Supreme Court No. S231644

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	4th Criminal No. E062540
Plaintiff and Respondent,	)	
v.	)	San Bernardino County Superior Court Case No. FVI1300082
ANDRE MERRITT, Defendant and Appellant.	)	

APPELLANT'S ANSWER TO PETITION FOR REVIEW

On Appeal from the Judgment of the Superior Court
of the State of California, San Bernardino County

Hon. Debra Harris, Judge

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INTRODUCTION

The Court of Appeal correctly determined "the instant case is so closely on-point with" *People v. Cummings* (1993) 4 Cal.4th 1233, "the error is reversible per se." (Typed Op. p. 9.) The Attorney General petitions for review, asking this Court to "settle an important question of law" concerning *Cummings*. (PR 1.) However, because this opinion is unpublished and follows existing precedent, there is no conflict in the law for this Supreme Court to resolve, requiring the petition be denied.

STATEMENT OF THE CASE

On May 7, 2013, the San Bernardino County District Attorney filed an information alleging appellant, Andre Merritt, had committed second degree robbery (Pen. Code, § 211) against Kristen Wickum (count one); and second degree robbery (Pen. Code, § 211) against Christian Lopez (count two). (1C.T. 18-19.) The information also alleged both counts constituted a serious felony (Pen. Code, § 1192.7, subd. (c)), and a violent felony (Pen. Code, § 667.5, subd. (c)). (1C.T. 18, 20.) The information also alleged Merritt personally had used a firearm during the commission of counts one and two (Pen. Code, § 12022.53, subd. (b)), also alleging Merritt had committed

counts one and two for the benefit of a street gang (Pen. Code, § 186.22, subd. (b)(1)(C)). (1C.T. 19-20.)

Jury trial began October 14, 2014 (1C.T. 102; 1R.T. 1), concluding October 20, 2014 (2C.T. 192), the jury finding Merritt guilty as to both counts and finding the firearm enhancement true as to both counts. (2C.T. 183-184, 185, 187, 194; 2R.T. 304-305.) The jury found the gang enhancement not true as to both counts. (2C.T. 186, 188, 194; 2R.T. 304-305.)

On December 12, 2014, the court sentenced Merritt to a total term of 19 years and four months as follows: the upper term of five years for count one, deemed the principal count; the upper term of 10 years for the firearm-use enhancement to count one, to be served consecutively to count one; one-third the mid-term, i.e., one year, for count two, to be served consecutively to count one; and three years and four months for the firearm-use enhancement to count two, to be served consecutively to count one. (2C.T. 210, 211; 2R.T. 311-.)

The court imposed a $300.00 section 1202.4 restitution fine, plus a $300.00 parole revocation fine, suspended unless parole revoked, and a $60.00 court security and conviction fee for each

convicted charge, totaling $120.00. (2C.T. 209-210, 212; 2R.T. 310.) Merritt was awarded credits of 708 actual days, plus 106 conduct days, a total of 815 days. (2C.T. 210, 212; 2R.T. 312.)

On December 15, 2014, Merritt timely filed a notice of appeal. (2C.T. 213.) On November 20, 2015, the Court of Appeal filed its opinion, reversing the judgment. The People filed a rehearing petition December 7, 2015, which was denied December 14, 2015.

STATEMENT OF FACTS

First Incident

Around 5:00 p.m. on December 19, 2012, Kristen Wickum was working at the front counter at Storage Direct, a storage facility located at 15262 Mojave Drive in Victorville. (1R.T. 88-89, 39, 45.) A man wearing a hoodie entered the building, pulled out a gun, and asked for all the money. (1R.T. 89.) Wickum gave the man the money in the drawer, after which he asked if there was more money. Wickum gave him the petty cash box, which was locked. The man asked Wickum to open the box, but she told him she didn't have the key, and to just take the whole box. (1R.T. 89.) The man told Wickum to get down on the ground. He asked Wickum for her cell

phone. She said, "Please don't take my phone." (1R.T. 92.) He then took the office phone and broke it, then left. (1R.T. 92.)

Wickum then yelled for Elisha Cordova, the manager, who had been in the back room and had not witnessed the incident. (1R.T. 93, 54, 56.) They immediately called 9-1-1. (1R.T. 57, 94.)

Sheriff's Deputy Travis Buell of the San Bernardino County Sheriff's Department responded to a dispatch call of an armed robbery, arriving at the scene shortly thereafter. (1R.T. 38-39, 42-43.) He spoke with Wickum, who told him she had been robbed. (1R.T. 42-43.) Wickum appeared visibly upset. (1R.T. 44.) She described the perpetrator as a black male, five feet 11 inches tall, about 20 years old, wearing a blue hooded sweat shirt, gray shorts, white socks, and black Chuck Taylor shoes, and armed with a black, scuffed and scratched, semiautomatic handgun. (1R.T. 46, 51.) The suspect took about $338. (1R.T. 49.)

Deputy Buell also interviewed Cordova, who said she was the manager of the business and had not seen the incident. (1R.T. 44, 46.)

Detective Paul Solorio and Detective Hendrix of the San

Bernardino County Sheriff's Department went to the business, met with Wickum, and showed her photographic lineups. (1R.T. 103-104.) Wickum "almost immediately" identified Merritt in a six-pack photo lineup. (1R.T. 105, 96.)

The incident was captured on the building's video surveillance system, and a video of the incident was played for the jury at trial. (1R.T. 91.)

Second Incident

Around 6:22 p.m. that same day–December 19, 2012–Christian Lopez was working as a clerk at La Mexicana, a convenience store located at 15383 Seventh Street in Victorville. (1R.T. 46-48, 51.) As Lopez was counting money at the register, he heard the door sensor ring. (1R.T. 68.) A man wearing a hoodie pointed a gun at Lopez, stating, "Give me the money, muthafucker." (1R.T. 68-69.) Lopez gave the suspect the money from the register, after which the man told Lopez to lay down. (1R.T. 70.) Lopez laid down, face-down, after which the man kicked him in the back, then left the store, after which Lopez called 9-1-1. (1R.T. 70-71.)

Shortly after responding to the robbery dispatch call at the

Storage Direct, Deputy Buell responded to another dispatch call of an armed robbery at La Mexicana. (1R.T. 46-48.) Buell spoke with Lopez, who "seemed scared." (1R.T. 47-48.) Lopez told Buell he had been robbed at gunpoint by "a black male in his 20s, about 6 foot with a thin, bulky build wearing a black shirt, khaki shorts, and he was armed with a silver" semiautomatic handgun. (1R.T. 48-49, 51.) The suspect took about $700. (1R.T. 49.)

While being showed a photo lineup. Lopez identified Merritt "right away." (1R.T. 75, 79.)

The incident was captured on the store's video surveillance system, and a video of the incident was played for the jury at trial. (1R.T. 72.)

Search of Residence

On January 4, 2013, Detective Heather Forsythe and Deputy Stoll of the San Bernardino County Sheriff's Department served a search warrant on Merritt at his residence at 15810 Arbolanda Lane in Victorville. (1R.T. 110-111.) The officers announced themselves and knocked, then entered the home. (1R.T. 112.) Inside, they found three individuals, including Merritt. (1R.T. 112.) They detained

Merritt, then began searching the home. (1R.T. 112.)

Merritt told the officers which room was his, after which they searched his bedroom. (1R.T. 112.) They found some ammunition, a black bandanna with white symbols on it, and some baseball hats. (1R.T. 112.) They searched the rest of the house, finding some black hooded sweat shirts, some Chuck Taylor Converse shoes, and some cargo shorts. (1R.T. 112, 114, 119-120.)

Defense Case

Charlene Butts, Merritt's mother, testified Merritt had been released from custody at midnight on December 19, 2012, and she had picked him up and drove him home. (1R.T. 181.) Waiting for them at home were Merritt's brother, Derek; Keith Glass; Prince Dean; and Tayveon Cheatum, all there to greet him upon his arrival and to celebrate his release. (1R.T. 181.) They were "smoking weed" and playing video games. (1R.T. 181.) The party lasted "at least two or three days." (1R.T. 182.)

Butts testified that, at 5:00 p.m. on December 19, 2012, Merritt was still at home with brother Derek, his sister, Keith Glass, Prince Dean, and Tayveon Cheatum. (1R.T. 182.) Merritt did not leave the

house during the day, and did not leave the house from between 5:00 p.m. to 5:30 or 6:00 p.m. (1R.T. 182.) He did not leave the house "until like four days later." (1R.T. 183.)

Tayveon Cheatum, Merritt's cousin, testified he had arrived at Merritt's house around midnight December 19, 2012. (1R.T. 189.) Cheatum remained at Merritt's house during the day on December 19, leaving some time before 5:00 p.m., and returning around 9:00 p.m. Cheatum testified that, when he left the house before 5:00 p.m., and when he returned around 9:00 p.m.; Merritt was at the house, wearing the same clothing. (1R.T. 190-191.)

Derek Coleman, Merritt's older brother, testified he was at Merritt's home on December 19, 2012. (1R.T. 198-199.) Merritt was at home between 4:30 p.m. and 6:30 p.m. on December 19, 2012. (1R.T. 199.)

Rebuttal Evidence

The prosecution recalled Detective Solorio, who testified he and Detective Hendrix had interviewed Merritt on January 4, 2013. (1R.T. 227.) When asked where he was on December 19, 2012, Merritt "basically stated that he was at his house earlier in the day,

and then he left his house and walked to a friend's house at the Rodeo apartments," spending the night at the Rodeo apartments. (1R.T. 227.)

DISCUSSION

1. Review Should Be Denied Because the Opinion Is Consistent with Existing Law.

California law is clear on the question presented, requiring review be denied. The opinion summarizes the relevant law:

> In *Cummings*, the defendant was convicted of robbery, attempted robbery, and conspiracy to commit robbery, but the trial court failed to instruct the jury on the offense of robbery. (*Cummings*, *supra*, 4 Cal.4th at pp. 1256, 1311.) However, the trial court did instruct the jury that the crime of attempted robbery requires the specific intent to permanently deprive the owner of his/her property. (*Id.* at pp. 1311-1312.) The defendant argued that the trial court's failure to instruct on four of the five elements of robbery was reversible per se. (*Id.* at p. 1312.) The People argued the error was harmless because (1) the evidence established the robberies were committed at gunpoint; (2) the jury was instructed on the intent to permanently deprive; and (3) the defendant only disputed identity—he did not dispute that the robberies occurred. (*Ibid.*) [¶]
>
> The Supreme Court discussed cases that permit a harmless error analysis to be performed when one element or a portion of an element was omitted from a jury instruction. (*Cummings*, *supra*, 4 Cal.4th at pp. 1313-1314.) The Supreme Court then wrote, "These decisions make a clear distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect

> of an element. Moreover, none suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*Id.* at p. 1315.) The Supreme Court then concluded the defendant's convictions "must be reversed," "regardless of the merits of the People's argument that [the defendant] did not dispute the existence of the predicate facts and that the evidence overwhelmingly established all of the elements of robbery, attempted robbery, and conspiracy to commit robbery." (*Ibid.*)

(Typed Op. pp. 7-8.)

Respondent points to no conflict in the law which needs to be settled. Respondent claims *Neder v. United States* (1999) 527 U.S. 1, 4 [119 S.Ct. 1827, 144 L.Ed.2d 35], and this Court's decision in *People v. Mil* (2012) 53 Cal.4th 400, are in conflict with *Cummings*. (PR 5-6.) They are not. *Mil* expanded on the "element" discussion, holding omission of more than one "element" also may be subject to a harmless error analysis. (*Id.* at pp. 410-414.) *Mil* did not hold omission of the key instruction concerning the primary offense was subject to a harmless error analysis, nor does any case cited by respondent.

Indeed, *Mil* repeats *Cummings*, holding "omission of 'substantially all of the elements' of a charged offense is reversible

per se." (*People v. Mil*, *supra*, 53 Cal.4th at p. 413, citing *People v. Cummings*, *supra*, 4 Cal.4th at p. 1315.) *Mil* also specifically rejected the argument the omission of two elements from the charge equated to the omission of "substantially all of the elements of an offense, concluding, "We do not find that the omission here was akin to what occurred in *Cummings*." (*Id.* at pp. 415-416.) Omission of the entire instruction certainly is more grievous than omission of "substantially all of the elements."

As the Court of Appeal here correctly concluded,

> Similar to *Cummings*, the instant case did not include instructions that overlapped with all or most of the elements of robbery. For example, a finding that defendant had the specific intent to permanently deprive does not compel a conclusion that the jury found the facts necessary to establish the property was taken from the victims or the victims' immediate presence. (*See Cummings*, *supra*, 4 Cal.4th at p. 1313 ["A finding that property was taken with the intent to permanently deprive the owner does not compel a conclusion that the jury has found the facts necessary to establish the remaining elements of the offense"].)

(Typed Op. p. 9.)

As for *Neder*, this Court already considered *Neder*'s application in *Mil*, observing *Neder* had involved the omission of a single element, which this Court reaffirmed is not akin to "substantially all of the elements" as in *Cummings*. (*People v. Mil*,

supra, 53 Cal.4th at pp. 413-414.) Without the primary robbery instruction, any other instructions were abstractions, untethered to the legal basis for the conviction. Respondent points to no authority to the contrary.

As for *People v. Magee* (2003) 107 Cal.App.4th 188 [Fifth Dist.], review denied June 11, 2003, S115303 (PR 7), which involved prosecution of an accessory to a robbery charge, the prosecution and defense had *agreed* to withdraw an instruction defining the elements of robbery, and the defendant relied instead on the defense that he did not know a robbery had occurred. (*Id.* at p. 191.) By agreeing to withdraw the instruction, the defendant effectively agreed to remove the issue from the jury's determination. This Court declined to review that case. A single published appellate decision has cited *Magee* for the proposition "a failure to instruct the jury on *an element* of the charged offense was subject to harmless error analysis . . . ." (*People v. Rubio* (2004) 121 Cal.App.4th 927, 935 [Fifth Dist.], emphasis added.) Neither *Neder*, *Mil*, *Magee*, nor *Rubio* conflict with *Cummings*.

Respondent cites a number of unpublished opinions (PR 7-9),

which do not create a conflict in the law because unpublished opinions "must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.1115(a).) As for respondent's claim judicial notice of unpublished opinions is proper to "address an institutional problem" (PR 7), first, *People v. Hill* (1998) 17 Cal.4th 800, does not contain this language, and more importantly, *Hill* confirmed it did "not *cite or rely on* that [unpublished] opinion" which it took judicial notice of, noting doing so would violate the rules of court. (*Id.* at p. 848, emphasis added.) *Hill* took judicial notice of that unpublished opinion merely to point to its factual history to demonstrate the prosecutor's history of misconduct. *Hill* did not use the unpublished opinion to highlight the legal reasoning employed by the appellate court, which is what respondent is improperly asking this Court to do here.

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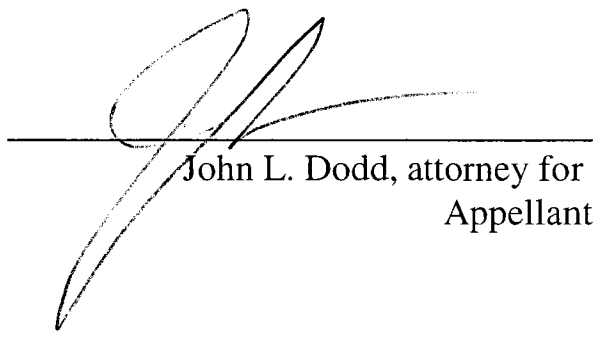
CONCLUSION

Because there is no conflict to be resolved, the petition for review should be denied.

Dated: January 19, 2016

Respectfully submitted,



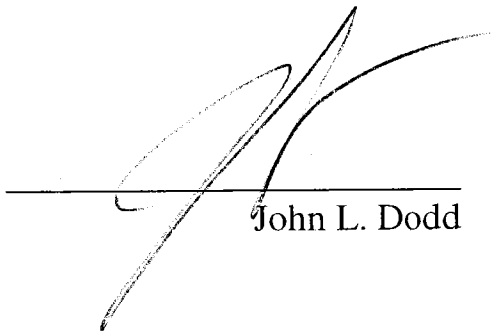
John L. Dodd, attorney for Appellant

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c).)

I, John L. Dodd, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 2,546 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: January 19, 2016



John L. Dodd

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780.

On January 19, 2016, I served the foregoing document described as **APPELLANT'S ANSWER TO PETITION FOR REVIEW** on the interested parties in this action.

(x) by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

( ) by placing ( ) the original ( ) a true copy thereof enclosed in sealed envelopes addressed as follows:

(x) BY MAIL

(x) I deposited such envelope in the mail at Tustin, California. The envelope was mailed with postage thereon fully prepaid.

( ) BY PERSONAL SERVICE

I delivered such envelope by hand to the offices of the addressee.

I additionally declare that I electronically submitted a copy of this document to the Court of Appeal on its website at http://www.courts.ca.gov/9408.htm#tab18464, in compliance with the court's Terms of Use.

Furthermore, I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document from John L. Dodd & Associates' electronic service address jdodd@appellate-law.com on January 19, 2016, to the Attorney General's electronic service address ADIEService@doj.ca.gov and to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com by the close of the business day at 5:00 p.m.

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

Executed this 19th day of January 2016, at Tustin, California.

John L. Dodd

MAILING LIST

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