but Adam saw him. (3 RT 608.) Adam tried to get around the girl to get to appellant. (3 RT 608, 637.) At that point, Tisdale handed appellant a gun. (3 RT 608, 612, 637.)

Adam raised the knife up at appellant. (3 RT 612, 638.) Appellant pointed the gun at Adam and told him to "Back up" and "Just get the fuck out of here, get your homeboy and get the fuck out of here." (3 RT 612.) Adam backed away. (3 RT 612, 638.) Appellant put the gun in his pocket. (3 RT 638.)

To his right, appellant saw Luis in an altercation. (3 RT 612-615.) A group of people were yelling at Luis to "leave now" and "get the fuck out of here." (3 RT 613.) Luis ran into the group and started fighting with one of them. (3 RT 614.) After the scuffle, Luis went around some bushes and ended up in front of a neighboring house, continuing to argue with the group along the way. (3 RT 616-617.) Appellant walked toward Luis and

told him to "Get the fuck out of here." (3 RT 616-617, 643.) Luis replied, "Fuck you" and started waving a rock in this hand. (3 RT 617.) Appellant again told Luis to "just get the fuck out of here." (*Ibid.*) Luis rushed appellant with the rock. (3 RT 617, 642.) Appellant thought Luis was going to smash him in the head with the rock. (3 RT 618, 622, 634.) Appellant pulled out the gun and fired at Luis from a distance of approximately ten to twelve feet away. (3 RT 617-618.) Luis dropped the rock and fell to the ground. (3 RT 618.) After the shooting, appellant left the scene with Tisdale and Lopez. (3 RT 619.)

ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO GIVE A STANDARD REASONABLE DOUBT INSTRUCTION (CALJIC NO. 2.90) WAS A STRUCTURAL DEFECT THAT REQUIRES AUTOMATIC REVERSAL.

Trial courts have a sua sponte duty to instruct the jury that the accused is presumed innocent and that the prosecution bears the burden of proving guilt beyond a reasonable doubt. (*People v. Vann* (1974) 12 Cal.3d 220, 225-226 (*Vann*); *People v. Soldavini* (1941) 45 Cal.App.2d 460, 463-464.) Prior to the 2005 adoption of the CALCRIM instructions, that obligation was routinely discharged by delivering CALJIC No. 2.90, the omitted instruction at issue in this case.[4] CALJIC No. 2.90 states as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.

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[4] Although appellant was tried in 2009, the trial court here relied on CALJIC instructions. (See 3 RT 507-508; accord, *People v. Thomas* (2007) 150 Cal.App.4th 461, 466 ["No statute, rule of court, or case mandates the use of CALCRIM instructions to the exclusion of other valid instructions."].)

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

Here, the trial court read the panel of prospective jurors a slightly altered version of CALJIC No. 2.90 during jury selection, but failed to give a standard reasonable doubt instruction (CALJIC No. 2.90 or an equivalent instruction) at anytime after the jury was impaneled. The instructions which the trial court did give, considered individually and as a whole, did not adequately inform the jury that the prosecution bore the burden of proving, beyond a reasonable doubt, each element of the offenses of which appellant was convicted. In addition, the given instructions failed to mention the presumption of innocence and did not define reasonable doubt for the jury.

The Court of Appeal in this case found that the trial court's failure to give a standard reasonable doubt instruction violated the federal Constitution. (*People v. Aranda*, *supra*, 188 Cal.App.4th at pp. 1494-1495.) The Court of Appeal further concluded that the omission of CALJIC No. 2.90 was not per se reversible error, but rather was amenable to harmless error review under the harmless-beyond-a-reasonable-doubt standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*). (*People v. Aranda*, *supra*, at p. 1495.) Under

that standard, the Court of Appeal reversed one of appellant's convictions (street terrorism) and affirmed the other (voluntary manslaughter). (*Id.* at pp. 1497-1499.)

In *Vann*, this Court analyzed the failure to give a standard reasonable doubt instruction (CALJIC No. 2.90) under the *Chapman* standard. (*Vann*, *supra*, 12 Cal.3d at p. 228.) However, *Vann* was decided nearly two decades before the United States Supreme Court's decision in *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] (*Sullivan*), which unanimously held that a constitutionally deficient reasonable doubt instruction cannot be harmless error. (*Id.* at p. 281.) California courts are divided on whether the failure to give a standard reasonable doubt instruction is per se reversible error (see *People v. Crawford* (1997) 58 Cal.App.4th 815, 821-823 (*Crawford*) and *People v. Phillips* (1997) 59 Cal.App.4th 952, 956-958 (*Phillips*)), or subject to harmless error review (see *People v. Flores* (2007) 147 Cal.App.4th 199, 203-211 (*Flores*) and *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1220-1224 (*Elguera*)).

As appellant shall explain, *Sullivan*'s reversal per se standard applies to the omission of an instruction on the reasonable doubt standard of proof. Moreover, because the instructions given at appellant's trial did not

otherwise properly convey the concept of reasonable doubt to the jury, the omission of CALJIC No. 2.90 requires reversal of both his convictions.

A. BACKGROUND.

1. JURY SELECTION.

Jury selection in this case occurred over the course of three days. On the second day (January 7, 2009), prior to commencing the voir dire examination, the trial court told the panel of prospective jurors that "[t]o find one guilty of a crime . . . you must be convinced of guilt beyond a reasonable doubt" as to each of the elements. (1 Augmented Reporter's Transcript [ART] 108.) The trial court also told the prospective jurors: "In my opinion, everything revolves around the jury instructions." (1 ART 107-108.) The trial court explained that "[i]n this voir dire process, I try to provide bits and pieces of many of the instructions," but noted that the actual instructions that applied to the case would not be given "until after you've heard from all the witnesses." (1 ART 108.) The trial court further explained to the prospective jurors that one of the reasons it could not give them "the instructions now" was because "[w]e don't know right now what all the instructions will be . . . So it's impossible, almost impossible to

present the instructions ahead of time. That's why they're presented to you afterwards." (1 ART 109-110.)

Throughout voir dire, on January 7 and 8, the trial court discussed and questioned prospective jurors on the presumption of innocence and the reasonable doubt standard of proof. (1 ART 123, 154, 180-185, 191-196, 214-215, 228; 2 ART 290, 302-305, 348, 352-354, 360-361.) On January 7, the trial court also gave prospective jurors an instruction that was very similar to CALJIC No. 2.90.[5]

2. PRETRIAL JURY INSTRUCTIONS.

None of the pretrial jury instructions that were given after the jury was impaneled and before the first witness was sworn mentioned the

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[5] The trial court stated: "A defendant in a criminal case is presumed innocent until the contrary is proved. If you have a reasonable doubt, a reasonable doubt – the word that we use probably more often in the law than any other word is that word, 'reasonable.' If you have a reasonable doubt whether the defendant's guilt is satisfactorily shown, he is entitled to a verdict of not guilty. [¶] Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in a condition that they cannot say they feel an abiding conviction of the truth of the charge. If you have a reasonable doubt as to the defendant's guilt, the defendant is entitled to a verdict of not guilty." (1 ART 179-180.)

prosecution's burden of proof or the reasonable doubt standard.[6] (See 1 RT 35-39, 54-56.)

3. PREDELIBERATION JURY INSTRUCTIONS.

On January 22, after the close of evidence and before counsels' closing arguments, the trial court delivered its final instructions to the jury. (4 CT 774, 776-853; 3 RT 667-706.) The jury was given a copy of the instructions for use in deliberating. (3 RT 667.)

Pursuant to CALJIC No. 1.00, the trial court told the jury that it would "now . . . instruct you on the law that applies to this case" and that "[y]ou must accept and follow the law as I state it to you." (4 CT 779.)

For reasons not disclosed on the record, the trial court neglected to instruct the jury, either orally or in writing, with CALJIC No. 2.90, nor did the court give a comparable instruction, like CALCRIM No. 220. Other instructions referred to reasonable doubt in specific contexts.

Instruction Relating to Circumstantial Evidence

Pursuant to CALJIC No. 2.01, the trial court instructed the jury on the use of circumstantial evidence in pertinent part:

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[6] In contrast to CALJIC, CALCRIM contains a special pretrial reasonable doubt instruction. (Compare CALJIC No. 0.50 with CALCRIM No. 103.)

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

(4 CT 786; 3 RT 674.)

Instructions Relating to Count 1

The trial court defined first and second degree murder pursuant to CALJIC Nos. 8.10, 8.11, 8.20, and 8.30. (CT 808-811; 3 RT 682-685.) In addition, pursuant to CALJIC No. 8.71, the trial court instructed the jury:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by Defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or second degree, you must give Defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree, as well as a verdict of not guilty on murder in the first degree.

(4 CT 813; 3 RT 685.)

The jury was instructed that a killing in self-defense is justifiable and not unlawful in accordance with CALJIC Nos. 5.12 and 5.13. (4 CT 828-829; 3 RT 696.) Pursuant to CALJIC No. 5.15, the jury was further instructed:

> Upon a trial of a charge of murder, a killing is lawful if it was justifiable or excusable. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is not justifiable or excusable. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty.

(4 CT 830; 3 RT 695-696.)

The trial court also gave manslaughter instructions. Manslaughter was defined pursuant to CALJIC No. 8.37 as follows:

> The crime of manslaughter is the unlawful killing of a human being without malice aforethought. It is not divided into degrees but is of two kinds, namely, voluntary manslaughter and involuntary manslaughter.

(4 CT 817; 3 RT 686.)

Voluntary manslaughter was defined in accordance with CALJIC No. 8.40. The instruction enumerated the elements of that crime and told the jury "[t]here is no malice aforethought if the killing occurred upon a sudden quarrel or heat of passion, or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily harm," however, it did not mention the burden of proof/reasonable doubt standard. (4 CT 818; 3 RT 686.)

In addition, pursuant to CALJIC No. 8.72, the trial court instructed the jury:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder.

(4 CT 814; 3 RT 685.)

Pursuant to CALJIC No. 8.50, the trial court instructed the jury in pertinent part:

> To establish that the killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury.

(4 CT 823; 3 RT 689.)

Pursuant to CALJIC No. 8.75 (Jury May Return Partial Verdict - Homicide), the trial court instructed the jury in pertinent part:

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in Count 1 and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of a lesser crime. [¶] . . . Murder in the second degree is a lesser crime to that of murder in the first degree. Voluntary manslaughter is lesser to that of murder in the second degree.

(4 CT 824; 3 RT 689-690.)

The jury acquitted appellant of murder, but convicted him of voluntary manslaughter. (4 CT 873-874.)

Instruction Relating to Count 3

The jury convicted appellant of the substantive gang crime (street terrorism) as charged in count 3. (4 CT 875.) The instruction relating to this offense, CALJIC No. 6.50, did not refer to the prosecution's burden of proof or reasonable doubt. (4 CT 839-840; 3 RT 699-701.)

Instruction Relating to the Gang Enhancement

In contrast to the instruction defining the substantive gang offense, the instruction defining the gang enhancement on count 1, CALJIC No. 17.24.2, specifically told the jury: "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it not to be true." (4 CT 825; 3 RT 693.) The jury found this allegation to be not true. (4 CT 876.)

Instructions Relating to the Firearm Enhancements

In both the instructions defining the two firearm enhancements, the trial court instructed the jury: "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it not to be true." (4 CT 826-827; 3 RT 694-695.) The jury found these allegations to be true. (4 CT 877-878.)

4. CLOSING ARGUMENTS.

During closing argument, neither the prosecutor nor defense counsel ever mentioned the reasonable doubt standard or the prosecution's burden of proof. (3 RT 706-745.)

B. APPLICABLE LEGAL PRINCIPLES.

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." (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) The Sixth Amendment requires "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of guilty." (*Sullivan, supra*, 508 U.S. at p. 277.) Together, these rights mean that a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (*United States v. Gaudin* (1995) 515 U.S. 506, 510 [115 S.Ct. 2310, 132 L.Ed.2d 444].)

As a result of these constitutional imperatives, courts must "instruct[] the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt." (*Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239, 127 L.Ed.2d 583] (*Victor*); see also *Middleton v. McNeil* (2004) 541 U.S. 433, 437 [124 S.Ct. 1830, 158 L.Ed.2d 701] ["In a criminal trial, the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement."].) While the federal Constitution does not dictate the precise words that must be used

to advise the jury of the People's burden of proof, and does not require courts to define reasonable doubt, "'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.'" (*Victor*, *supra*, at p. 5 [citation omitted].)

The reasonable doubt concept "provides concrete substance for the presumption of innocence – that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." (*In re Winship*, *supra*, 397 U.S. at p. 363.) The "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." (*Estelle v. Williams* (1976) 425 U.S. 501, 503 [96 S.Ct. 1691, 48 L.Ed.2d 126].) While the presumption of innocence and the People's burden of proof are "logically similar," courts recognize that "the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence," by cautioning jurors "'to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.'" (*Taylor v. Kentucky* (1978) 436 U.S. 478, 484 [98 S.Ct. 1930, 56 L.Ed.2d 468] [citation omitted].)

In *Taylor*, the Supreme Court found that the trial court's refusal to give a requested instruction on the presumption of innocence violated the

defendant's due process right to a fair trial, notwithstanding that the jury was instructed on the prosecution's burden of proof beyond a reasonable doubt. (*Id.* at pp. 488-490.) However, the Supreme Court has also explained that "the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution." (*Kentucky v. Whorton* (1979) 441 U.S. 786, 789 [99 S.Ct. 2088, 60 L.Ed.2d 640] .) Rather, "such a failure must be evaluated in light of the totality of the circumstances – including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors – to determine whether the defendant received a constitutionally fair trial." (*Ibid.*)

C. THE TRIAL ERROR/STRUCTURAL DEFECT DICHOTOMY.

In *Chapman*, the Supreme Court "recognized that some constitutional errors require reversal without regard to the evidence in the particular case." (*Rose v. Clark* (1986) 478 U.S. 570, 577 [106 S.Ct. 3101, 92 L.Ed.2d 460], overruled on other grounds in *Brecht v. Abrahamson* (1993) 507 U.S. 619, 637 [113 S.Ct. 1710, 123 L.Ed.2d 353], citing *Chapman, supra*, 386 U.S. at p. 23, fn. 8.) "Such errors infect the entire trial process, and necessarily render a trial fundamentally unfair." (*Neder v.*

United States (1999) 527 U.S. 1, 8 [119 S.Ct. 1827, 144 L.Ed.2d 35] (*Neder*) [internal quotation marks and citations omitted].) Most constitutional errors, however, do not rise to that level and, instead, do not require reversal if "the court [is] able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman, supra*, 386 U.S. at p. 24.)

In *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct.1246, 113 L.Ed.2d 302] (*Fulminante*), the Supreme Court articulated standards for determining whether a constitutional error should be considered reversible per se or not. The court distinguished between "trial error," which is subject to harmless error review, and "structural defects," which are not. (*Id.* at pp. 307-310.) Trial error occurs "during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.) A structural defect, on the other hand, affects "the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." (*Id.* at p. 310.) Without certain basic or "structural" protections, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." (*Rose v. Clark, supra*, 478 U.S. at pp. 577-578.) "Structural defects identified in *Arizona v. Fulminante* include: (i) 'total

deprivation of the right to counsel at trial'; (ii) trial by a 'judge who was not impartial'; (iii) 'unlawful exclusion of members of the defendant's race from the grand jury'; (iv) denial of the right to self-representation at trial; and (v) denial of the right to a public trial." (*People v. Stewart* (2004) 33 Cal.4th 425, 462, quoting *Fulminante*, *supra*, at pp. 309-310.)

Structural defects "defy" analysis by normal harmless error standards (*Fulminante*, *supra*, 499 U.S. at p. 309), because their consequences "are necessarily unquantifiable and indeterminate." (*Sullivan*, *supra*, 508 U.S. at p. 282.) Thus, in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [126 S.Ct. 2557, 165 L.Ed.2d 409], the Supreme Court found that the erroneous deprivation of a defendant's Sixth Amendment right to counsel of choice qualified as a structural defect based upon the "difficulty of assessing the effect of the error." (*Id.* at p. 149, fn. 4.) The Supreme Court has not relied upon a "single, inflexible criterion," such as "fundamental unfairness," as the "sole criterion of structural error." (*Ibid.*; cf. *Puckett v. United States* (2009) 556 U.S. 129, __ [129 S.Ct. 1423, 1432, 173 L.Ed.2d

266, 278] [plea breach "shares no common features with errors we have held structural"].)[7]

The United States Supreme Court has "often applied harmless-error analysis to cases involving improper instructions on a single element of the offense." (*Neder*, *supra*, 527 U.S. at p. 9 [listing cases].) In *Neder*, for instance, the court found that a failure to instruct the jury on an element of the offense was subject to harmless error analysis. (*Id.* at pp. 8-10.) However, in *Sullivan*, the court "made clear that at least one type of instructional error may amount to a structural defect in the trial mechanism that requires reversal regardless of the strength of the evidence of the defendant's guilt." (*People v. Flood* (1998) 18 Cal.4th 470, 494.)

In *Sullivan*, the defendant was convicted of first degree murder and sentenced to death. In the jury instructions, the trial court gave a definition

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[7] For purposes of this brief, appellant assumes structural defects involve errors implicating federal constitutional rights. However, the question whether non-constitutional errors can ever be "structural" has been the source of disagreement in the courts. (E.g., compare *United States v. Curbelo* (4th Cir. 2003) 343 F.3d 273, 280, fn. 6 ["Despite occasionally suggesting in dicta that structural errors must implicate constitutional rights, the Supreme Court has clearly held that structural errors need not be of constitutional dimension."]; with *id.* at p. 289 (Wilkins, C.J., dissenting) ["The Supreme Court and this court have repeatedly made clear that structural errors necessarily must affect a defendant's constitutional rights."].)

of reasonable doubt that had previously been found unconstitutional.[8] (*Sullivan*, *supra*, at p. 277.) The Supreme Court unanimously found that the error was a structural defect not amenable to harmless error review. As explained in *Sullivan*, "[h]armless-error review looks . . . to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. " (*Id.* at p. 279 [original emphasis].) The court reasoned that "where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings," no jury verdict exists upon which to base a harmless error analysis. (*Id.* at p. 281 [original emphasis].) *Sullivan* further explained:

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that that jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed

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[8] The trial judge in *Sullivan* "gave a definition of 'reasonable doubt' that was . . . essentially identical to the one held unconstitutional in *Cage v. Louisiana* [(1990)] 498 U.S. 39." (*Sullivan*, *supra*, 508 U.S. at p. 277.)

> verdicts for the State would be sustainable on appeal; it requires an actual finding of guilty.

(*Id.* at p. 280 [original emphasis].)

The *Sullivan* court held that the same conclusion was required under the trial error/structural defect framework established in *Fulminante*. The court found that the right to a jury verdict of guilt beyond a reasonable doubt was a "'basic protection' . . . without which a criminal trial cannot reliably serve its function," and concluded that "deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'" (*Sullivan*, *supra*, 508 U.S. at pp. 281-282.)

D. PRE-*SULLIVAN* CALIFORNIA CASES.

In *Vann*, *supra*, 12 Cal.3d 220, this Court reversed the defendants' convictions based on the trial court's inadvertent failure to instruct the jury with CALJIC No. 2.90. (*Id.* at pp. 225-228.) There, the trial court had informed prospective jurors of the People's obligation "'to prove the allegations as to each defendant, and to prove them beyond a reasonable doubt, to a moral certainty, before [the jury] would be entitled to return a guilty verdict.'" (*Id.* at p. 227, fn. 6.) Immediately thereafter, the trial court told the jury panel that, at the conclusion of the evidence, the court would

give instructions on the law. However, final instructions were not given to the jury until 16 days later, at which time the court did not refer back to the preliminary remarks made before the jurors were selected, and the instructions did not inform the jury of the presumption of innocence or of the prosecution's burden to prove guilt beyond a reasonable doubt. (*Id.* at pp. 225, 227, fn. 6.)

During final instructions, the trial court gave a circumstantial evidence instruction which, in pertinent part, told the jurors that they could not find defendants guilty based on circumstantial evidence unless "'each fact which is essential to complete a set of circumstances necessary to establish a defendant's guilt has been proved beyond a reasonable doubt.'" (*Vann*, *supra*, 12 Cal.3d at p. 226.) *Vann* concluded that this instruction was insufficient to inform the jury of the standard of proof, noting that the prosecution depended in large part on direct evidence, and that the jury might reasonably have interpreted the instruction as indicating that a lesser degree of proof was needed where the evidence was direct, and thus of higher quality than circumstantial evidence. (*Id.* at pp. 226-227.) An instruction telling the jury that evidence of good character might raise a reasonable doubt about the defendant's guilt was also found to be insufficient to cure the trial court's omission. (*Id.* at p. 227.) *Vann* concluded: "The foregoing references to reasonable doubt in isolated

applications of that standard of proof fall far short of apprising the jurors that defendants were entitled to acquittal unless each element of the crimes charged was proved to the jurors' satisfaction beyond a reasonable doubt buttressed by additional instructions on the meaning of that phrase." (*Ibid.* [fn. omitted].)

Regarding the applicable standard of prejudice, *Vann* noted that the reasonable doubt standard was "now recognized as rooted in the federal Constitution." (*Vann*, *supra*, 12 Cal.3d at p. 227 [citing *Winship*].) Without further elaboration, *Vann* assessed the error under the *Chapman* standard and found it could not conclude "the omission of the vital instruction was harmless beyond a reasonable doubt." (*Id.* at p. 228.) Significantly, *Vann* did not consider whether the trial court's failure to instruct the jury with CALJIC No. 2.90 was per se reversible error, and it is "'axiomatic that cases are not authority for propositions not considered.'" (See *In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388 [citation omitted].)

Elguera, *supra*, 8 Cal.App.4th 1214 [First App. Dist., Div. Three] was decided before *Sullivan* but after *Fulminante*. In *Elguera*, the entire trial, including jury selection and deliberations, occurred in a single day, and, prior to starting the voir dire process, the trial court read the prospective jurors CALJIC No. 2.90. (*Id.* at pp. 1217-1218.) Furthermore, during voir dire, the trial court asked each prospective juror whether he or

she understood the requirement of proof beyond a reasonable doubt, and all of them said they did. (*Id.* at p. 1218.) The trial court did not repeat CALJIC No. 2.90 in its predeliberation charge to the jury. (*Ibid.*) As in *Vann*, the trial court instructed the jury that circumstantial evidence used to establish the defendant's guilt must be proved beyond a reasonable doubt. (*Id.* at p. 1218.) However, unlike in *Vann*, "the prosecution's evidence on the crucial disputed issue was entirely circumstantial." (*Id.* at p. 1221.) Moreover, unlike in *Vann*, just before counsels' closing arguments, the trial court reminded the jury that the prosecutor had the burden of proof. (*Ibid.*) Finally, during closing arguments, the two attorneys referred to the prosecutor's burden of proof beyond a reasonable doubt at least eight times. (*Ibid.*)

The appellate court, in an opinion by Justice Werdegar, found that the trial court's failure to instruct on the presumption of innocence and proof beyond a reasonable doubt "during trial rather than during jury selection" was error. (*Elguera*, *supra*, 8 Cal.App.4th at p. 1219.) As in *Vann*, the court applied *Chapman* review to the error and found it was not harmless beyond a reasonable doubt. (*Id.* at pp. 1220-1224.) However, unlike *Vann*, the *Elguera* court considered the argument that the error was prejudicial per se. *Elguera* found that *Vann* had "answered" this question "and indicate[d] *Chapman* is the appropriate standard." (*Elguera*, *supra*, at

pp. 1219-1220 [citation omitted].) *Elguera* further noted that it was not faced with a case involving "a complete failure to acquaint the jury with the presumption of innocence and the standard of proof, or an instruction that misinformed the jury as to the correct standard of proof" – which the court suggested "would qualify as 'structural defects . . . which defy analysis by "harmless-error" standards'" – but rather "with a failure to repeat in the final charge an instruction that had been read to the jury before trial." (*Id.* at p. 1220, quoting *Fulminante*, *supra*, 499 U.S. at p. 309.)

The *Elguera* court acknowledged that "[o]ne can confidently conclude, in the circumstances of this case, that the jurors were not left ignorant of the basic principles that the defendant in a criminal case is presumed innocent and the prosecutor must prove his guilt beyond a reasonable doubt," but concluded the error was prejudicial for three reasons. (*Elguera*, *supra*, 8 Cal.App.4th at p. 1222.) First, the court noted that the reasonable doubt instruction read during jury selection was not given to actual jurors, but to prospective jurors, "who at the time did not know whether they would ultimately serve in the case," and, as a result, may not have given the instruction "the same focused attention they would have had they been impaneled and sworn." (*Ibid.*) Second, "because the court made no reference to the presumption of innocence and the general reasonable doubt standard" in its predeliberation charge to the jury, "any

intellectual awareness the jurors had that the reasonable doubt standard applied may not have been accompanied by the sense of centrality and importance the instruction should carry." (*Ibid.*) Third, the court noted that the jury was not provided any definition of reasonable doubt in the oral or written charge and was "unlikely to remember the exact definition read to them five and one-half hours earlier, and neither the instruction on circumstantial evidence nor the arguments of counsel, both of which employed the phrase, explained the meaning of 'reasonable doubt.'" (*Id.* at p. 1223.) Thus, the court concluded that even assuming the jurors applied a reasonable doubt standard, it was impossible to tell whether the "effective lack of a definition of the standard affected their application of it." (*Ibid.*)

E. POST-*SULLIVAN* CALIFORNIA CASES.

Based on *Sullivan*, the appellate courts in *Crawford*, *supra*, 58 Cal.App.4th 815 [First App. Dist., Div. Two], and *Phillips*, *supra*, 59 Cal.App.4th 952 [Second App. Dist., Div. Six], concluded that the failure to give CALJIC No. 2.90 is constitutional error that requires per se reversal of the judgment. The court in *Crawford* explained: "The *Sullivan* decision is straightforward and uncompromising. The court held that a constitutionally deficient reasonable doubt instruction cannot be harmless error." (*Crawford*, *supra*, at p. 821.) In *Crawford*, the trial was conducted over a

two day period. (*Id.* at p. 819.) The trial court informed the audience of prospective jurors of the rules embodied in CALJIC No. 2.90, but failed to include the instruction in its predeliberation charge. (*Id.* at p. 820.) In addition, the impaneled jury heard reasonable doubt referenced in other instructions. (*Ibid.*) *Crawford* concluded that, under *Sullivan*, "the trial court . . . erred in failing to instruct, after presentation of the evidence, on the requirement of proof beyond a reasonable doubt and in failing to assign the burden of proof to the prosecution, in effect denying to appellant the most elementary and fundamental right provided by our system of justice, a jury verdict of guilty beyond a reasonable doubt." (*Id.* at pp. 822-823.)

The *Crawford* court also noted that in a concurring opinion in *Sullivan*, Chief Justice Rehnquist had "expressed concern that the [*Sullivan*] majority may have painted with too broad a brush. He noted the instances where the court had applied harmless error analysis to instructional error and he suggested that the deficiency in *Sullivan* in many respects bore the hallmark of an error that is amenable to harmless-error analysis. The Chief Justice added: 'In this regard, a trial in which a *deficient* reasonable-doubt instruction is given seems to me to be quite different from one in which no reasonable-doubt instruction is given at all.' [Citation.] Nevertheless, the Chief Justice accepted the majority's conclusion that a constitutionally deficient *reasonable doubt instruction* 'is a breed apart from the many other

instructional errors that we have held *are* amenable to harmless-error analysis.' [Citation.]" (*Crawford*, *supra*, 58 Cal.App.4th at p. 822 [emphasis added in *Crawford*].)

The *Crawford* court rejected "outright" the Attorney General's position that the trial court's failure to reiterate the reasonable doubt instruction at the conclusion of trial did not violate the federal Constitution, but instead merely violated state procedural rules. (*Crawford*, *supra*, 58 Cal.App.4th at p. 823.) The court further concluded that, even if the error was not per se reversible, it would reverse the judgment based on a harmless error analysis. (*Ibid.*) Significantly, the court noted: "There can be little question that instruction on the presumption of innocence and the reasonable doubt standard of proof after the presentation of evidence places the concepts at center stage for consideration during deliberations. As *Elguera* noted, 'If any phrase should be ringing in the jurors' ears as they leave the courtroom to begin deliberations, it is "proof beyond a reasonable doubt."' [Citation.] [¶] We must be ever diligent to guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. [Citation.] Instructions given after the evidence has been received and before deliberations commence is one way of protecting an accused's constitutional right to be judged solely on the basis of proof adduced at trial." (*Id.* at pp. 825-826.)

In *Phillips*, *supra*, 59 Cal.App.4th 952, the trial court mentioned the presumption of innocence and the People's burden of proof during jury selection, but failed to instruct the impaneled jury on these concepts. (*Id.* at pp. 953, 956.) The prosecutor referred to the burden of proof during opening statements, both attorneys referred to the reasonable doubt standard during closing arguments, and the trial court gave the jury other instructions that referred to reasonable doubt. (*Id.* at pp. 957-958.) Those instructions included CALJIC No. 2.61, which stated that in deciding whether to testify, the defendant could choose to rely on the state of the evidence and the failure of the People to prove beyond a reasonable doubt every essential element of the charges; CALJIC No. 17.10, which informed the jury that if it was not satisfied beyond a reasonable doubt that the defendant was guilty of the crime charged, it could convict him of a lesser crime of which it was convinced he was guilty beyond a reasonable doubt; and CALJIC No. 2.01, informing the jury that circumstantial evidence used to establish guilt must be proved beyond a reasonable doubt. (*Id.* at pp. 955-956.) However, *Phillips* found that the attorneys' arguments and the instructions given did not cure the failure of the trial court to instruct on the meaning and applicability of the reasonable doubt standard. (*Id.* at pp. 957-958.)

The Attorney General in *Phillips* urged the court to apply a harmless error analysis "because the trial court did not give a constitutionally

defective instruction. It gave no instruction." (*Phillips*, *supra*, 59 Cal.App.4th at p. 957.) However, the *Phillips* court rejected this argument: "In our view, the trial court's error suffered no less a constitutional defect than did the trial court in *Sullivan*. The reversal per se rule of *Sullivan* does not allow for exceptions where counsel refer to the reasonable doubt instruction in argument. The structural infirmity present in *Sullivan* is present here as well." (*Id.* at pp. 957-958.)

By contrast, in *Flores*, *supra*, 147 Cal.App.4th 199 [Fourth App. Dist., Div. One], the majority declined to follow the decisions in *Crawford* and *Phillips*, and instead found that *Vann* required application of *Chapman* review to the trial court's omission of CALJIC No. 2.90.[9] During jury selection in *Flores*, the trial court fully instructed all of the ultimate jurors at least once (and some twice) with CALJIC No. 2.90; however, the trial court failed to repeat the instruction after the jury was impaneled.[10] (*Ibid.*) The predeliberation charge contained various other references to the reasonable doubt standard, including: CALJIC No. 2.01 on circumstantial evidence;

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[9] In the instant case, the Court of Appeal expressly relied on *Flores* in holding that the omission of a standard reasonable doubt instruction is not per se reversible error. (*People v. Aranda*, *supra*, 188 Cal.App.4th at p. 1495.) Incidentally, both opinions were authored by Justice Huffman.

[10] The trial court delivered its final instructions to the jury eight days after reading the jurors CALJIC No. 2.90 during voir dire. (*Flores*, *supra*, at p. 212.)

CALJIC No. 2.61 on a defendant's choice not to testify; a special findings instruction limited to three of the nineteen counts ("If you find the defendant guilty beyond a reasonable doubt of any of the counts filed pursuant to Penal Code Section 803(g) . . .."); and an instruction relating to special allegations pursuant section 667.61 ("The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find . . . it not to be true."). (*Id.* at pp. 212-213.) Furthermore, during closing argument, the prosecutor discussed the reasonable doubt standard with the jury, but defense counsel did not. (*Id.* at pp. 213-214.)

The first issue addressed in *Flores* was whether the omission of CALJIC No. 2.90 qualified as a structural defect requiring automatic reversal. The *Flores* majority criticized the analyses in *Crawford* and *Phillips* for (1) failing to consider the *Elguera* court's specific rejection of the per se reversal standard, including "the stare decisis considerations expressed in *Elguera*" (*Flores*, *supra*, 147 Cal.App.4th at p. 210); and (2) failing to acknowledge the Supreme Court's decision in *Kentucky v. Whorton*, *supra*, 441 U.S. 786, indicating that a failure to instruct on the presumption of innocence "'must be evaluated in light of the totality of the circumstances . . . to determine whether the defendant received a constitutionally fair trial.'" (*Flores*, *supra*, at pp. 210-211.)

Flores distinguished *Sullivan* because, in *Sullivan*, the jurors were misinformed as to the proper standard of proof, whereas the jurors in its own case were not. The court stated: "[T]his case in our view is markedly different from the one in which the jurors are misinformed as to the proper standard of proof." (*Flores*, *supra*, 147 Cal.App.4th at p. 211.) In reaching this conclusion, the majority noted that (1) reasonable doubt was properly defined during jury selection; (2) several of the instructions in the trial court's predeliberation charge reminded the jury that the elements of the offenses had to be proved beyond a reasonable doubt, and (3) "both counsel"[11] told the jury that the prosecutor bore the burden of proving its case beyond a reasonable doubt. (*Id.* at p. 211.) *Flores* also noted that, under the Supreme Court's decision in *Victor*, *supra*, 511 U.S. 1, the federal constitution does not require courts to define "reasonable doubt," provided the jury is correctly informed as to the standard of proof. (*Flores*, *supra*, at p. 211.)

Finally, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455, the majority concluded that application of the *Chapman* standard was required by *Vann*:

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[11] This seems to be a misstatement, as later in the opinion the majority highlights the fact that "[i]n closing argument, Flores's counsel did not make *any* reference to reasonable doubt." (*Id.* at p. 214 [original emphasis].)

> We conclude that at least in a case where the jurors have been told the prosecution must prove its case beyond a reasonable doubt and there has not been an erroneous definition of that burden of proof, the harmless-error standard applied by our Supreme Court in *Vann* remains the controlling law. We are satisfied that there has not been an intervening authority from the United States Supreme Court which undermines that precedent. Accordingly, we are bound to follow the decision of our Supreme Court.

(*Flores*, *supra*, 147 Cal.App.4th at p. 211 [citations omitted].)

Although it rejected per se reversal, *Flores* nevertheless reversed the defendant's convictions, finding the trial court had "committed federal constitutional error, which was not harmless beyond a reasonable doubt." (*Flores*, *supra*, 147 Cal.App.4th at p. 215.) *Flores* found the circumstances in the case to be "closely analogous" to those of *Vann* and *Elguera* and stated that "the trial court's instructions, considered individually and as a whole, did *not* inform the jury that the prosecution had the burden to prove each element of the charged offense(s) beyond a reasonable doubt."[12] (*Id.* at pp. 214-215 [original emphasis].)

A concurring and dissenting opinion by Justice McDonald endorsed the holdings in *Phillips* and *Crawford* and concluded that *Sullivan* required per se reversal of the defendant's convictions: "A federal constitutional

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[12] As previously noted, one of the reasons the majority gave for rejecting the per se reversal standard was because "[s]everal of the instructions given at the conclusion of the case reminded the jurors that the elements of the offenses had to be proved beyond a reasonable doubt." (*Id.* at p. 211.) The two statements seem inconsistent.

error in omitting an instruction that the prosecution has the burden to prove each element of a charged offense beyond a reasonable doubt is *structural* error under *Sullivan*, and is not subject to the harmless error analysis under *Chapman*." (*Flores*, *supra*, 147 Cal.App.4th at p. 220 [citation omitted; original emphasis].) Justice McDonald explained his position this way:

> Whether the instructional error is a "misdescription" of the burden of proof, as in *Sullivan*, or a "nondescription" (i.e., no description of or instruction on) the burden of proof, the same analysis applies. With either a misdescription or an absence of a description of that burden of proof, the jury has not found the defendant guilty based on the constitutionally required standard of proof beyond a reasonable doubt. As *Sullivan* noted, were the appellate court to apply the *Chapman* standard of prejudicial error, the wrong entity (i.e., a judge, rather than a jury) would be determining the defendant's guilt. [Citation.] Furthermore, *Sullivan* concluded the harmless-error analysis could not apply in its case because the instructional error involved a "structural defect." [Citation.] The court stated: "In *Fulminante*, we distinguished between, on the one hand, 'structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards,' [citation], and, on the other hand, trial errors which occur 'during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented,'[citation]. *Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort [i.e., a structural defect], the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function* [citation]." *Sullivan* concluded: "*The deprivation of that right* [i.e., constitutional right to a jury verdict of guilty beyond a reasonable doubt], *with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.*'" [Citation.] . . . That holding applies to not only "misdescriptions" of the burden of proof, but also to "nondescriptions" (or lack of descriptions) of the burden of proof.

(*Id.* at p. 221 [emphasis added in *Flores*[13]].)

Justice McDonald further "expressly" found that *Sullivan* "has overruled *Vann* to the extent it held the *Chapman* standard of harmless error applies to structural defects in violation of the United States Constitution (i.e., omission of an instruction on the reasonable doubt standard of proof)." (*Flores*, *supra*, 147 Cal.App.4th at p. 222.)

Finally, in *People v. Mayo* (2006) 140 Cal.App.4th 535 [Second App. Dist., Div. Seven] (*Mayo*), the court did not reach the question of whether the failure to give a standard reasonable doubt instruction (CALJIC No. 2.90) was a structural defect, or amenable to the harmless error review under the *Chapman* standard. (*Id.* at p. 548, fn. 13.) Rather, the court concluded that the trial court's omission of CALJIC No. 2.90 was not federal constitutional error because it found that the jury had been fully apprised of the reasonable doubt standard through other instructions. (*Id.* at pp. 545-549.) *Mayo* generally agreed that the omission of a standard reasonable doubt instruction is federal constitutional error "when the instructions given to the jury, taken as a whole, fail to otherwise adequately

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[13] In a footnote, Justice McDonald criticized the majority for omitting the italicized language from its recitation of *Sullivan*, adding: "That language shows the United States Supreme Court believes the denial of a defendant's right to a jury trial, including an instruction on the applicable reasonable doubt standard of proof, is structural error and *not* subject to harmless error analysis: (*Id.* at p. 221, fn. 1 [original emphasis].)

convey the concept of reasonable doubt" (*id.* at p. 542), but determined that the instructions in that case specifically advised the jury that the defendant was entitled to acquittal unless each element of the charged offense (murder) was proved beyond a reasonable doubt. Finding no federal constitutional error, *Mayo* applied the standard of prejudice articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), and concluded that any error in omitting CALJIC No. 2.90 was harmless under state law. (*Mayo*, *supra*, at pp. 550-552.)

F. THE OMISSION OF AN INSTRUCTION ON THE REASONABLE DOUBT STANDARD IS PER SE REVERSIBLE ERROR UNDER *SULLIVAN*.

Failing to instruct jurors on the proper standard of proof is not "markedly different" from misinforming jurors on the proper standard of proof. (*Flores*, *supra*, 147 Cal.App.4th at p. 211.) Like an error in an instruction defining reasonable doubt, a verdict rendered by a jury that is not instructed "on the necessity that the defendant's guilt be proved beyond a reasonable doubt" (*Victor*, *supra*, 511 U.S. at p. 5), is an error that defies harmless error analysis. In either case, there is "no jury verdict of guilty-beyond-a-reasonable-doubt," and thus "no object . . . upon which harmless error scrutiny can operate." (*Sullivan*, *supra*, 508 U.S. at p. 280 [italics omitted].) The failure to properly inform the jury of the reasonable

doubt standard, whether by deficient instruction, or no instruction at all, deprives a defendant of a "'basic protection" with consequences that are "unmeasurable." (*Id.* at p. 281.) In the latter case, as in the former, "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made," and a reviewing court can only speculate as to "what a reasonable jury would have done." (*Ibid.*)

This Court's decision in *Vann*, decided long before *Sullivan* and *Fulminante*, did not consider whether the trial court's omission of a general reasonable doubt instruction was per se reversible error. (*Vann*, *supra*, 12 Cal.3d at pp. 227-228; see generally *People v. Sengpadychith* (2001) 26 Cal.4th 316, 325-326 [intervening United States Supreme Court authority interpreting federal Constitution supersedes contrary prior authority on issue by this Court].) Accordingly, contrary to the views expressed in *Elguera* and *Flores*, the fact *Vann* applied harmless error analysis has no precedential value under the doctrine of stare decisis. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 684 ["'It is axiomatic that cases are not authority for propositions not considered.'"] [citation omitted].) Omission of an instruction on the reasonable doubt standard of proof is structural error under *Sullivan*. (See also *Jackson v. Virginia* (1979) 443 U.S. 307, 320, fn. 14 [99 S.Ct. 2781, 61 L.Ed.2d 560] ["Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a

reasonable doubt can never be harmless error."]; *Ex Parte Gillentine* (Ala. 2007) 980 So.2d 966, 971 ["there is no question that the trial court's failure to give a reasonable-doubt instruction constitutes a structural error"]; *Montgomery v. State* (1981) 292 Md. 84, 93 [437 A.2d 654, 658] [stating that inclusion of a reasonable doubt instruction "is so indispensable that the Supreme Court has indicated that failure to instruct the jury of the requirement of the reasonable doubt standard is never harmless error"].)

The omission of a standard reasonable doubt instruction, however, might not always result in the "[d]enial of the right to a jury verdict of guilt beyond a reasonable doubt." (*Sullivan*, *supra*, 508 U.S. at p. 281.) Other instruction(s) could conceivably cover the same territory as the missing instruction. That is essentially what the *Mayo* court found, and what the courts in *Vann*, *Elguera*, *Crawford*, *Phillips*, and *Flores* did not. This notion is consistent with *Victor*'s observation that, while the federal Constitution "does not require that any particular form of words be used in advising the jury of the government's burden of proof . . . 'taken as a whole, the instructions [must] correctly convey the concept of reasonable doubt to the jury.'" (*Victor*, *supra*, 511 U.S. at p. 5 [citation omitted]; see also *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248 ["correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction"]

[internal quotation marks and citations omitted].) Here, however, the other instructions, viewed collectively, were not sufficient to satisfy federal constitutional requirements.

G. BECAUSE THE GIVEN INSTRUCTIONS, TAKEN AS A WHOLE, FELL SHORT OF CONVEYING THE CONCEPT OF REASONABLE DOUBT TO THE JURY, REVERSAL IN THIS CASE IS AUTOMATIC.

The jurors here were led to believe that the law that applied to the case was limited to the information contained in the trial court's final instructions. At the beginning of its final charge, the trial court told the soon to be deliberating jurors that it would "*now* . . . instruct you on the law that applies to this case," and that "[y]ou must accept and follow the law as I state it to you." (3 RT 670 [italics added].) In a similar vein, at the other end of the trial process, the court repeatedly told the jurors during jury selection that the actual instructions they would apply to the case would not be revealed to them until "after" all the witnesses had testified. (1 ART 108, 109, 110, 118.) Thus, as *Vann* noted in nearly identical circumstances, "In net effect the jurors were given to understand that they had received a self-contained, complete statement of the law they were to follow." (*Vann*, *supra*, 12 Cal.3d at p. 227, fn. 6; see also *Flores*, *supra*, 147 Cal.App.4th at p. 215 [pursuant to the directions in CALJIC No. 1.00 "the jurors

presumably (and reasonably) inferred that all of the instructions on the law that they were to apply to the facts in this case were given them during the court's predeliberation instructions"].) Consequently, although the trial court referenced the presumption of innocence and reasonable doubt standard during voir dire, and even read the panel of prospective jurors a modified version of CALJIC No. 2.90, this "did not cure the error of the court's omission" as to the impaneled jury. (*Vann*, *supra*, at p. 227, fn. 6.)

Furthermore, the trial court's pretrial remarks on the reasonable doubt requirement were given to prospective jurors "who at the time did not know whether they would ultimately serve in the case." (*Elguera*, *supra*, 8 Cal.App.4th at p. 1222.) As explained in *Flores*, "it is unreasonable to expect prospective jurors, who have yet to be empanelled and sworn as actual jurors in the trial, to give the necessary attention and weight to instructions given by a trial court during jury selection as the federal constitution requires." (*Flores*, *supra*, 147 Cal.App.4th at p. 215.)

The passage of time further diluted any possibility that information the jurors heard during jury selection on the burden of proof/reasonable doubt concepts found its way into the deliberating room. (See *Elguera*, *supra*, 8 Cal.App.4th at p. 1223.) The CALJIC No. 2.90 based instruction read during voir dire, for instance, occurred 15 days before final instructions were given. (Cf. *Vann*, *supra*, 12 Cal.3d at p. 227, fn. 6 [final

jury instructions given 16 days after court spoke to prospective jurors about the burden of proof during jury selection]; *Flores*, *supra*, 147 Cal.App.4th at p. 215 [court gave final jury instructions 8 days after reading prospective jurors CALJIC No. 2.90]; *Elguera*, *supra*, at p. 1223 [jurors "unlikely to remember" reasonable doubt definition read 5 ½ hours earlier during jury selection].)

In sum, the events of jury selection did not blunt the constitutional significance of the omission of CALJIC No. 2.90 from the trial court's predeliberation charge. (See *Vann*, *supra*, 12 Cal.3d at p. 227, fn. 6.)

The circumstantial evidence instruction, CALJIC No. 2.01[14], also contributed little to the jury's understanding of the reasonable doubt concept, and might even have made matters worse. Cases involving the giving of similar instructions have concluded that such instructions are insufficient to comport with federal constitutional requirements, especially where, as in this case, the challenged convictions are based in part on direct evidence. (*Vann*, *supra*, 12 Cal.3d at pp. 226-227; *Flores*, *supra*, 147 Cal.App.4th at pp. 215-216; *Crawford*, *supra*, 58 Cal.App.4th at pp. 824-825; *Elguera*, *supra*, 8 Cal.App.4th at p. 1218.) CALJIC No. 2.01 only reaches circumstantial evidence; "it fails to tell the jurors that a

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[14] 4 CT 786; 3 RT 674.

determination of guilt resting on direct testimony must also be resolved beyond a reasonable doubt." (*Vann*, *supra*, at p. 226.) Here, the prosecution relied "in large part on direct evidence" (*ibid.*), namely, the testimony and statements of the people who attended the party where the incident occurred. In these circumstances, as this Court has noted, CALJIC No. 2.01 might actually lead jurors to apply a *lower* burden of proof than the constitution requires: "An instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence, rather than importing a need for the same degree of proof where the crime is sought to be established by direct evidence, might with equal logic have been interpreted by the jurors as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality." (*Id.* at pp. 226-227.) Thus, "the trial court's instruction with CALJIC No. 2.01 in this case did *not* effectively inform the jury" of the prosecution's general burden of proof of proof beyond a reasonable doubt. (*Flores*, *supra*, at p. 216 [original emphasis].)

The trial court's instructions on the count 1 enhancement allegations – firearm[15] and gang[16] – referred to the reasonable doubt standard; however,

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[15] 4 CT 826-827; 3 RT 694-695.

[16] 4 CT 825; 3 RT 693.

"indirect reference[s]" such as these are "insufficient to satisfy federal constitutional requirements." (*Flores*, *supra*, 147 Cal.App.4th at p. 217.) It would be unreasonable to "presume that a reasonable doubt instruction given in a *specific* context (e.g., regarding special findings to be made in connection with certain charge(s)) will necessarily be understood by all of the jurors to apply *generally* to their determination of the defendant's guilt on *all* of the charged offenses (or even to the specific charges to which that special instruction applies)." (*Ibid.* [original emphasis].)

The trial court's instructions on the substantive crimes were also insufficient to fill the hole left by the omission of CALJIC No. 2.90. The only offense where the jury was expressly told the prosecution bore the burden of proving each element beyond a reasonable doubt was with respect to murder, and appellant was acquitted of that crime. Pursuant to CALJIC No. 8.50, entitled "Murder and Manslaughter *Distinguished*," the jury was instructed in relevant part: "To establish that a killing was murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt *each of the elements of murder* . . . ." (4 CT 823 [emphasis added]; 3 RT 689.) The fact that the jury was not also expressly instructed that the prosecution bore the burden of proving each of the elements of voluntary manslaughter and street terrorism beyond a reasonable doubt is problematic. In these circumstances, the jury might have reasonably concluded that the

prosecution's burden of proof was not as demanding for the lesser offense of voluntary manslaughter and the separate offense of street terrorism as it was for murder. (Cf. *Vann*, *supra*, 12 Cal.3d at pp. 226-227 [because circumstantial evidence instruction failed to state that guilt based on direct evidence also had to be proved beyond a reasonable doubt, jurors might have logically interpreted instruction "as importing the need of a lesser degree of proof where the evidence is direct and thus of a higher quality"].) This concern is particularly troubling because the jury convicted appellant of voluntary manslaughter and street terrorism, but acquitted him of murder.

The other homicide instructions contained only limited or indirect references to the prosecution's burden of proof beyond a reasonable doubt. CALJIC No. 8.71 (Doubt Whether First or Second Degree Murder) was limited to murder. As presented to the jury, this instruction provided in relevant part: "If you are convinced beyond a reasonable doubt and unanimously agree that *the crime of murder* has been committed by a defendant . . .." (4 CT 813[emphasis added]; 3 RT 685.)

CALJIC No. 5.15 informed the jury that the burden was on "the prosecution to prove beyond a reasonable doubt that the homicide was unlawful." (4 CT 830; 3 RT 695-696.) This instruction, entitled "*Charge of Murder* – Burden of Proof Re Justification or Excuse," expressly referred to murder, but did not mention manslaughter: "Upon a trial of *a*

charge of murder, a killing is lawful if . . .." (4 CT 830 [emphasis added].) Without the guidance of a standard reasonable doubt instruction, a juror in this case would reasonably have thought this instruction pertained only to murder. (See *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127 ["[w]e must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors"]; *Falconer v. Lane* (7th Cir. 1990) 905 F.2d 1129, 1136-1137 [instructions cannot be analyzed as if the jury consisted of lawyers].) Furthermore, this instruction only addressed a single element. (See *Flores*, *supra*, 147 Cal.App.4th at p. 216 ["[w]e cannot presume that a reasonable doubt instruction given in a *specific* context . . . will necessarily be understood by all of the jurors to apply *generally* to their determination of the defendant's guilt"] [original emphasis].)

Pursuant to CALJIC No. 8.72 (Doubt Whether Murder or Manslaughter), the jury was instructed: "If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of that doubt and find it to be manslaughter rather than murder." (4 CT 814; 3 RT 685.) However, like the previously discussed instruction, this one too only addressed the standard of proof as to the specific element of

"unlawfulness." (See *Flores*, *supra*, 147 Cal.App.4th at p. 216 [improper to "presume" jurors will understand reasonable doubt standard applies "*generally* to their determination of the defendant's guilt" from a "reasonable doubt instruction given in a *specific* context"].) Furthermore, this instruction did not assign the burden of proof to the prosecution. (See *Middleton v. McNeil*, *supra*, 541 U.S. at p. 437 ["the State must prove every element of the offense, and a jury instruction violates due process if it fails to give effect to that requirement"].)

Finally, the trial court referenced reasonable doubt when instructing the jurors on the procedure they should follow for completing the verdict forms. Specifically, pursuant to CALJIC No. 8.75, the "acquittal first"[17] or *Stone*[18] instruction, the jurors were instructed in relevant part: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in Count 1 and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of a lesser crime. [¶] You have

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[17] The "'acquittal first'" procedure requires "the jury [to] grapple with the question of a defendant's guilt of the highest crime charged." (*People v. Fields* (1996) 13 Cal.4th 289, 304.)

[18] *Stone v. Superior Court* (1982) 31 Cal.3d 503, 519 held that the jury must acquit of the greater offense before returning a verdict on the lesser included offense.

been provided with guilty and not guilty forms as to Count 1 for the crime of murder in the first degree and lesser crimes thereto. Murder in the second degree is a lesser crime to that of murder in the first degree. Voluntary manslaughter is lesser to that of murder in the second degree." (3 RT 689-690; 4 CT 824.) "[I]ndirect reference" to the reasonable doubt standard in an instruction telling jurors how to fill out the verdict forms is "insufficient to satisfy federal constitutional requirements." (*Flores*, *supra*, 147 Cal.App.4th at p.217.) Furthermore, this instruction failed to assign the burden of proof to the State. (See *Crawford*, *supra*, 58 Cal.App.4th at pp. 822-823 ["*Sullivan* compels the conclusion that the trial court . . . erred in failing to instruct . . . on the requirement of proof beyond a reasonable doubt *and in failing to assign the burden of proof to the prosecution*, in effect denying to appellant the most elementary and fundamental right provided by our system of justice, a jury verdict of guilty beyond a reasonable doubt"].)

In sum, none of the foregoing instructions, individually and collectively, correctly expressed the concept of reasonable doubt to the jury. (See *Victor*, *supra*, 511 U.S. at p. 5.) Rather, as in *Vann*, "[t]he foregoing references to reasonable doubt in isolated applications of that standard of proof fall far short of apprising the jurors that [appellant] [was] entitled to acquittal unless each element of the crimes charged was proved to the

jurors' satisfaction beyond a reasonable doubt . . .." (*Vann*, *supra*, 12 Cal.3d at p. 227.)

In *Crawford*, the trial court instructed the jury on reasonable doubt as to an enhancement allegation which the jury rejected, but did not do so for the underlying offense on which the defendant was convicted. (*Crawford*, *supra*, 58 Cal.App.4th at p. 825.) These circumstances prompted the court to note: "One can only speculate as to what the jurors would have done had they been admonished to find guilt only if they were convinced beyond a reasonable doubt" on the underlying crime as well. (*Ibid.*)

The same is true in this case. Here, unlike the instructions relating to murder and the gang allegation, the instructions relating to the crimes of conviction, voluntary manslaughter and street terrorism, did not apprise the jury of "[w]hat the factfinder must determine to return a verdict of guilty," namely, that "[t]he prosecution bears the burden of proving all elements of the offense[s] . . . , and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements." (*Sullivan*, *supra*, 508 U.S. at pp. 277-278 [citations omitted].) In fact, the street terrorism instruction in this case did not contain any reference whatsoever to the prosecution's burden of proof or the reasonable doubt standard. (3 RT 699-701; 4 CT 839-840.)

The fact that the trial court did not mention the presumption of innocence to the jury after it was impaneled, is further evidence that the omission of CALJIC No. 2.90 violated the federal Constitution. Although not necessarily of federal constitutional magnitude itself (*Kentucky v. Whorton*, *supra*, 441 U.S. at p. 789), the failure to instruct on the presumption of innocence is another indication that the instructions, taken as a whole, did not "'correctly convey the *concept* of reasonable doubt to the jury.'" (*Victor*, *supra*, 511 U.S. at p. 5 [citation omitted; emphasis added]; see also *Coffin v. United States* (1895) 156 U.S. 432, 453 [15 S.Ct. 394, 39 L.Ed.481] [presumption of innocence "lies at the foundation of the administration of our criminal law"].)

Absent a standard reasonable doubt instruction, it cannot reasonably be presumed that the jurors in this case understood that the prosecution's burden of proof beyond a reasonable doubt applied "*generally* to their determination of the defendant's guilt on *all* of the charged offenses . . .." (*Flores*, *supra*, 147 Cal.App.4th at p.217 [original emphasis].) Accordingly, because appellant was denied his federal constitutional right to a jury verdict of guilt beyond a reasonable doubt, his convictions must be reversed without a harmless error analysis. (*Sullivan*, *supra*, 508 U.S. at pp. 279-282.)

II.

ASSUMING THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY WITH CALJIC NO. 2.90 IS SUBJECT TO HARMLESS ERROR REVIEW, THEN *CHAPMAN* IS THE APPROPRIATE PREJUDICE STANDARD.

"If a trial court's instructional error violates the United States Constitution, the standard stated in *Chapman* requires the People, in order to avoid reversal of the judgment, to 'prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.' But if a trial court's instructional error violates only California law, the standard is that stated in *Watson*, which permits the People to avoid reversal unless '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. Mower* (2002) 28 Cal.4th 457, 484 [citations omitted].)

Should this Court conclude that the trial court's failure to give a standard reasonable doubt instruction is subject to harmless error analysis, then the error should be assessed under the *Chapman* standard of review. As previously explained, the trial court's omission of CALJIC No. 2.90 from its predeliberation charge to the jury violated appellant's due process and jury trial rights under the Sixth and Fourteenth Amendments. (*In re Winship*, *supra*, 397 U.S. at p. 364; *Sullivan*, *supra*, 508 U.S. at pp. 277-

278.) Consequently, if the error here does not rise to the level of a structural defect, its prejudicial effect must be determined under the federal harmless-beyond-a-reasonable-doubt test. (*Chapman*, *supra*, 386 U.S. at p. 24.)

A. THE *WATSON* STANDARD APPLIES TO CONSTITUTIONAL AS WELL AS NONCONSTITUTIONAL ERRORS, BUT BOWS TO *CHAPMAN* WHEN A FEDERAL CONSTITUTIONAL RIGHT IS INVOLVED.

"Unlike the United States Constitution, which includes no provision relating to reversible error, the California Constitution contains a specific provision addressed to this subject, article VI, section 13." (*People v. Cahill* (1993) 5 Cal.4th 478, 487-488 (*Cahill*).) "That constitutional provision states, in relevant part: 'No judgment shall be set aside, or new trial granted, in any cause, 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.'" (*People v. Flood*, *supra*, 18 Cal.4th at p. 487.) Interpreting this provision, *Watson* concluded that "a 'miscarriage of justice' should be declared only when the court 'after an examination of the entire cause, including the evidence,' 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." (*Watson*, *supra*, 46 Cal.2d at p. 836; accord, *Cooper v. California* (1967) 386 U.S. 58, 62 [87 S.Ct. 788, 17 L.Ed.2d 730] [when "state standards alone have been violated, the State is free . . . to apply its own state harmless-error rule to such errors of state law"].)

"[T]he California constitutional provision governing reversible error . . . applies to constitutional as well as to nonconstitutional errors." (*Cahill*, *supra*, 5 Cal.4th at p. 491.) Thus, "*for purposes of California law*," the prejudicial effect of the error in this case should be determined under "the generally applicable reasonable-probability test embodied in article VI, section 13, of the California Constitution." (*Id.* at pp. 509-510 [original emphasis].) However, "because the *Watson* standard is less demanding than the harmless-beyond-a- reasonable-doubt standard," whenever the failure to give a standard reasonable doubt instruction violates a defendant's rights under the federal Constitution, the prejudicial effect of the error must be assessed under the federal harmless error test of *Chapman*. (*Id.* at p. 510; *Chapman*, *supra*, 386 U.S. at p. 21 [federal law governs harmless error analysis if error violates federal constitutional right].)

B. HARMLESS ERROR ANALYSIS IN THIS CASE IS GOVERNED BY FEDERAL LAW BECAUSE THE TRIAL COURT'S FAILURE TO DELIVER A GENERALLY APPLICABLE INSTRUCTION ON THE PROSECUTION'S BURDEN OF PROVING GUILT BEYOND A REASONABLE DOUBT AND THE PRESUMPTION OF INNOCENCE CONSTITUTES FEDERAL CONSTITUTIONAL ERROR.

This Court in *Vann*, and the Courts of Appeal in *Flores*, *Crawford*, *Phillips*, and *Elguera*, all found that the trial court's failure to give a standard reasonable doubt instruction constituted federal constitutional error, even though reasonable doubt was referred to in other instructions read to the jury. (*Vann*, *supra*, 12 Cal.3d at pp. 227-228; *Flores*, *supra*, 147 Cal.App.4th at pp. 214-215, 219-220; *Crawford*, *supra*, 58 Cal.App.4th at p. 817, 822-823, 825; *Phillips*, *supra*, 59 Cal.App.4th at pp. 953-954; *Elguera*, *supra*, 8 Cal.App.4th at pp. 1219-1220.)

Mayo is the only published case to find that a trial court's failure to give such an instruction was not a federal constitutional error. (*Mayo*, *supra*, 140 Cal.App.4th at pp. 546, 548-549.) *Mayo* observed that the absence of a standard reasonable doubt instruction does not violate the federal Constitution when "other instructions adequately inform[] the jury of the correct standard of proof." (*Id.* at p. 549.) Based on its review of the instructions given in that case, *Mayo* found that, "In sharp contrast to *Vann* the instructions in the instant case fully and repeatedly informed the jurors

that [defendant] was entitled to an acquittal unless each element of the crime charged was proved beyond a reasonable doubt." (*Id.* at p. 545.) Specifically, the *Mayo* court concluded that the murder and manslaughter instructions given in that case sufficiently "inform[ed] the jury it had to acquit [the defendant] of murder unless each and every element of murder (including first degree murder) was proved beyond a reasonable doubt . . .." (*Id.* at p. 546.) According to *Mayo*, this situation "plainly distinguish[ed] [the defendant's] case not only from *Vann*, but also from those appellate court decisions relying on *Vann* to hold the omission of CALJIC No. 2.90 was federal constitutional error." (*Ibid.* [citation omitted].)

Many of the same homicide instructions given in *Mayo* were also given in this case. (See *Mayo*, *supra*, 140 Cal.App.4th at p. 545.) Nevertheless, *Mayo* is easily distinguished. The essential difference is that the defendant in *Mayo* was charged and *convicted* of murder, whereas appellant was charged and *acquitted* of murder, and was instead convicted of voluntary manslaughter and street terrorism. (*Id.* at pp. 539-541.) Therefore, even assuming the jury instructions in this case can properly be construed as having informed the jurors that appellant was entitled to acquittal unless each element of *murder* was proved beyond a reasonable doubt, this fact provides no basis for finding that the trial court's omission

of CALJIC No. 2.90 was not a federal constitutional error. In short, *Mayo* is inapplicable.

As appellant explained in Argument I, part G, *ante*, the instructions in this case, whether viewed individually or collectively, did not properly convey the concept of reasonable doubt to the jury. (*Victor*, *supra*, 511 U.S. at p. 5.) The impaneled jury was not informed it had to acquit appellant of voluntary manslaughter and street terrorism unless each and every element of *those* offenses was proved beyond a reasonable doubt. The impaneled jury was not properly instructed that *the People* bore the burden of proof on all of the elements of *all* of the offenses and allegations, and that appellant was presumed innocent. (*In re Winship*, 397 U.S. at pp. 363-364; *Flores*, *supra*, 147 Cal.App.4th at p.217.) In these circumstances, the trial court's failure to instruct the jury with CALJIC No. 2.90 on the reasonable doubt standard of proof and the presumption of innocence constitutes federal constitutional error under the Sixth and Fourteenth Amendments. (*Sullivan*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, 397 U.S. at pp. 363-364.) Since the error is of federal constitutional dimension, the standard of error is governed by federal law. (*Chapman*, *supra*, 386 U.S. at p. 21.) As such, the state law standard of error articulated in *Watson* is not the appropriate standard to use in assessing the prejudicial effect of the error in this case.

C. THE TRIAL COURT'S FAILURE TO DELIVER A STANDARD REASONABLE DOUBT INSTRUCTION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A *Chapman* analysis asks "whether it appears beyond a reasonable doubt that the error did not contribute to [the] jury's verdict. [Citations.]" (*People v. Flood*, *supra*, 18 Cal.4th at p. 504.) Under this standard, the trial court's failure to give the impaneled jury a standard reasonable doubt instruction was not harmless as to either of appellant's convictions.

"[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.' [Citation.]" (*In re Winship*, *supra*, 397 U.S. at p. 364.) "The reasonable doubt instruction more than any other is central in preventing the conviction of the innocent." (*People v. Brigham* (1979) 25 Cal.3d 283, 290.) "'No instruction could be more vital . . ..'" (*Vann*, *supra*, 12 Cal.3d at p. 227 [citation omitted].)

"There can be little question that instruction on the presumption of innocence and the reasonable doubt standard of proof *after the presentation of evidence* places the concepts at center stage for consideration during deliberations. . . . 'If any phrase should be ringing in the jurors' ears as they leave the courtroom to begin deliberations, it is 'proof beyond a reasonable doubt.'" (*Crawford*, *supra*, 58 Cal.App.4th at p. 825 [original emphasis],

quoting *Elguera*, *supra*, 8 Cal.App.4th at pp. 1222-1223; see also *People v. Gayle* (1980) 431 N.Y.S.2d 18, 21 [76 A.D.2d 587, 590] ["It is not unlikely that some jurors understand that a defendant is presumed innocent at the outset of the trial, but do not fully understand that the principle continues during the course of the trial."].)

In its final charge to the jury, the trial court here made no reference to the presumption of innocence, and its references to the reasonable doubt standard of proof pertained to specific contexts or particular allegations. The court also failed to provide the jury with any definition of reasonable doubt.[19] (See *Vann*, *supra*, 12 Cal.3d at p. 227; *Elguera*, *supra*, 8 Cal.App.4th at p. 1223.) Although there is no federal requirement to define reasonable doubt to a jury (*Victor*, *supra*, 511 U.S. at p. 5), as Justice Ginsburg observed in her concurrence in *Victor*, "several studies of jury behavior have concluded that 'jurors are often confused about the meaning of reasonable doubt' when that term is left undefined." (*Id.* at p. 26 (Ginsburg, J., conc. in part and conc. in the judgment) [citation omitted].)

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[19] CALJIC No. 2.90 has two paragraphs, the first setting forth the concept of reasonable doubt (including the presumption of innocence and the prosecution's burden of proof), and the second defining reasonable doubt as articulated by the Legislature in Penal Code section 1096. As noted in *People v. Hearon* (1999) 72 Cal.App.4th 1285, 1286, this definition has passed constitutional muster with every California appellate court to consider it, as well as with the Ninth Circuit Court of Appeals in *Lisenbee v. Henry* (9th Cir. 1999) 166 F.3d 997, 990-1000.

Here, the danger of such confusion was heightened because the given instructions contained inconsistent references to the standard of proof which could have led jurors to believe "reasonable doubt" applied to some crimes and allegations, but not others.

Appellant's self-defense claim was plausible and apparently had traction with the jury. The evidence at trial established that it was the victim's friend, Adam, that instigated the incident, and it was undisputed that appellant was beaten and attacked with a knife by Adam during the brawl. Just before the shooting, Adam approached appellant again with the knife. Appellant pointed the gun at Adam but did not shoot because Adam backed away. (3 RT 612, 638.) The fact that appellant did not fire at Adam, but did fire at Luis, would have strongly suggested to the jury that appellant was telling the truth when he testified Luis came rushing at him with a rock in his hand. (3 RT 617, 642.) Physical evidence – the blood stained rock the police recovered from the street near where Luis was shot – further supported appellant's self-defense claim. (2 RT 266, 272.)

The length of the jury deliberations, somewhere in the range of six to eight hours over the course of three days, and the numerous jury questions and requests to rehear testimony, indicate this was a close case. (4 CT 775, 854-862; see, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341 [defendant's guilt "far from open and shut" where jury deliberated nearly

six hours]; *People v. Cribas* (1991) 231 Cal.App.3d 596, 607-608 [reaback request and jury question demonstrated "jury did not view its decision as clear cut"].) The jury rejected the most serious charge, murder, and this was the one crime where the jury was told it had to acquit unless the People proved each and every element beyond a reasonable doubt. (See *Crawford, supra*, 58 Cal.App.4th at p. 825 [emphasizing that jurors were instructed on reasonable doubt standard as to enhancement allegation which they rejected, and were not instructed on reasonable doubt standard as to underlying offense on which they convicted].) Without a clear, general instruction on the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, it cannot be concluded that the omission of CALJIC No. 2.90 was harmless beyond a reasonable doubt as to appellant's voluntary manslaughter conviction.

The jury instruction relating to the substantive gang crime, count 3, did not include any reference at all to the prosecution's burden of proof or reasonable doubt. (4 CT 839-840.) By contrast, the instruction relating to the gang allegation did refer to the constitutionally mandated standard of proof, and the jury rejected this allegation. (4 CT 825.) "One can only speculate as to what the jurors would have done had they been admonished to find guilt only if they were convinced beyond a reasonable doubt" on the gang offense as well. (*Crawford, supra*, 58 Cal.App.4th at p. 825.) It

cannot be concluded beyond a reasonable doubt that the trial court's failure to give such a vital instruction did not contribute the jury's verdict on count 3.

"We must be ever diligent to guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." (*Crawford, supra*, 58 Cal.App.4th at p. 826.) Here, appellant's right to have every element of the voluntary manslaughter and street terrorism offenses proved beyond a reasonable doubt was not adequately safeguarded. The trial court's instructional omission was not harmless as to either conviction. Reversal is required.

CONCLUSION

For all the foregoing reasons, appellant respectfully requests this Court find that the omission of CALJIC No. 2.90 from appellant's trial requires automatic reversal of his convictions. Alternatively, should the Court conclude that the failure to deliver a standard reasonable doubt instruction to the impaneled jury was not a structural defect, reversal of appellant's convictions is required under the *Chapman* standard.

Respectfully submitted,

William J. Capriola
Counsel for Appellant

WORD COUNT COMPLIANCE

Pursuant to rule 8.520(c) of the California Rule of Court, and in reliance on the word count of the computer program used to prepare this document, I hereby certify that this document contains 15,256 words, excluding the tables, cover information, signature block(s), quotation of issues, and this certificate. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Sebastopol, California, on August 15, 2011.

William J. Capriola

DECLARATION OF SERVICE

Re: *People v. Aranda*, S188204

I, William J. Capriola, declare that I am over eighteen years of age, and not a party to the within cause; my employment address is Post Office Box 1536, Sebastopol, California 95473-1536. I served a true copy of the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Superior Court of California
County of Riverside
4100 Main Street
Riverside, CA 92501

Office of the District Attorney
Riverside County
3960 Orange Street
Riverside, CA 92501

Anthony Aranda, G-52174
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Each envelope was then, on August 16, 2011, sealed and deposited in the United States Postal Service at Sebastopol, California, in the county in which I am employed, with the first class postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Sebastopol, California, this 16th day of August, 2011.

William J. Capriola