IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
MARVIN TRAVON HICKS
Defendant and Appellant.

No. S232218

SUPREME COURT
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Second Appellate District, Division Five, Case No. B259665
Los Angeles Superior Court No. MA058121
Honorable Kathleen Blanchard, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

JONATHAN B. STEINER
Executive Director

*NANCY GAYNOR
Staff Attorney
(State Bar No. 101725)

CALIFORNIA APPELLATE PROJECT
520 S. Grand Ave./4th Floor
Los Angeles, CA 90071
Telephone: (213) 243-0300
Fax: (213) 243-0303
Email: nancy@lacap.com

Attorneys for Appellant
Marvin Travon Hicks

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APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE ON REVIEW

By order of this Court, filed March 23, 2016, the issue presented by this case is "Did the trial court err when it refused to inform the jury at the retrial of a murder charge that defendant had been convicted of gross vehicular manslaughter in the first trial? Compare *People v. Batchelor* (2014) 229 Cal.App.4th 1102."

STATEMENT OF THE CASE

In 2012, appellant killed a 2-year-old girl in a car crash after leading police on a high-speed chase. He was charged with murder (Pen. Code § 187), along with gross vehicular manslaughter (Pen. Code § 191.5, subd. (a)), evasion of a peace officer causing injury (Veh. Code § 2800.3, subd. (a)), evasion of an officer causing death (Veh. Code § 2800.3, subd. (b)) and felony driving under the influence with two great bodily injury allegations (Veh. Code § 23153, subd. (a); Pen. Code § 12022.7, subds. (a) and (d)). (1CT 8-12.) The jury convicted him on all charges except for the murder, on which they failed to reach a unanimous verdict (1CT 127-132.)

A second jury trial ensued on the murder charge on April 1, 2014 (1CT 84). The trial court refused appellant's request to inform the jury under the authority of *People v. Batchelor* (2014) 229 Cal.App.4th 1102 that appellant had already been convicted of vehicular manslaughter (4 RT 2710-2711, 2715-2725). The jury convicted him of second-degree murder (1CT 217).

On October 10, 2014, the court sentenced appellant to 15 years to life for the murder plus 7 years for evasion of a police officer causing injury. One of the remaining counts was dismissed as a lesser included offense of another, and sentence on the remaining counts was stayed. (1CT 263-267.)

On December 23, 2015, the Court of Appeal affirmed the judgment in a partially published opinion in which it disagreed with the *Batchelor* decision, and this

Court granted appellant's Petition for Review on March 23, 2016, limiting the question on review to whether the trial court erred in refusing to inform the jury at the retrial of the murder charge that appellant had been convicted of gross vehicular manslaughter in the first trial.

STATEMENT OF FACTS FROM THE RETRIAL

Prosecution Evidence

(a) Reckless driving culminating in the fatal collision.

Several civilian witnesses and sheriff's deputies saw appellant driving a black Toyota in a reckless manner at high speeds on public streets in the Lancaster area from about 4:45 to 5:00 p.m. on December 6, 2012.

As Kim Thomas was driving on 30th East and Avenue P, she saw the Toyota stop two car lengths before a stop sign. The driver appeared to be talking to someone, though he was alone in the car. (6RT 4504-4505.) He then turned left onto Avenue P at a high rate of speed (5RT 4507-4508; 6RT 4510). Thomas, along with other cars, passed the Toyota on Avenue P, as it was then going only about 25 miles per hour, but a little while later on Sierra Highway, it sped by her going 65 or 70 (6RT 4508-4511). Later, Thomas saw the Toyota stopped on Sierra Highway, blocking both lanes. The driver was pushing it while waving his hands and appearing to be talking to himself. After briefly speaking to a bicyclist, he started hitting and kicking the Toyota, jumped back into it, and started driving north at a "pretty fast" rate of speed, in excess of the 60 or 65 miles per hour at which Thomas was traveling. (6RT 4510-4513.)

John Alvarez too saw the Toyota blocking traffic while the driver was talking to a bicyclist. Alvarez maneuvered around it, but shortly thereafter it passed him at a high rate of speed, crossing the double yellow line into oncoming traffic lanes while

attempting to pass other vehicles. Alvarez phoned 911. (4RT 3635-3629.)

At about 5:00 p.m., Deputy Sheriff Thomas Kim saw the Toyota pass him at about 100 miles per hour on Sierra Highway, then proceeding recklessly on the wrong side of the highway and going through a red light at Avenue K without the brake lights appearing (4RT 3639-3648). Deputy Kim broadcast a description of the Toyota to all sheriff's vehicles in the area. He was unable to keep pace with it, but other sheriff's vehicles arrived and pursued it with their sirens and emergency lights on (4RT 3657-3660).

Eric Eitner, an off duty deputy sheriff, saw the Toyota driving northbound on Sierra Highway as it went through an intersection at about 100 miles per hour with no apparent application of its brakes, causing several other drivers to belatedly apply their own brakes (4RT 3673-3674).

Deputy sheriffs Gustavo Munoz and Giovanni Lampignano were in their marked patrol car when they responded to a dispatch about the Toyota (4RT 3673-3674). Nearing the intersection of Avenue I and Sierra Highway, they saw the Toyota speed through a red light, lose traction and come to a stop at the southbound curb. Other vehicles in the intersection had to stop in reaction. (4RT 3675-3677.)

The deputies activated their lights and sirens and positioned their patrol car behind the Toyota. Appellant was hanging halfway out the driver door window, screaming. (4RT 3676-3677, 3686.) In response to Deputy Lampignano's commands,

appellant stared blankly, screamed obscenities, talked to himself, waved his hands as if he were hallucinating and growled like a dog (4RT 3678-3680, 3684-3686). Appellant then restarted his car and, while jerkily accelerating and braking in an attempt to make a left turn, caused a motorcyclist to almost lift his bike to get it out of appellant's path (4RT 3667, 3678-3679). Deputy Lampignano had to jump back into the patrol car because the Toyota came within two feet of him at a high speed (4RT 3679).

The deputies pursued appellant westbound down Avenue I with their lights and sirens activated. They could not keep up with him, though they'd accelerated to about 75 miles per hour in a 40 mile an hour zone. On three occasions, appellant veered into oncoming traffic for a few seconds, causing other cars to swerve to avoid collisions. The deputies lost sight of him after he ran a red light. (4RT 3680, 3687; 5 RT 4016.)

As Candyce Bailey was pausing on Avenue I to make a left turn, she saw the Toyota head towards her and then veer around her after coming within two or three inches of her vehicle. A short time later, she saw a police car in pursuit of the Toyota followed by five or six police cars with the lights and sirens activated. (4RT 3690-3695.)

Within moments, Tina Ruano stopped for a red light at the intersection of 10th Street West and Avenue I in a Lexus, with her two-year-old daughter Madison buckled into a rear passenger side child seat. As the light turned green, she entered the intersection, saw a black car coming from the right side, and remembered nothing more. (6RT 4581-4583.)

The collision of appellant's Toyota with the Lexus was witnessed by James Ouart and Rhonda Perez. Ouart estimated the Toyota as going 80 to 100 miles per hour. Both he and Perez described the event as an explosion, with Perez witnessing the Toyota going airborne and wrapping itself around a pole. (5RT 3948-3954, 4225-4227.)

Deputy Amos Cisneros, who was on approach to the intersection, heard a loud explosion (5RT 4017). Deputies Lampignano and Munoz arrived, exited their patrol car with weapons drawn and ordered appellant to show his hands. He was screaming, laughing, apparently angry and mumbling nonsense to himself. Upon being forcibly removed from the car, he was jittery, sweating profusely and staring blankly while talking to himself as if hallucinating (4RT 3684-3689.)

Madison Ruano was taken to the hospital in full arrest, and pronounced dead shortly after. The first two vertebrae in her neck were fractured and separated from each other causing her spinal cord to be severed from her brain in what the treating doctor termed a "functional decapitation." (5RT 4221-4245, 4246).

(b) Appellant's condition following the collision.

An Emergency Medical Technician who examined appellant at the collision scene deemed him to be alert and oriented on the "Alert and Oriented Times 3" scale, and showing a normal level of consciousness on the Glasgow scale (5RT 3957-3961). Appellant told the technician he was aware of the collision, had been wearing a seatbelt, ran through a red light and, though he was bleeding from a head laceration, had no pain

(5RT 3961-3965, 3971, 3974-3975, 3983). In the ambulance on the way to the hospital, appellant denied being in a car crash and having been chased by police; the technician thought his unawareness was feigned (3RT 1510-1511; 5 RT 3965, 3969, 3982).

Appellant arrived at the hospital at 5:38 p.m. There, he vacillated between being agitated and combative (it took four or five people to physically restrain him and strap him into a gurney), and calm; he required restraints in order to be treated, and displayed more strength than a man his size would normally have. (5RT 3964-3965, 3993-3995, 4000-4002, 4008.)

His blood, which was drawn shortly before 6 p.m., tested positive for PCP, marijuana and .02 blood alcohol content; the amount of PCP in his system indicated that it was ingested from a few minutes to 48 hours before the blood draw, and the amount of marijuana indicated ingestion from one to five hours before. (4RT 3616-3622, 3902-3915; 5RT 4005, 4219-4220).

Appellant was twice given the Glasgow test at the hospital to assess his neurologic status based on eye movement, responses to verbal questions and motor function. A person who is completely awake and normal would score a 15. Upon arrival, appellant scored 13, and upon discharge, 15. (5RT 4212-4217.)

(c) Accident reconstruction.

An accident reconstruction expert examined the Toyota and found no mechanical problems. He opined that it had been travelling west and hit the right side of

the Lexus at a minimum speed of 70 miles per hour while the Lexis was travelling at 16 miles per hour, with neither car showing signs of pre-impact braking. (5RT 4276-4291).

(d) Expert testimony regarding appellant's PCP use.

Two law enforcement criminalists testified on the effects of PCP: David Vidal, a retired senior criminalist with the Los Angeles County Sheriff's Department, and California Highway Patrol Officer Joshua Wupperfield.

According to Vidal, people under the influence of PCP exhibit nystagmus, muscle rigidity and profuse sweating; they can be extremely agitated and violent, stare blankly and speak repetitively. The length of influence is usually three to five hours. PCP use can severely distort judgment and the ability to operate a motor vehicle, and can cause short-term memory loss. (4RT 3910-3912; 5 RT 3915-3928.)

According to Patrol Officer Wupperfield, people under the influence of PCP cannot safely operate motor vehicles because PCP severely diminishes the ability to multi-task and causes mental impairment, aggressiveness and hallucinations; they are capable, however, of making decisions. Appellant's behavior on the day of the collision was consistent with PCP use. (6RT 4520-4561.)

(e) Prior convictions, drug counseling and drug awareness.

On June 1, 1995, appellant pled no contest to a violation of Vehicle Code section 23103 (reckless driving) and was ordered to complete an alcohol and drug education program (Exh. 29 at Supp. CT 27-32). On August 31, 2001, he pled no contest

to a violation of Vehicle Code section 23152, subd. (b) (driving under the influence of drugs or alcohol) and ordered to complete another such program (Exh. 31 at Supp. CT 36-40). Both programs included the effect of alcohol and drugs on the body and brain, and the dangers of driving under their influence; both programs included a showing of "Red Asphalt," a graphic documentary showing actual traffic collisions involving impaired drivers. (5RT 4248-4256.)

On April 9, 2009, appellant signed a driver's license form certifying that he had read, understood and agreed with the contents of the form, including certifications on the back of the form, one of which stated that he'd been "advised that being under the influence of alcohol or drugs or both, impairs the ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs or both. If I drive while under the influence of alcohol or drugs or both and as a result, a person is killed, I can be charged with murder." (5RT 4262-4265).

(f) Appellant's prior testimony.

The prosecutor read into evidence selected portions of appellant's testimony from the first trial, described to the jury as "a prior proceeding on April 10th, 2014" (5RT 4294). Appellant testified that he was the driver of the Toyota and responsible for the collision (5RT 4294). That morning, he smoked a PCP-laced marijuana cigarette, then went to sleep for several hours. He woke between 3:30 and 4:00 p.m. and decided to drive, so he picked up his car keys and left. (5RT 4300-4303).

Appellant had been convicted of "alcohol related reckless driving" in 1995 and required to attend a three-month drug and alcohol program. In 2001 he rear-ended another vehicle on the freeway resulting in injuries, for which he was convicted of driving under the influence and ordered to take an 18-month course which covered many of the issues of the previous program. (5RT 4303-4307.) He knew prior to these programs that people could be killed by someone driving under the influence of alcohol or drugs, and he still had that knowledge in 2012 (5RT 4309-4310).

Appellant had used PCP 10 to 15 times between 2001 and the date of the collision, and felt the effects of it each time. During a two-week period in October and November of 2011, he was hospitalized because of PCP use on one occasion; arrested and booked for being under the influence on another; and broke his garage door lock on a third, which is something he would not normally do, although he might not have been under the influence of PCP at the time. The effect of PCP on him was pretty sudden, could happen within a minute and could last for several hours. (5RT 4295-4231.)

Defense Evidence (Appellant's Testimony)

Appellant had battled substance abuse issues all his life, starting with alcohol and marijuana. He began smoking PCP in 2011 after his divorce, and used it about 10 to 15 times since. Although each experience with it was different, he liked the feeling it gave him and found it hard to stop using it. The highs would come on within a minute or so and could last for hours. (6RT 4811, 4813, 4815-4816, 4847.)

Appellant recounted his two prior alcohol-related driving convictions and the courses he was required to attend as a result of them. He did not remember the specifics of the courses, but was put on notice that driving while impaired was dangerous. (6RT 4811-4814, 4864). He also related the three incidents in October and November of 2011 that resulted, respectively, in his hospitalization, arrest, and the sheriffs coming to his house when he broke his garage door lock (6RT 4852-4857).

On the date of the collision, appellant woke at 7:00 a.m. with no plans for the day. After breakfast, he smoked a PCP-laced marijuana cigarette and drank some beer. The PCP affected him badly; he heard loud voices and felt as if he were being pushed, pulled and compressed. He went to sleep for several hours, waking at 4:00 or 4:30. He still heard the voices and felt compressed, so he tried to telephone his son for help but was unable to reach him. (6RT 4816-4829.)

He then decided to go to his son's house in Lancaster because he didn't want to be alone and wanted to get to a place where he felt safe. It did not occur to him to get to his son's house by any means other than driving or to go someplace nearer for help, so he got into his car and started to drive, first presumably grabbing his keys although he didn't remember doing so. Nor did he remember anything that occurred subsequently until he woke in county jail the next morning. (6RT 4818-4822, 4827, 4844-4846.)

On the day of the collision, appellant had the knowledge that driving under the influence is dangerous, and in his testimony he accepted responsibility for the death of

Madison Ruano. But when he left his home to get help, all he was thinking about was reaching his son. Nothing else crossed his mind; he did not process what he had learned in the past or weigh and balance the possibility of anything happening. (6RT 4821-4823.) When asked if he was responsible because he knew it was dangerous to drive while he was impaired that day, he answered, "I never – it is dangerous to drive if you're under the influence, but that never – I never formulated that process, or I never weighed the good and bad of being under the influence that day. I simply wanted to do something and I set out to do it." (6RT 4866-4867.)

ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO INFORM THE JURY AT THE RETRIAL OF THE MURDER CHARGE THAT APPELLANT HAD BEEN CONVICTED OF GROSS VEHICULAR MANSLAUGHTER IN THE FIRST TRIAL

A. Introduction and summary of argument.

This case concerns the relationship between the California rule that the jury must not speculate about punishment in reaching its verdict and the recognized danger that when it is clear the defendant is responsible for a criminal act (here, one with terrible consequences), the jury will convict of a greater crime than he committed if they believe their only other option is to let him walk free. In the situation here, where a defendant has, unbeknownst to the jury, already been convicted of a lesser degree of homicide and the jury's task is limited to deciding whether he is guilty of murder, the jury will naturally speculate about the consequences of their verdict by wrongly assuming that an acquittal will absolve him of all criminal responsibility, and that speculation will inevitably influence their verdict.

In this situation, an instruction informing the jury of the conviction with the proviso that their only task is to decide whether the elements of the greater crime have been proven will remove, rather than promote, any speculation about punishment, and is necessary to remove the risk that an unwillingness to set free a defendant who is clearly guilty of a horrendous act will affect the determination of guilt. There is precedent for

such an instruction in cases where the jury is tasked with determining whether a defendant is not guilty of a crime by reason of insanity. In that analogous context, California courts have recognized the utility – and necessity if the defendant requests it – of informing the jury that a favorable verdict will not result in the defendant's freedom. Such an instruction would not interfere with the prosecutor's charging decision or otherwise thwart any legitimate concerns of justice, but would enhance the truth-finding function of the jury by eliminating a serious risk to it.

B. The rule that juries are not to speculate about punishment.

It is axiomatic that a jury determining the defendant's guilt of a crime should not consider the subject of penalty or punishment. The reason for the rule is that it is the judge's task, not the jury's, to decide punishment and that without being admonished that penalty and punishment must not enter into its deliberations, "' a jury may permit their consideration of guilt to be deflected by a dread of seeing the accused suffer the statutory punishment' (*People v. Shannon* (1956) 147 Cal.App.2d 300, 306; see also *People v. Alvarez* (1996) 49 Cal.App.4th 679, 687; *People v. Moore* (1985) 166 Cal.App.3d 540, 551; *People v. Allen* (1973) 29 Cal.App.3d 932, 936 ['It is settled that in the trial of a criminal case the trier of fact is not to be concerned with the question of penalty, punishment or disposition in arriving at a verdict as to guilt or innocence.'].)" (*People v. Nichols* (1997) 54 Cal.App.4th 21, 24.) Thus, it is standard procedure to instruct California juries accordingly, per CALCRIM No. 2550 or formerly, and still

occasionally, CALJIC No. 1742.[1]

Of course, the danger in the present case was not that the jury's consideration of punishment would prompt it to acquit out of dread that appellant would be unduly punished (compare three strikes cases such as *People v. Nichols, supra,* 54 Cal.App.4th 21), but that, without being told he had already been held criminally accountable for Madison's death, they would naturally speculate he would go unpunished for what was unquestionably and admittedly a criminal act with a terrible consequence unless they convicted, deflecting the question whether malice was proven and focusing instead on the necessity of holding him accountable. The requested instruction is perfectly consistent with the rule against considering punishment. Informing the jury of appellant's manslaughter conviction with the proviso that the jury's sole task was to determine whether the elements of murder were proven beyond a reasonable doubt would have addressed holding appellant accountable, taking the question of accountability, and therefore punishment, off the table so that the jury could focus solely on their proper task.

C. Speculation about punishment is an acknowledged reality.

As mentioned above, appellant's jury was instructed not to consider punishment. Lest it be said that jurors are presumed to follow their instructions, caselaw recognizes that it is natural, even inevitable, for the jury to speculate about punishment

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[1] CALJIC No. 17.42, given to appellant's jury at 1CT 228, states: "In your deliberations do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict."

regardless. Even as to less volatile subjects, the presumption is more a bow to practicalities than a reflection of reality. "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant." (*Richardson v. Marsh* (1987) 481 U.S. 200, 211.) See also Justice Jackson's concurring opinion in *Krulewitch v. United States* (1940) 336 U.S. 440, 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury, *cf. Blumental v. United States* (1947) 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction. [Citation.]"[2]

More to the point, this Court has frequently recognized that speculation about punishment is either "inevitable" or "probably unavoidable" in certain contexts, instructions to the contrary regardless. In *People v. Riel* (2000) 22 Cal.4th 1153, 1219,

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[2] Specific instances abound, e.g., *Bruton v. United States* (1968) 391 U.S. 123 [codefendant's confession inculpating defendant; instruction to disregard would be to no avail]; *People v. Hill* (1998) 17 Cal.4th 800 [prosecutor's repeated misstatements of law during argument – instruction that arguments of counsel are not evidence and law would come only from the judge to no avail]; *People v. Diaz* (2014) 227 Cal.App.4th 360 [videos defendant had been shown after past DUI convictions concerning consequences of alcohol-related driving offenses with commentary by victims' families and statements of a prosecutor and judge in drunk-driving murder case; curative instruction not to consider various aspects of the videos to no avail]; *People v. Alvarado* (2006) 141 Cal.App.4th 1577 [prosecutor's argument vouching for integrity of her office; no objection necessary because curative instruction could not have cured the harm]; *People v. Ozuna* (1963) 213 Cal.App.2d 338 [no curative instruction could prevent jury from being influenced by testimony defendant was an "ex-convict"]; *People v. Allen* (1978) 77 Cal.App.3d 924 [same, re reference to defendant being on parole].

the defendant claimed jury misconduct in the penalty phase of a capital trial based on a juror's remark that if a verdict of death were reached, the judge would just commute it to life in prison anyway. This Court disposed of the claim as follows:

> "A prediction that the court would commute a death verdict, if in fact made was merely the kind of comment that is probably unavoidable when 12 persons of widely varied backgrounds, experiences, and life views join in the give-and-take of deliberations. . . . The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses; it has the potential to undermine determinations that should be made exclusively on the evidence . . . and instructions . . . Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' [Citation.] Moreover, under that 'standard' few verdicts would be proof against challenge." [Citing *People v. Marshall* (1990) 50 Cal.3d, 907 at p. 950, with a *see also* cite to *People v. Cox* (1991) 53 Cal.3d 618, 696.]

More recently, in another claim of improper juror speculation about punishment in a capital penalty trial, the Court recognized that such speculation is "an inevitable feature of the jury system." (*People v. Dykes* (2009) 46 Cal.4th 731, 812.) *Dykes* parenthetically cited numerous examples, presumably all in cases where the jury received the standard instruction not to speculate about penalty: *People v. Schmeck* (2005) 37 Cal.4th 240, 307 [speculation about the defendant's possible release]; *People v. Pride* (1992) 3 Cal.4th 195, 267-268 ["The average juror undoubtedly worries that a

dangerous inmate might escape" in answer to claim of juror misconduct in discussing possibility defendant would escape from prison]; *People v. Cox* (1991) 53 Cal.3d 618, 696 [juror comment about death penalty never being carried out].

The inevitability of speculation about the consequences of one's verdict is not confined to capital cases. In an example more closely connected to the present case, California has recognized that juries tasked with determining whether a prisoner, already found guilty of a crime, is to be adjudged not guilty by reason of insanity, are at high risk of allowing their decision to hinge on speculation that he will be released into the community if found sane. This risk, moreover, is so great as to require judges to grant a defendant's request that the jury be instructed that a not guilty by reason of insanity verdict will cause the defendant's confinement until his sanity has been judged restored or he has served the maximum sentence for his crime. (*People v. Moore* (1985) 166 Cal.App.3d 540; *People v. Dennis* (1985) 169 Cal.App.3d 1135; see also *People v. Kelly* (1992) 1 Cal.4th 495, 538.) These cases will be discussed more extensively in section E, *post*. The point to be made here is that, basic platitudes notwithstanding, it cannot be assumed that CALJIC No. 17.42 prevented appellant's jury from considering whether their verdict would absolve him of all criminal responsibility and thereby effect his release. As appellant will demonstrate, the nature of this case all but ensured they would do so and that that consideration would affect their determination of guilt.

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D. The risk that ignorance of appellant's manslaughter conviction undermined the determination whether murder was proven.

It has long been recognized that juries are apt to convict a defendant of a greater crime than was proven beyond a reasonable doubt if they are not given the option of finding him guilty of a lesser crime in lieu of complete acquittal. This principle was first laid out almost a half century ago in *People v. St. Martin* (1970) 1 Cal.3d 524 as to lesser crimes whose elements are necessarily included in the one charged. The danger was explained thusly:

> "The state has no interest in a defendant obtaining an acquittal where he is innocent of the primary offense charged but guilty of a necessarily included offense. Nor has the state any legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense . . ." (*Id.*, at p. 533.)

This Court reiterated the principle, and risk, more recently in *People v. Barton* (1995) 12 Cal.4th 186, 196, in holding that not even a defendant's deliberate strategy could trump the obligation to present the jury with an informed choice: "Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to

inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function." (See also, *People v. Smith* (2013) 57 Cal.4th 232, 243-244.)

The same risk was recognized as to lesser offenses closely related to, but not necessarily included in, the charged crime in *People v. Geiger* (1984) 35 Cal.3d 510. Because "a procedure which affords the trier of fact no option other than conviction or acquittal when the evidence shows that the defendant is guilty of some crime but not necessarily the one charged, increases the risk that the defendant may be convicted notwithstanding the obligation to acquit if guilt is not proven beyond reasonable doubt" (*id.* at p. 520), *Geiger* held that a defendant has the right to have his jury instructed on a lesser related offense closely related to that charged where there is evidence of its commission and his theory of defense is consistent with finding him guilty of it.

Geiger was overruled in *People v. Birks* (1998) 19 Cal.4th 108, but *not* on the basis that it was wrong in acknowledging that the risk to the jury's truth-finding function extends beyond situations where the lesser offense shown by the evidence is necessarily included in the one charged. It is true that one of the several reasons for overruling *Geiger* was intervening authority from the United States Supreme Court belying *Geiger's* assumption that the risk violated due process (*Birks, supra,* at p. 124, citing *Hopkins v. Reeves* (1998) 524 U.S. 88 [held, no due process right to instruction on lesser related offenses]). But acknowledging the reality of the risk, even regarding

necessarily included offenses, has never hinged on finding a due process violation (see *Beck v. Alabama* (1980) 447 U.S. 625, 637 ["we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process"]). Rather, *Geiger* was overruled for reasons irrelevant to its recognition of the risk attendant on presenting the jury with an all-or-nothing choice between conviction and acquittal upon evidence that he committed some crime while not necessarily the one charged or technically included within it.

This is apparent from a brief summary of the *Birks* court's justifications for repudiating *Geiger*: (1) as mentioned above, *Geiger's* constitutional underpinning had dissolved; (2) *Geiger's* interpretation of the definition of a "necessarily included" offense in Penal Code section 1159[3] is based on a federal statute subsequently interpreted to have a meaning inconsistent with *Geiger's* gloss on it; (3) the *Geiger* rule violates the principle of mutual fairness to the defense and prosecution; (4) the rule proved unworkable and uncertain regarding what crimes the judge must instruct on *sua sponte*; (5) the rule results in unreliable fact-finding because it allows conviction of crimes that no prosecutor is on notice of having the necessity to prove; (6) entitlement to instruction on non-included offenses is a distinct minority position among American jurisdictions; and (7) insofar as the rule allows conviction of offenses not charged by the prosecution, it might be

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[3] Section 1159 states: "The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

irreconcilable with the separation of powers clause of the California constitution. Trenchant though these observations may be, none of them addresses, much less undermines, *Geiger's* recognition that the risk identified in *St. Martin* is not dependent on the niceties of the technical distinction between lesser included and related offenses, a distinction that has no meaning to jurors confronted with the question of whether to set free a defendant who is clearly guilty, though not necessarily of the crime charged.[4]

Moreover, the principle of mutuality addressed in *Birks* favors appellant's position. Noting that California takes seriously the principle of mutual fairness to the defense and prosecution, the Court found that the *Geiger* rule offended this principle by creating a tactical imbalance that was both "significant and inappropriate" in granting the defense unilateral power to force an all-or-nothing verdict. (*Birks, supra*, 19 Cal.4th 108, 127-128.) Just such an unfair tactical advantage was granted the prosecution in the present case. Without the requested instruction, the prosecution had the advantage of an opportunity to receive a manslaughter verdict if the jury didn't convict of murder and then

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4 This court has acknowledged that California's definition of a lesser included offense may properly be termed "technical" (*People v. Birks, supra,* 19 Cal.4th 108, 118). The artificiality of the concept in the present situation is illustrated by the fact that had the prosecutor been sufficiently loquacious in the information to describe what exactly appellant did to warrant being charged with murder, vehicular manslaughter would qualify as a necessarily included, rather than merely "related," offense and no second trial could have occurred at all. (*People v. Wolcott* (1983) 34 Cal.3d 92, 98 [a lesser crime is included in a greater one when "the language of the accusatory pleading encompasses all the elements of the lesser offense"]; *People v. Fields* (1996) 13 Cal.4th 289 [interpreting Pen. Code § 1023 to preclude retrial of a charge on which the jury has deadlocked if they've convicted the defendant of a lesser included offense].)

to try again for a murder conviction with a new jury who wrongly believed that complete acquittal and guilt of murder were the only possible outcomes defining appellant's fate, while appellant had to contend with a jury ignorant that he had already been held accountable for the middle ground. As recognized in *People v. Batchelor, supra,* 29 Cal.App.4th 1102, 1116-1117, "[t]he People *chose* to charge both murder and manslaughter in the information. The circumstance that the first jury was unable to reach a verdict on the murder charge should not properly be an opportunity to retry the case in a new posture, giving the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished. In other words, the People may not have their cake and eat it too." (Emphasis added.) Insofar as the *Geiger* rule violates mutuality by granting the defense a unilateral right to force an all-or-nothing choice upon the jury, the same unfair advantage was granted the prosecution here by allowing it to reap the benefit of a middle-ground conviction while keeping the second jury in the dark.

E. Precedent for the instruction: the not guilty by reason of insanity cases.

As alluded to in section C, *ante*, the question whether the kind of risk presented in appellant's second trial should be tolerated rather than alleviated by an instruction educating the jury on the realities of the situation is not of first impression in California. It has been answered in favor of educating the jury in cases where they are asked to determine whether a defendant, already adjudged guilty of a crime, is to be found sane or not guilty by reason of insanity. (*People v. Moore* (1985) 166 Cal.App.3d 540;

People v. Dennis (1985) 169 Cal.App.3d 1135; see Pen. Code § 1026, providing for bifurcated trials upon a plea of not guilty by reason of insanity, the first to determine guilt and the second to determine sanity.) As the two situations are analogous, the same result should occur here.

In *Moore, supra,* the defendant requested that the jury at the sanity phase of his trial be instructed that if they were to find him not guilty by reason of insanity and the court considered him a danger to the public, he would be ordered committed to an institution until either no longer a danger or otherwise discharged by authority of law. The trial court refused the instruction, but was reversed by the Second District Court of Appeal which found that the risk of a miscarriage of justice due to refusal to educate the jurors on the consequence of their verdict far outweighed any danger that they would misuse that knowledge to speculate on matters likely to be discussed in the jury room in any event. Without such an instruction, the *Moore* court found that the jury's likely speculations might well include the mistaken assumption that a verdict of not guilty by reason of insanity would result in the defendant walking free, just like a defendant found not guilty for other reasons. (*Id.* at p.554-556.) The Court relied heavily on the reasoning of Judges Prettyman and (later Chief Justice) Burger who wrote in *Lyles v. United States* (D.C. Cir. 1957) 254 F.2d 725, 728: "It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of

insanity has no such commonly understood meaning . . . We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts."

Shortly thereafter, the Third District Court of Appeal followed suit in *Dennis, supra,* based on the same reasoning. Both opinions, however, modified the requested instruction to more accurately portray the consequences of a not guilty by reason of insanity verdict and to add the proviso that the jury was not to consider these consequences in reaching its verdict, which was to be confined to the question whether the defendant was sane at the time he committed his crimes. CALJIC No. 4.01 was drafted in response to these decisions, followed by its analog in CALCRIM No. 3450.[5] Both cases held that the instruction must be given on a defendant's request, and such has been the law in California for some 30 years. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 625-626, overruled on unrelated grounds in *Price v. Superior Court* (2001)

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[5] CALCRIM No. 3450 provides in relevant part: "If you find the defendant was legally insane at the time of (his/her) crime[s], (he/she) will not be released from custody until a court finds (he/she) qualifies for release under California law. Until that time (he/she) will remain in a mental hospital or outpatient treatment program, if appropriate. (He/she) may not, generally, be kept in a mental hospital or outpatient program longer than the maximum sentence available for (his/her) crime[s]. If the state requests additional confinement beyond the maximum sentence, the defendant will be entitled to a new sanity trial before a new jury. Your job is only to decide whether the defendant was legally sane or insane at the time of the crime[s]. You must not speculate as to whether (he/she) is currently sane or may be found sane in the future. You must not let any consideration about where the defendant may be confined, or for how long, affect your decision in any way."

Cal.4th 1046, 1069 [upholding the instruction against challenge and acknowledging its "purpose is to prevent a finding of sanity by a jury concerned that a finding of not guilty by reason of insanity would lead to the release of the defendant from custody"].)

The same considerations that led to the holdings of *Moore* and *Dennis* require a finding of error in the trial court's refusal to educate the jury in appellant's case. Perhaps even more so, since while the meaning of a verdict of not guilty by reason of insanity may not be common knowledge, the meaning of an unadorned not guilty verdict surely is: "the prisoner goes free" (*Lyles v. United States, supra,* 254 F.2d 725, 728). In both situations, the jury is asked to render a verdict under an acknowledged risk that they will base it on the same misconception about its consequences. In both situations, that risk is easily avoidable by telling them that whatever their verdict, the prisoner will *not* go free. And in both situations, providing that information, far from encouraging consideration of punishment, would naturally work to put such considerations to rest so that the jury can render a true verdict uninfluenced by fear and unfounded speculation.[6]

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[6] The two contexts to which this Court has declined to extend the holding of *Moore* are readily distinguishable. No similar instruction has been held appropriate on the consequence of a jury finding the defendant incompetent to stand trial because that consequence would be necessarily speculative (*People v. Dunkle* (2005) 36 Cal.4th 861, 897; see also *People v. Marks* (2003) 31 Cal.4th 197). And no similar instruction has been held appropriate on the consequence of a capital jury's failure to reach a unanimous verdict on penalty because there is no real risk of a jury returning a death verdict out of fear that the defendant would receive a penalty lesser than life without possibility of parole should they deadlock (*People v. Thomas* (1992) 2 Cal.4th 489). Here, in contrast, the consequence of a not guilty verdict is certain: the defendant would still be held criminally accountable for killing Madison; and the risk of the jury returning a guilty

The following instruction, or one something like it, should therefore have been given to appellant's second jury:

> "The defendant has been convicted of the crime of 'gross vehicular manslaughter while intoxicated' in a prior proceeding. In this proceeding, your only job is to decide whether he is also guilty of the crime of murder. You must not speculate as to his punishment and must not let any consideration about how long he may be confined affect your decision in any way." (Compare CALCRIM No. 3450.)

Such an instruction is equally, if not more, necessary to protect the truth-finding function of the jury from mistake, speculation and fear as in the sanity context.

F. The *Batchelor* decision was correct.

In a case with facts virtually identical to appellant's, the Court of Appeal agreed that it was error to deny the defendant's request that the second jury be informed of his manslaughter conviction (*People v. Batchelor, supra,* 229 Cal.App.4th 1102). In *Batchelor*, as here, the prosecutor charged, *inter alia*, both gross vehicular manslaughter while intoxicated and second-degree murder, and proceeded to a second trial on the murder charge alone after the original jury convicted of manslaughter while failing to reach a verdict on the murder. The *Batchelor* court's reasoning in reaching the result urged here is sound and compelling.

Batchelor first observed that *People v. Birks, supra*, 19 Cal.4th 108 and the

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verdict out of fear that the defendant would otherwise go free is, as demonstrated *ante*, all too present.

other cases disavowing the defense's unilateral right to instructions on uncharged and unincluded offenses did not address the instant question, since in the present situation the prosecution *did* charge the nonincluded offense and moreover obtained conviction on it. Then, after finding that the second jury could not appropriately be instructed on the actual elements of vehicular manslaughter (a position not taken here), the court went on to observe that an instruction doing nothing more than informing the jury of the historical fact of the manslaughter conviction would in no way interfere with the prosecutorial charging discretion that was a concern of *Birks*. (*Batchelor, supra*, at p. 1116.)

Having disposed of any impediment to giving the requested instruction from *Birks et al.*, the court went on to explain why the instruction *should* have been given:

> "The People chose to charge both murder and manslaughter in the information. The circumstance that the first jury was unable to reach a verdict on the murder charge should not properly be an opportunity to retry the case in a new posture, giving the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished. In other words, the People may not have their cake and eat it too. Defendant was in fact charged with both murder and manslaughter, and convicted of the latter offense in his first trial; we see no appropriate reason why both of defendant's juries should not have been aware of that circumstance."
>
> "We conclude the trial court erred by instructing defendant's second jury in a manner that gave the jury the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder." (*Id.*, at pp. 1116-1117.)

As demonstrated in preceding sections of this brief, both threads of this reasoning are solidly backed by authority. Allowing the prosecution the benefit of at once charging the unincluded offense and keeping the second jury ignorant of it created a mirror image of the tactical imbalance which *Birks* declared "significant and inappropriate" (*Birks, supra*, 19 Cal.4th 108, 127-128; see section D, pp. 22-23, *ante*). Had the prosecution not chosen to charge manslaughter as a lesser related offense, the jury would have had an all-or-nothing choice between murder and no criminal accountability which would have affected both parties equally, as the lack of a middle ground in the face of undisputed evidence of a grievous criminal act meant the jury could not split the difference, but had to resolve any doubt by either giving the prosecution a boon in the form of a murder verdict or the defense one in the form of complete absolution. That it *did* so choose, procured a manslaughter verdict and then retried the murder charge, left the prosecution with no gamble whatsoever while never according the defense the option of acquittal should the jury believe his act amounted to no more than manslaughter. The only way to correct that imbalance and preserve the principle of mutual fairness in the treatment of lesser offenses affirmed in *Birks* (at 19 Cal.4th, p. 127) was, as *Batchelor* observed, to inform the second jury that murder and no criminal accountability were not the sole options. The *Birks* court affirmed that "*neither* party has a greater interest than the other in gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground, and *neither* party's 'strategy,

ignorance or mistake[]' should open the way to such a verdict. [Citations omitted.] Our courts, we have stressed, '"are not gambling halls but forums for the discovery of truth."' [Citations omitted.]" (*People v. Birks, supra,* 19 Cal.4th at p. 127.) Here, absent the instruction at the second trial, the prosecution strategy subjected the defense to such "an inaccurate all-or-nothing verdict" while the prosecution never faced that risk. Or, in *Batchelor's* shorthand, the People were wrongly allowed to "have their cake and eat it too."

The second thread of *Batchelor's* reasoning, that absent instruction otherwise, the jury would have had "the false impression that defendant would be left entirely unpunished for his actions if the jury did not convict him of murder," is similarly well supported by authority. Rather than repeat the showing made in the preceding sections of this argument, it should suffice to observe that there is no disagreement among our courts that speculation about punishment is an inevitable feature of the jury system (e.g., *People v. Riel, supra,* 22 Cal.4th 1153; *People v. Dykes supra,* 46 Cal.4th 731; *People v. Moore, supra,* 166 Cal.App.3d 540), that juries perceive "not guilty" verdicts as the defendant's ticket out the door (e.g., *People v. Moore, supra,* 166 Cal.App.3d 540; *Lyles v. United States, supra,* 254 F.2d 725) and that a stark choice between conviction and acquittal when the defendant has clearly committed a criminal act is not conducive to reliable verdicts (e.g., *People v. St. Martin, supra,* 1 Cal.3d 524; *People v. Geiger, supra,* 35 Cal.3d 510; *People v. Barton, supra,* 12 Cal.4th 186). In addition, not only the

defendant, but the jury too, has a legitimate interest in a verdict unaffected by reliance on a false notion of its consequences (*Lyles, v. United States, supra,* 254 F.2d 725, 728).

In short, *Batchelor* had it right.

G. The opinion below does not speak to the issue at hand.

In contrast, the opinion below rejecting *Batchelor* and coming to an opposite conclusion is poorly reasoned, misreads *Batchelor*, and fails to address in other than conclusory fashion any pertinent authority (*People v. Hicks* (2015) 243 Cal.App.4th 343).[7] It has nothing to offer to the resolution of the issue before this Court.

At the outset, the opinion misreads *Batchelor* by asserting that its finding of error was partially premised on the content of the prosecutor's closing argument and that it is that closing argument the *Batchelor* court was referring to in noting "the unusual circumstances of this case" (*Hicks* opinion at p. 346.) Not so. The "unusual circumstances" to which *Batchelor* referred was the procedural posture of the case, which the present one shares, i.e., the presentation to a second jury of a single charge of murder after a first jury had deadlocked on that charge while convicting of gross vehicular manslaughter. The reference to the prosecutor's closing argument came *after* the court found error and was offered not as an aspect of the error but as a circumstance that

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[7] As review has been granted, the opinion below is cited only for informational purposes.

compounded it (*Batchelor, supra,* 229 Cal.App.4th at p. 1117).[8]

Next, the opinion faults *Batchelor* to the extent it held that a trial court must always advise a jury in a second trial that the defendant was convicted of a lesser related crime in the first trial (*Hicks* opinion at p. 347). *Batchelor* never said that; it solely addressed the "unusual circumstances" it shares with the present case (*Batchelor, supra,* at p. 1117.) It follows that the opinion's ensuing string of citations is beside the point (*People v. Edwards* (1991) 54 Cal.3d 787, 845; *People v. Burgener* (2003) 29 Cal.4th 833, 867; *People v. Washington* (1993) 6 Cal.4th 215, 254 [all dealing with requests to inform a jury of a previous jury's or court's resolution of the precise issue resubmitted to the new jury, not, as here, information regarding a fact whose resolution is complete]).[9]

The opinion does correctly note that a trial court must refrain from instructing the jury on irrelevant and confusing matters and that the defendant's punishment is not a proper matter for jury consideration (*Hicks* opinion at p. 347),[10] but restricts all ensuing discussion of these principles to the conclusory assertion that the

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[8] In the prejudice section of this brief, *post*, appellant will note that the opinion then wrongly asserts that the prosecutor's closing argument in the present case was not comparable to the one cited in *Batchelor*.

[9] The opinion adds a "cf." cite to Penal Code section 1180. That section is indeed a contrast to the present situation, since it addresses proceedings after "the granting of a new trial." Here, of course, there was no grant of new trial; rather the outcome of the old trial remained intact while the prosecution exercised its prerogative to have an additional one.

[10] Albeit misciting the relevant jury instruction as CALCRIM No. 706, which is tailored for special circumstance murder proceedings.

requested instruction might cause a jury to focus on punishment rather than whether murder was proved beyond a reasonable doubt. The analysis, such as it is, ends where the discussion should begin; absent is any hint that appellant's jury was already at risk of diverting its focus to punishment and that the instruction could have ameliorated, not been the cause of, that risk. (*Id.*, at p. 348.)

The only other authority cited for the opinion's conclusion that the requested instruction was properly denied consists of cases declaring that gross vehicular manslaughter is a lesser related but not included offense in second-degree murder and that juries are not to be instructed (i.e., the defense has no unilateral right to compel the option of conviction) on lesser related offenses (*Id.* at pp. 347-348). True, but not the issue before this Court or either of those below.

Finally, the opinion premises its holding on two briefly stated concerns that minimal analysis shows to be unfounded (*Id.* at p. 348). The first is that the requested instruction might possibly prejudice the defense. This was answered in *People v. Moore, supra,* 166 Cal.App.3d 540 and *People v. Dennis, supra,* 169 Cal.App.3d 1135 by providing that the jury in sanity proceedings be instructed on the consequences of their verdict only upon defense request. The second is that the requested instruction might induce the jury to assume that the previous jury could not come to a conclusion as to the murder charge and draw an inference from that assumption. Inferentially, the opinion seems to be referring to a danger that the jury would assume that the murder charge

before it was previously tried, that it was tried to a jury, that while some members of that jury found guilt of murder beyond a reasonable doubt, others did not, and that they should therefore be inclined to side with those who did not. This is not an assumption followed by an inference, but a series of speculations leading to an inference that does not naturally flow from them. It is not a basis for deciding an issue which can be resolved by applying a logical set of propositions supported by caselaw.

In sum, for all the reasons given in the *Batchelor* decision and this brief, the trial court erred in failing to give appellant's requested instruction. The opinion below to the contrary adds nothing to the discussion.

H. Appellant's conviction should be reversed.

Assuming for purposes of argument that the applicable prejudice standard is that stated in *People v. Watson* (1956) 46 Cal.2d 818, 836, the failure to inform appellant's jury that Madison's death had already resulted in his manslaughter conviction requires reversal because it is reasonably probable that an informed jury would not have unanimously found beyond a reasonable doubt that he acted with malice.

In order to find malice, the jury had to find not only that appellant had knowledge that driving while intoxicated was dangerous to life, but that he drove with conscious disregard of that danger, the required state of mind being: "I know my conduct is dangerous to others, but I don't care if someone is hurt or killed" (*People v. Jiminez* (2015) 242 Cal.App.4th 1337, 1358). Although there clearly was sufficient evidence to

support the verdict, not only the defense, but the prosecution, presented evidence that also would have justified a reasonable doubt whether appellant drove with malice. He testified his only thought was to get to his brother and didn't think of anything else (6RT 4821-4823). Witnesses uniformly described him as irrational and delusional, talking to himself, screaming, hallucinating and barking like a dog (4RT 3678, 3684-3686, 3689; 6RT 4504-4505), all consistent with, as he testified, not "processing" the danger of what he was doing (6RT 4866-4867).

Moreover, just as in *Batchelor*, the prosecutor took advantage of the jury's ignorance to emphasize that appellant must be held accountable for killing Madison. Though it was conceded at the outset of the defense case that appellant had committed all the acts the prosecution witnesses attributed to him and that therefore the question for the jury was not whether he should be held accountable but whether the elements of murder had been proven beyond a reasonable doubt (6RT 4807-4809), the prosecutor nonetheless chose to address accountability in cross-examining him:

> "Q And you believe people should be personally accountable for their actions, right, sir?
>
> "A Yes.
>
> "Q And you're saying to this jury that you should be personally accountable for the crash shown here in People's 24?[11]

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[11] People's 24 was a photograph of the crushed Lexus that Madison spent her last conscious moments in (5RT 4230).

> "A   I am the person. My actions led to that crash; so yes, I am responsible . . ." (6RT 4868)

The prosecution returned to the subject, twice, in his closing argument:

> "The defendant himself said, in evidence that you have before you, that – and he testified to this yesterday – he's responsible. He's the driver. He is the one who took Madison Ruano out of this very car seat and took her life. That's the reality." (6RT 5251)

> "Sometimes what needs to happen is people need to hold [those who make poor choices] personally accountable for what they've done. You have the opportunity to do that in this case." (6RT 5255)

These allusions to personal accountability are indistinguishable from those the prosecutor made in *Batchelor* that were held to compound the error and serve to demonstrate prejudice. The *Batchelor* prosecutor argued to the jury: "And now is the time that you have to hold this person accountable. Now is the time to send the message that you drink and drive and kill someone, you're going to be held accountable. There is only one count in this case that you have to decide on. This is it. Hold him accountable for killing someone." (*Batchelor, supra,* at p. 1117.) Although the opinion below quotes from this argument, it unaccountably, without referring to the trial record, goes on to state that "[h]ere, in contrast, the prosecutor made no such argument" (*Hicks* opinion at p. 346). Yet the two arguments are identical in creating the misleading impression that unless the jury found the defendant guilty of the murder charge he would not be held accountable at all for the death. The *Batchelor* court concluded that "[p]articularly in

light of the prosecutor's argument, underlining and attempting to capitalize on the second jury's incomplete information from the instructions, there is a reasonable probability that the second jury's false impression that a failure to convict defendant of murder would leave him unpunished for his actions was the determining factor why the second trial resulted in a coviction for murder, while the first did not" (*Batchelor, supra,* 229 Cal.App.4th at p. 1118). The same is true here.

It is significant that when appellant's first jury announced their deadlock on the murder charge and the court asked them whether the deadlock was "based on one or more of the jurors failure to deliberate" as opposed to "a genuine disagreement as to what was proven," the foreperson reported a genuine disagreement (4RT 2413-2415). Contrary to the opinion's conclusory statement (*Hicks* opinion at p. 348), the evidence was functionally identical in both trials.[12] There can therefore be no confidence that the same genuine disagreement would not have occurred absent the impetus to convict based on an

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[12] The two trials shared 20 prosecution witnesses in common. In addition, the first trial had 7 not present at the second, and the second had 6 not present at the first, most giving overlapping testimony. The only additional witness at the second trial who gave new testimony pertinent to the question of malice was Highway Patrol Officer Joshua Wupperfield, who opined that a hypothetical person whose acts were the same as appellant's on the day of the crash would be "capable" of making decisions. It is questionable whether this added anything significant to the testimony of the prosecutor's other drug expert, retired senior criminalist David Vidal, who explained to both juries that PCP intoxication disrupts short-term memory and the ability to process data from multiple sources, conditions not inconsistent with the ability to make decisions and arguably inconsistent with its absence; there was nothing in the first trial to cause the jury to doubt appellant's capacity to make decisions.

erroneous assumption that conviction was the only alternative to letting appellant go free when he was admittedly responsible for the unjustified, and unjustifiable, killing of a two-year old child. Appellant's murder conviction should therefore be reversed and remanded for new trial by a properly informed jury.

CONCLUSION

For the foregoing reasons, this Court should approve the decision in *People v. Batchelor* (2014) 229 Cal.App.4th 1102 and hold that the trial court erred to appellant's prejudice in refusing to inform the jury at the retrial of his murder charge that he had been convicted of gross vehicular manslaughter in the first trial.

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Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

JONATHAN B. STEINER
Executive Director

NANCY GAYNOR

Attorneys for Appellant
Marvin Travon Hicks

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People v. Marvin Travon Hicks

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 10,187 words.

NANCY GAYNOR

People v. Marvin Travon Hicks, S232218

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On August 1, 2016, I served the within

APPELLANT'S OPENING BRIEF ON THE MERITS

in said action, by emailing a true copy thereof to:

Kamala D. Harris, Attorney General
docketingLAawt@doj.ca.gov.

and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

Jamal Tooson
Attorney at Law
11601 Wilshire Blvd., Ste. 500
Los Angeles, CA 90025

Craig Kleffman, Dep. District Attorney
Office of the District Attorney
42011 4th St. W
Lancaster, CA 93534

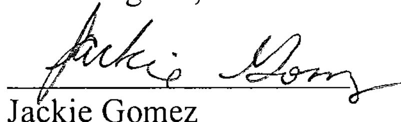
Marvin Travon Hicks (AU-9789)
Ironwood State Prison
P.O. Box 2199
Blythe, CA 92226

Office of the Clerk,
Los Angeles County Superior Court
210 West Temple Street
Los Angeles, CA 90012
For delivery to the:
Honorable Kathleen Blanchard, Judge

Joseph A. Lane
Clerk of the Court of Appeal
Second Appellate District
Division Five
300 S. Spring Street, Room 2217
Los Angeles, CA 90013

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

Executed August 1, 2016, at Los Angeles, California.



Jackie Gomez