In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **EDUARDO MIL, JR.,** **Defendant and Appellant.**	Case No. S184665

Fifth Appellate District, Case No. F056605
Kern County Superior Court, Case No. BF 11667B
The Honorable Kenneth C. Twisselman, II, Judge

ANSWER BRIEF ON MERITS

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Is harmless error analysis appropriate when the trial court omits multiple elements from a jury instruction on special circumstance murder, and, if so, was the error harmless in this case?[1]

STATEMENT OF THE CASE

On October 22, 2006, Michael McLane, the part-time manager of the El Don Motel in Bakersfield, saw appellant, Eduardo Mil, Jr. at the motel. Appellant was arguing with his girlfriend, Crystal Eyraud, the stepdaughter of McClane's friend, Carl Cowen, a parolee who stayed at the motel and did odd jobs. (2RT 33, 44-49.) McLane asked appellant to leave the property and appellant complied. (2RT 47-48, 187, 190.)

The next day, Roland Coe rented room number 11. (2RT 34-35.) Coe parked his blue Dodge van outside of room number 11, adjacent to the motel. (2RT 36-38.)

Later that evening, Mr. McLane was walking around the motel, and saw Coe working on his van and drinking a beer. (2RT 42.) The door to room number 11 was open and McLane saw Eyraud in the room. (2RT 43.)

McLane saw appellant around the hotel several times; each time he told appellant to leave the premises. (2RT 50, 192, 194.) On one occasion, McLane heard appellant tell Eyraud that, "I am going to rob the mother fucker." (2RT 51.)

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[1] Appellant indicates in his Opening Brief on the Merits that his "petition listed two other issues relating to statements admitted in violation of federal and state law." (AOB p. 1.) Appellant appears unsure if his petition was also granted as to those additional issues he raised on direct appeal. (AOB p. 1.) His petition for review, however, only sought review of the single issue on the jury instruction given on special circumstance murder listed above. (Pet., pp. 6-16.)

On October 24, 2006, between midnight and 2:00 a.m., Cowen saw appellant out in front of his motel room. (2RT 191.) Appellant was with a man named Kevin and was looking for Eyraud. (2RT 192.) When appellant heard that Eyraud was in room number 11 with a man, appellant stated that, "He was going to beat the hell out of the guy and rob him." (2RT 192.) Cowen told appellant to leave. (2RT 192.) Mr. Cowen saw appellant leave, pushing his bicycle. (2RT 192.)

Approximately an hour later, Cowen saw appellant in front of room number 11 talking to Eyraud. (2RT 193.) Cowen again told appellant to leave. (2RT 194.) Appellant walked away, appearing to leave. (2RT 194.) Thirty minutes later, Cowen again saw appellant at the motel and told him to leave. (2RT 194.) Appellant again stated that he was going to rob the man in room number 11. (2RT 195.) Cowen told appellant to leave once more and appellant walked off. (2RT 195.)

On October 24, 2005, around 5:00 a.m., McLane was awakened by a commotion and yelling. (2RT 55-57.) He knocked on McLane's door; McLane was getting dressed. (2RT 58.) McLane left his room and went around the corner and saw Coe lying in a fetal position in the threshold of his room. (2RT 59, 61.) McLane tried to assure Coe that he would be all right but Coe was non-responsive. (2RT 67.) McLane called 9-1-1 and waited for the police to arrive. (2RT 67.)

Kern County Sheriff's Deputy Bret Lackey arrived at the El Don Motel around 5:50 a.m. after receiving a dispatch call. (2RT 90.) When Deputy Lackey arrived, Coe had already been taken to the hospital. (2RT 91.) Deputy Lackey entered room number 11 and observed blood on the bed, carpeting, and a blanket. (2RT 106.) Deputy Lackey also identified a knife with a plastic handle that was located in a trash can a block from the motel. (2RT 118-119.)

Kern County Sherriff's Sergeant Michael Bonsness arrived at the El Don Motel and spoke with Eyraud. (2RT 160-162.) Sergeant Mil also interviewed appellant later that evening. (2RT 163.)

Sergeant Mil noticed that appellant had scratches on his left hand and wrist. (2RT 179.) Appellant told Sergeant Bonsness that he had known Eyraud for around six months and that she was "more of a friend than my girlfriend." (1SCT 29.) Appellant saw Eyraud at the El Don Motel staying with an "older guy." (1SCT 44.) Eyraud wanted appellant to steal a car and the two argued. (1SCT 49.) Eyraud then told appellant that she was going to give her "John" or "trick" or "mark" some sleeping pills and then "take his loot." (1SCT 53.) Appellant claimed he just wanted dope from her and, after arguing, he got on his bike and left. (1SCT 55.) After riding around for a while, appellant returned to the El Don Motel twice looking for Eyraud. (1SCT 56-57.) Appellant claimed that he did not find Eyraud so he left. (1SCT 58.)

Appellant then told the police that he saw Eyraud at the El Don Motel and that she opened the door for him. (1SCT 64.) According to appellant, Coe said, "Is this the mother-fucker?" (1SCT 64.) When Coe started to get out of his chair, appellant hit him twice. (1SCT 65.) Coe started yelling, "What's wrong with you Crystal? Crystal, what the fuck?" as the two men started fighting. (1SCT 65.) Eyraud yelled "Get his wallet." (1SCT 73.) Coe responded, "You don't really have to do all this for my wallet." (1SCT 76.)

Appellant claimed the fight was "even" and when Coe said "okay," appellant ran out of the room without seeing Eyraud stab Coe. (1SCT 66.) Appellant further claimed that Eyraud had told him before that she and a pregnant girl were planning on robbing Coe that night. (1SCT 68-69, 73.) Appellant admitted that Eyraud was supposed to leave a cigarette on the van's bumper to let him know she was still in the room; by the time he

entered the room, Coe was supposed to be knocked out cold. (1SCT 141, 145.) Appellant finally admitted that he went to the motel room to rob Coe and it went terribly wrong. (1SCT 157.)

A few months after the murder, Cowen, who had been arrested for absconding from parole, was on a jail transport bus with appellant and Eyraud. (2RT 196-197.) Cowen was sitting two seats behind appellant, while Eyraud was next to appellant, separated by wire mesh fencing. (2RT 197.) Appellant told Eyraud that she should "take the rap" for the murder since she was retarded and she would likely get nine to twelve months in an institution. (2RT 198.) Appellant also told Eyraud that he beat Coe until he was unconscious and then stabbed him several times. (2RT 198.) As they were exiting the bus, Cowen called appellant a "piece of crap." (2RT 200.) Appellant then appeared to recognize Cowen and stated, "I was just trying to help Eyraud out." (2RT 200.) Later, in a holding cell, appellant threatened Cowen to "stay out of it" because he had "friends that could take care of" him either in prison or on the streets. (2RT 201.)

Raquel Rodriquez met Eyraud while they were in the same pre-trial pod at the Kern County jail. (2RT 220-221.) Rodriquez also took a bus ride with Eyraud and saw her talking to appellant. (2RT 221-222, 229.) Rodriquez heard appellant try to convince Eyraud to take a plea since she had "some mental issues" and since she would go to Patton Hospital, whereas appellant would get either life in prison or the death penalty. (2RT 229.) Appellant also told Eyraud that he had gone crazy because he thought Eyraud was having sex with the man, so he "stuck him and kept sticking him and couldn't stop." (2RT 230.) Rodriquez heard appellant threaten to kill Cowen. (2RT 230-231.)

District Attorney Investigator Eusebio Garza confirmed that the Kern County Sheriff's Office jail logs showed that appellant, Eyraud, Cowen,

and Rodriquez were all on the same transportation bus on January 17, 2007. (2RT 231-232.)

Dr. Lesley Wallis-Butler performed an autopsy on Coe. (2RT 135-137.) She opined that Coe died of multiple stab wounds to his right chest. (2RT 157.)

Eyraud told Sergreant Bosness that she had stabbed Coe with a knife. (3RT 330.) Eyraud stated that she was attempting to separate appellant and Coe when Coe kicked her in the stomach. (3RT 334.) Eyraud thought that Coe had hurt her baby so she "lost it" and stabbed Coe in a thrusting manner. (3RT 334-335.) Eyraud, however, claimed to have stabbed Coe only once. (3RT 335.)

The District Attorney of Kern County filed information number BF116677B charging appellant with first degree murder (Pen. Code,[2] 187, subd. (a); count 1).[3] The information further alleged the special circumstances of murder during robbery and burglary pursuant to section 190.2, subdivisions (a)(17)(A) & (G). The information finally alleged that appellant suffered two prior prison terms within the meaning of section 667.5, subdivision (b). (1CT 93-96.)

On October 6, 2008, the jury returned its verdict of guilty and found both special circumstance allegations to be true. (1CT 272.) The same day, the trial court found both prior prison term allegations true. (1CT 272.)

On November 4, 2008, the trial court denied probation and sentenced appellant to life in prison without the possibility of parole for special circumstance murder. In addition, the trial court imposed a

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[2] Unless otherwise indicated, all further section references are to the California Penal Code.

[3] Eyraud was also charged in the same information with special circumstance murder with a knife-use enhancement. (Pen. Code, §§187, subd. (a); 12022, subd. (b).) (1CT 93-95.)

consecutive two years for the prison priors. (1CT 283.) The trial court also awarded appellant 743 days custody credit. (1CT 284.)

On June 17, 2010, after hearing oral argument, the Fifth District Court of Appeal filed its unpublished opinion, finding that the trial court's error in instructing on felony-murder special circumstance was harmless because the evidence revealed no reasonable doubt that appellant was a major participant in the robbery and burglary who acted with reckless indifference to human life.

This Court granted appellant's petition for review.

SUMMARY OF ARGUMENT

Appellant, by failing to object below, forfeited his right to complain that the trial court erred when it did not instruct the jury that appellant had to be a major participant in the burglary and robbery who acted with reckless indifference to human life. Nevertheless, the lower court properly applied a harmless beyond a reasonable doubt standard to the instructional error. As this Court noted in *People v. Odle* (1988) 45 Cal.3d 386, overruled on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 256, even when a trial court omits all elements of a special circumstance instruction (killing a peace officer engaged in the performance of his duties), a harmless error analysis is appropriate. Appellant concedes that a harmless error analysis is appropriate if only one element was omitted from the jury instructions. Respondent submits that the same rationale applies when multiple elements were omitted.

Applying the harmless error test in this case, the lower court properly held that the error was harmless beyond a reasonable doubt. The evidence overwhelmingly showed that appellant was a major participant in the burglary and robbery as he was well aware of the plan, was one of two assailants, and physically restrained the victim, allowing for escape. The evidence also proved that appellant acted with reckless disregard for the

victim's life by committing a dangerous crime with an associate whom he knew carried large steak knives and had a propensity to stab people.

ARGUMENT

I. THE LOWER COURT PROPERLY APPLIED THE HARMLESS ERROR TEST AFTER THE TRIAL COURT'S JURY INSTRUCTIONS ERRONEOUSLY OMITTED TWO ELEMENTS OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE

Appellant contends that the harmless error analysis used by the lower court in this case was inappropriate. (AOB 16-32.) Specifically, he contends that harmless error analysis is only appropriate when the trial court has erroneously omitted only *one* element from a jury instruction on special circumstance murder. Thus, he contends that because two elements were omitted in this case, the error is a "miscarriage of justice" and prejudicial "per se." Despite appellant's argument to the contrary, and as the Court of Appeal correctly found, a harmless error analysis was proper in this case.

A. Procedural Background

Appellant was convicted of first degree murder and the jury found true the special circumstance allegations that the murder was committed while appellant was engaged in the commission of a robbery and a burglary. (1CT 272.)

Section 190.2, subdivision (d), specifies a punishment of imprisonment in the state prison for life without the possibility of parole for a person, "not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, ... or assists in the commission of a [burglary or robbery] which results in the death of some person or persons, and who is found guilty of murder in the first degree..."

The trial court instructed the jury on the special circumstances with CALJIC No. 8.80.1, which provides in relevant part,

> If you find [the] defendant in this case guilty of murder of the first degree, you must then determine if [one or more of] the following special circumstance[s][are] true or not true: murder in the commission or attempted commission of robbery or burglary. [¶] The People have the burden of proving the truth of a special circumstance. If you have a reasonable doubt as to whether a special circumstance is true, you must find it to be not true. [¶] ... [¶] [*If you find that a defendant was not the actual killer of a human being, [or if you are unable to decide whether the defendant was the actual killer or [an aider and abettor] [or] [co-conspirator],] you cannot find the special circumstance to be true ... unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] any actor in the commission of the murder in the first degree] [.] [, or with reckless indifference to human life and as a major participant, [aided,] [abetted,] [counseled,] [commanded,] [induced,] [solicited,] [requested,] [or] [assisted] in the commission of the crime (Penal Code, § 190.2(a)(17) which resulted in the death of a human being....*] [¶] ... [¶] [You must decide separately each special circumstance alleged in this case. If you cannot agree as to both of the special circumstances, but can agree as to one, you must make your finding as to the one upon which you do agree.] [¶] In order to find a special circumstance alleged in this case to be true or untrue, you must agree unanimously.

(Italics added.)

The trial court here, however, neglected to give the italicized portion of CALJIC No. 8.80.1. (2CT 245-246.) As such, the jury was never instructed that in order to find the special circumstance true, it had to find that appellant was a major participant in the murder and that he acted with reckless indifference to human life. It is these omissions of which appellant complained on appeal.

The Court of Appeal correctly found the above omission harmless error.

B. Appellant has Forfeited this Issue on Appeal

Initially, respondent submits that because appellant failed to object to the special circumstance instructions at trial, he has forfeited this issue on appeal. Generally, a defendant who fails to object to a proposed jury instruction forfeits the right to challenge that instruction on appeal. (*People v. Bolin* (1998) 18 Cal.4th 297, 326 [waiver found when defense counsel agreed to giving of instruction and raised no objection]; *People v. Stone* (2008) 160 Cal.App.4th 323, 331 [defendant waived claim of instructional error by failing to object].) Here, appellant did not specifically object to the special circumstance instructions. Appellant simply made a general objection to giving "CALJIC instructions as opposed to the CALCRIM instructions..." (3RT 442.) Thus, appellant has forfeited this claim. Moreover, appellant suffered no possible prejudice from the instruction, as explained below.

C. The Court of Appeal Properly Applied the Harmless Error Test

Appellant acknowledges that the lower court would have properly applied a harmless error test if only a single element of the special circumstance were omitted. (AOB 18, citing *People v. Flood* (1998) 18 Cal.4th 470, 487 (*Flood*).) In appellant's view, because there was more than one element omitted from the instructions on the special circumstance, the error was a "miscarriage of justice" and the sentence of life in prison without the possibility of parole must be reversed. (AOB 24.) However, appellant ignores this Court's decision in *Odle*, where this Court held the harmless error applies when *multiple elements* of a special circumstance are not decided by the jury. As such, appellant's argument should be rejected. (See *People v. Odle*, *supra*, 45 Cal.3d 386.)

A trial court bears a sua sponte duty to instruct the jury on every element of a crime (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324;

Flood, *supra*, at pp. 479-480, 491), and the elements of a special circumstance allegation (*People v. Williams* (1997) 16 Cal.4th 635, 689 (*Williams*)). California law provides for a jury finding on the truth of any special circumstance allegation (§ 190.4, subd. (a); *Williams, supra*, at p. 688.) The federal Constitution's Sixth Amendment requires a jury determination of any fact, other than the fact of a prior conviction, that increases the penalty for a crime. (*Apprendi v. New Jersey* (200) 530 U.S. 466, 476, 490.)

"[A]ssertions of instructional error are reviewed de novo." (*People v. Lame*r (2003) 110 Cal.App.4th 1463, 1469.) A trial court's failure to instruct the jury on all elements of an offense is a constitutional error "subject to harmless error analysis under both the California and United States Constitutions." (*Flood*, *supra*, 18 Cal.4th 470, 475.) Under the federal Constitution, the standard is whether the instructional error was harmless under *Chapman v. California* (1967) 386 U.S. 18. (*Flood*, at p. 504; *Williams*, at p. 689.) Under that test, an error is harmless only when it can be said beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman*, *supra*, at p. 24.)

Likewise, a trial court's failure to instruct on all the elements of a special circumstance allegation is also subject to a harmless error analysis. (*Williams*, *supra*, 16 Cal.4th at p. 689.) This Court has consistently held that when a trial court fails to instruct the jury on an element of a special circumstance allegation, the prejudicial effect of the error must be measured under the test set forth in *Chapman, supra*, 386 U.S. at p. 24. (*People v. Osband* (1996) 13 Cal.4th 622, 681; *People v. Johnson* (1993) 6 Cal.4th 1, 45 (*Johnson*).)

In *People v. Odle*, *supra*, 45 Cal.3d 386, the defendant was charged with the special circumstance that: 1) the victim was a peace officer who 2) while engaged in the course of the performance of his duties was

intentionally killed, and 3) the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties. (*Id.* at p. 410.) The trial court, however, gave no instructions on the special circumstance. (*Ibid.*) This Court noted in *Odle* that there were three elements to this special circumstance, but still found the failure to instruct on all three elements harmless beyond a reasonable doubt. (*Id.* at pp. 415-416.)

This Court subsequently reiterated its holding in *Odle*. As this Court explained in *People v. Cummings* (1993) 4 Cal.4th 1233, 1312-1313:

> In *Odle*, the trial court had omitted instructions on the elements of the special circumstance of intentionally killing a peace officer engaged in the performance of his duty [citation] alleged in conjunction with a murder charge. We were persuaded that the standard of review to be applied to that error was not the reversible per se rule subject only to the exceptions recognized in *People v. Sedeno* [(1974) 10 Cal.3d 703].... The error could instead be tested under the harmless error analysis of *Chapman v. California*, *supra*,... [¶]"

Respondent concedes that part of this Court's reasoning for upholding the harmless error test in *Odle* was because, at the time, "[T]here [was] no constitutional right to a jury trial on the special circumstance issue." In fact, subsequent to its decision in *Cummings*, this Court noted in *People v. Prieto*, *supra*, 30 Cal.4th at pp. 256-257, that the holding of *Odle* that there is no right to have a jury determine the existence of all elements of a special circumstance is now erroneous after *Ring v. Arizona* (2002) 536 U.S. 584, 609. As this Court explained, though:

> *Ring* did not, however, undermine the core holding of *Odle*-that an erroneous instruction that omits an element of a special circumstance is subject to harmless error analysis pursuant to *Chapman v. California* .... Because the omission of an element [of a substantive offense] is an error that is subject to harmless-error analysis under Chapman [citation], by analogy, the erroneous omission of an element of a special circumstance is still subject to that same analysis, notwithstanding Ring.

This Court explained that one exception to this rule is where the instructional error "withdraws from jury consideration *substantially all of the elements of an offense* and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*People v. Cummings*, *supra*, 4 Cal.4th 1233 at p. 1315, italics added.) Otherwise, the fundamental fairness of the trial process is implicated, making the error reversible per se. (*Ibid.*) However, this did not occur in this case.

Other decisions by this Court have also upheld a harmless error test when jury instructions on an element of a special circumstance were omitted. For example, in *People v. Johnson*, *supra*, the trial court failed to instruct the jury on defendant's intent to kill. (*Johnson*, *supra*, 6 Cal.4th at p. 45.) Based on the manner in which the defendant in *Johnson* had committed the two killings-strangling one victim and setting her on fire, and beating the second victim to death by inflicting 10 to 12 kicks to her head and face-this Court concluded that the jury, in finding the defendant had committed those types of murders, necessarily found that he had an intent to kill. (*Id.* at pp. 46-47; see also *People v. Osband*, *supra*, 13 Cal.4th 622, 681 [applying the *Johnson* analysis to the felony-murder special circumstances].)

Likewise, in *Osband*, three felony-murder special circumstances were alleged, one each for the underlying crimes of burglary, robbery, and rape. This Court held that failing to instruct the jury that it had to find intent to kill as an element of each of the felony-murder special circumstances was error, but the error was harmless because "[t]he brutality of the assault, which involved force far in excess of that needed to complete any of the other crimes committed against [the victim], also evinces an intent to kill." (*Id.* at pp. 681, 683.)

As this Court stated in *Flood*:

> [A]n instructional error that improperly describes or omits an element of an offense, or that raises an improper presumption or directs a finding or a partial verdict upon a particular element, generally is not a structural defect in the trial mechanism that defies harmless error review and automatically requires reversal under the federal Constitution. Indeed, the high court never has held that an erroneous instruction affecting a single element of a crime will amount to structural error [citation], and the court's most recent decisions suggest that such an error, like the vast majority of other constitutional errors, falls within the broad category of trial error subject to *Chapman* review.

(*Flood*, *supra*, 18 Cal.4th at pp. 502-503.) Thus, there is no indication that the *Chapman* test cannot be applied when more than one element is missing. (See *People v. Odle*, *supra*, 45 Cal.3d at pp. 410-412.)

While it is true, as appellant contends, that the majority of published cases deal with cases in which one element of a jury instruction (usually intent to kill) was erroneously omitted, the same rationale for applying a harmless error test applies where, as here, the trial court failed to instruct on two elements of a special circumstance. This is especially true given that many independent "elements" listed in jury instructions may legitimately be divided into sub-elements for which a jury would need to make an independent finding.

For example, in *People v. Davis* (2005) 36 Cal.4th 510, this Court used a harmless error analysis for two different types of error: 1) where the jury was not instructed on a multiple-murder special circumstance; and 2) where, for a special circumstance of kidnapping for robbery, the jury was not asked whether the two murders were committed to advance an independent felonious purpose of kidnapping to commit robbery, or whether the kidnappings were merely incidental to the murders. (*Id.* at pp. 567-568.) This Court specifically noted, "We test trial court error in removing from jury consideration a required special circumstance finding under the beyond a reasonable doubt test of *Chapman*...." (*Id.* at p. 567.)

The Court used the *Chapman* analysis where there was a multiple murder special circumstance, and the jury was erroneously prevented from determining whether the defendant's crimes involved at least two murders. Moreover, as to the special circumstance of kidnapping for robbery, the jury in *Davis* was prevented from determining whether the murder of each victim was committed to further the robbery or whether the robbery was merely incidental to the murders. (*Id.* at p. 569.) In each instance, this Court found the errors harmless. (*Id.* at p. 568.)

Appellant also relies on *Neder v. United States* (1999) 527 U.S. 1 (*Neder*) in support of his argument that harmless error analysisshould only be applied if a single element is omitted from a special circumstance instruction. (AOB 25-31.) However, while the *Neder* case happened to involve the omission of a jury determination of a single issue (refusing to submit the issue of materiality to the jury with respect to charges involving tax fraud), the reasoning of that case supports an affirmance in this case. The Court held:

> We have recognized that "most constitutional errors can be harmless." [*Arizona* v.] *Fulminante* [(1991) 499 U.S. 279 at p. 306]. "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S.

275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)).

(*Neder*, *supra*, 527 U.S. at p. 8.) The Court also recognized, "The error at issue here-a jury instruction that omits an element of the offense-differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" (*Id.* at p. 9.)

Here, appellant was represented by competent counsel, afforded an impartial jury, so "the impact of the error on the jury's decision-making may be assessed." (*Ibid*; *Flood*, *supra*, 18 Cal.4th 470, 511 [concurring opinion of Werdegar, J.].) It is insignificant that more than one element was erroneously omitted. The omitted elements are completely independent and a finding on one would not affect a finding on the other. Here, the jury should have been instructed to determine whether appellant was the actual killer. If not the actual killer, then the jury should have been told to consider whether appellant, with reckless indifference to human life and as a major participant, aided, abetted, or assisted in the commission of a burglary or robbery which resulted in the death of some person or persons, and who was found guilty of murder in the first degree. The dual error did not undermine the integrity of the structure of the trial process. However, because appellant's rights were violated by the failure to instruct the jury on all elements of the special circumstance, the more rigorous harmless-beyond-a-reasonable-doubt standard was properly applied. As stated below, the error was harmless.

II. THE ERROR WAS HARMLESS IN THIS CASE

Appellant finally contends that, using a harmless error analysis, the error here was not harmless beyond a reasonable doubt. (AOB 33-45.) The

Court of Appeal correctly held that any error was harmless beyond a reasonable doubt.

A. The Court of Appeal Applied the Proper Harmless Error Test[4]

Appellant recognizes that the harmless error test, based on *Chapman v. California, supra,* 386 U.S. 18 , is whether the error, beyond a reasonable doubt, did not contribute to the verdict. (AOB 33.) However, appellant suggests that in the context of failure to instruct the jury, the *Chapman* test must be expanded to include "whether the evidence regarding a missing element was, or could have been, in any way contested by the defense." (AOB 33.) Appellant bases this theory on the fact that both *People v. Flood, supra,* 18 Cal.4th 470, and *Neder v. United States, supra,* 527 U.S. 1, in applying the *Chapman* standard, mentioned the fact that the defendant did not contest the missing element. However, while that factor was considered in those cases, there is no authority indicating consideration of whether defendant could have contested the evidence on a missing element is a necessary factor when applying the *Chapman* test. Respondent submits that a finding of harmless error would be even more justified where the defendant in fact contested the missing elements at trial, because if evidence was proffered to counter existence of the missing element, but the jury rejected it, then the remaining evidence must support the jury's verdict beyond a reasonable doubt.

Thus, it is clear that the standard *Chapman* test should be applied here.[5]

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[4] Although not included in his petition for review, respondent briefly addresses this issue.

[5] Other California Supreme Court cases applying the same harmless error analysis to special circumstance allegations include *People v. Cudjo* (1993) 6 Cal.4th 585, 629-630, *People v. Osband, supra,* 13 Cal.4th 622, (continued...)

B. Any Error was Harmless Beyond a Reasonable Doubt

As the Court of Appeal noted, the question, therefore, is "whether the jury could have had any reasonable doubt that appellant acted with the last of the alternative mental states [in section 190.2]: reckless indifference to human life by a major participant in the crime." (Slip opn., at p. 20.) The evidence in this case overwhelmingly demonstrates that appellant was a major participant who acted with reckless indifference to human life. Accordingly, the instructional error did not contribute to the jury's verdict; rather, because the verdict was inevitable based on the evidence, any error was harmless beyond a reasonable doubt.

A "major participant" in a robbery is one who plays a notable or conspicuous part or is one of the more important members of the robbery group. (*People v. Proby* (1998) 60 Cal. App. 4th 922, 930-931.) In *Proby*, the defendant argued there was

> insufficient evidence that he was a "major participant," under the common dictionary meaning of "major" as being "greater in dignity, rank, importance, interest, number, quantity or extent." He claim[ed] a major participant is one such as a triggerman or ringleader whose participation was of greater importance than the other participants.

(*Id.* at pp. 930-931.) *Proby* concluded this definition was too narrow:

> We see no reason to impose such a restriction on the definition of major participant, and defendant provides us with no argument supporting such a restriction.... [¶] We note the [proposed] instruction relies on the common dictionary meaning of "major" as "greater in dignity, rank, importance, interest, number, quantity or extent." [Citation.] However, ... the common dictionary meaning of "major" also includes "notable

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(...continued)
681, *People v. Marshall* (1997) 15 Cal.4th 1, 43, *People v. Bolden* (2002) 29 Cal.4th 515, 559-561, *People v. Haley* (2004) 34 Cal.4th 283, 309-312, and *People v. Davis, supra,* 36 Cal.4th 510, 567-568.

> or conspicuous in effect or scope" and "one of the larger or more important members or units of a kind or group." [Citation.]

(*Id.* at p. 934.)

Proby was cited by *People v. Hodgson* (2003) 111 Cal.App.4th 566, where the defendant's participation had been limited to helping his accomplice escape from the crime scene by keeping an automatic garage door from closing and by yelling out a warning. *Hodgson* acknowledged "the evidence of appellant's involvement ... is not as extensive as in other cases upholding robbery-murder special circumstance findings." (*Id.* at p. 578.) The Court went on to hold:

> Nevertheless, his role in the robbery murder satisfies the requirement his assistance be "notable or conspicuous in effect or scope." [¶] To begin with, this is not a crime committed by a large gang or a group of several accomplices. Instead only two individuals were involved. Thus, appellant's role was more "notable and conspicuous"-and also more essential-than if the shooter had been assisted by a coterie of confederates. By slowing down the closing automatic electric garage gate appellant was instrumental in assisting [his accomplice to] effect his escape with the loot.

(*Id.* at pp. 579-580.)

In *People v. Smith* (2006) 135 Cal.App.4th 914, the defendant merely waited outside a motel room while his accomplice went in and murdered the victim. Citing *Proby's* analysis of the "major participant" factor, *Smith* held:

> The jury could have found beyond a reasonable doubt that [defendant's] contributions were 'notable and conspicuous' because he was the one of only three perpetrators, and served as the only lookout to an attempted robbery occurring in an occupied motel complex. [Citation.] Unlike the hypothetical "non-major participant" in *Tison* [v. *Arizona* (1987) 481 U.S.

> 137][6] ... who "merely [sat] in a car away from the actual scene of the murders acting as the getaway driver to a robbery"-[the defendant here] stood sentry just outside [the victim's] room, where the jury could infer he monitored and guarded the increasingly lengthy, loud, and violent attempted robbery-turned-murder. [Citation.]

(*Id.* at p. 928.) Here, it is clear beyond a reasonable doubt that appellant was a "major participant" in the burglary and robbery of Mr. Coe. He was, in fact, one of only two participants in the robbery and burglary. Appellant and Eyraud planned to rob Mr. Coe well in advance of the crimes.

Here, several witnesses heard appellant threaten to rob Mr. Coe and "beat the hell" out of him. (2RT 51, 192.) Cowen saw appellant hanging around Mr. Coe's room with Eyraud. (2RT 193.) By appellant's own admission, he entered Mr. Coe's motel room in the middle of the night without the owner's consent. (1SCT 64.) Appellant admitted to the police that he went into the motel room to rob Mr. Coe after Eyraud "knocked" Mr. Coe out. (1 SCT 51, 141, 145, 157, 192, 195.) Appellant then admitted that Mr. Coe had not been hurt, but that he attacked the smaller and older man. (1SCT 65.) Appellant also acknowledged that he knew Eyraud carried "big old steak knives with her" and that he was not

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[6] *Tison* reasoned:

> The petitioners' own personal involvement in the crimes was not minor, but rather, as specifically found by the trial court, 'substantial.' Far from merely sitting in a car away from the actual scene of the murders acting as the getaway driver to a robbery, each petitioner was actively involved in every element of the kidnapping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight.

(*Tison v. Arizona, supra*, 481 U.S. at p. 158.)

surprised that Eyraud had stabbed Mr. Coe. (1SCT 84.) Finally, while appellant claimed he left without knowing that Mr. Coe had been stabbed[7], the evidence is clear that he left the motel room along with Eyraud knowing that Mr. Coe was down and in need of assistance. (1SCT 66, 157.) In fact, Raquel Rodriguez heard appellant say that he had "stuck him and kept sticking him and couldn't stop." (1 CT 230.) As this evidence shows, appellant was the "muscle" who first used force to subdue Mr. Coe when the plan went awry. Finally, appellant's use of force allowed Eyraud to attack Mr. Coe with the knife and allowed the two to escape with Mr. Coe's wallet.

Furthermore, the conclusion that appellant acted with reckless indifference to human life is also true beyond a reasonable doubt.

In *People v. Estrada*, *supra*, 11 Cal.4th 568, this Court affirmed the constitutionality of California's felony-murder special circumstance statute:

> *Tison* ... instructs that the culpable mental state of "reckless indifference to life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death" [citation], and it is this meaning that we ascribe to the statutory phrase "reckless indifference to human life" in section 190.2(d).

(*Id.* at p. 577.) This Court went on to explain:

> We have determined that, viewing the statutory language as a whole, the common understanding of the phrase 'reckless indifference to human life' conveys the notion that a defendant subjectively appreciated that his or her conduct created a grave risk of death. Because the ordinary meaning of the statutory phrase amply communicates the parameters of the mental state subjecting a defendant to a sentence of death or lifelong

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[7] The physical evidence that Mr. Coe was stabbed multiple times in his right chest and that the motel room was essentially covered in blood, contradicts appellant's claim that he did not know Mr. Coe had been stabbed. (2RT 106, 157.)

incarceration-as articulated in *Tison*-the statute is sufficiently certain. [Citation.]

(*Id.* at p. 581.)

The "reckless indifference" element can be proved solely by the circumstances of the current offense. (See *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754-1755 [defendant knew accomplice had a knife, defendant saw accomplice stab victim without trying to intervene, and defendant then fled with co-perpetrators and robbery loot, leaving victim to die]; *People v. Mora* (1995) 39 Cal.App.4th 607, 617 [defendant who helped plan armed robbery at drug dealer's house "had to be aware of the risk of resistance to such an armed invasion of the home and the extreme likelihood death could result"]; *People v. Hodgson*, *supra*, 111 Cal.App.4th at p. 580 [defendant "had to be aware use of a gun to effect the robbery presented a grave risk of death," but "instead of coming to the victim's aid after the first shot, he instead chose to assist [actual killer] in accomplishing the robbery"].) The California Supreme Court has held that robbery and burglary are inherently dangerous felonies. (§ 189; *People v. Cruz* (1996) 13 Cal.4th 764, 772-773; *People v. Brito* (1991) 232 Cal.App.3d 316, 321.)

Moreover, evidence of reckless indifference is strengthened where the defendant knew, from prior experience, that the actual killer was willing to harm people. In *Proby*, *supra*, for instance, evidence the defendant and the actual killer had committed a prior armed robbery "gave defendant notice of [the actual killer's] willingness to harm people, because defendant knew [the actual killer had] locked the employees in the walk-in freezer with the expectation they would be trapped there for five hours." (*People v. Proby*, *supra*, 60 Cal .App.4th at p. 930.)

Here, by appellant's own admission, he entered a small motel room in the middle of the night without the owner's consent. (1SCT 64.) Appellant stated several times that he was going to rob Mr. Coe, and admitted to the

police that he went into the motel room to rob Mr. Coe and it went terribly wrong. (2RT 51, 192, 195; 1SCT 157.) Appellant then admitted he attacked a smaller and older man. (1SCT 65.) Appellant also acknowledged that he knew Eyraud carried "big old steak knives with her" and that he was not surprised that Eyraud had stabbed Mr. Coe. (1SCT 84.) Finally, while appellant claimed he left without knowing that Mr. Coe had been stabbed, the evidence is clear that he left the motel room at the same time as Eyraud, knowing that Mr. Coe was down and in need of assistance. (1SCT 66, 157.)

In sum, the evidence, much of it from appellant's confession, overwhelmingly showed that appellant was a major participant in the robbery and burglary who acted with reckless indifference to human life. Thus, the instructional error was harmless beyond a reasonable doubt in this case.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment and sentence be confirmed.

Dated: March 21, 2011

Respectfully submitted,

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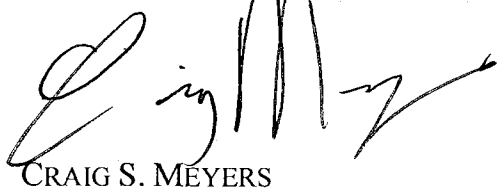

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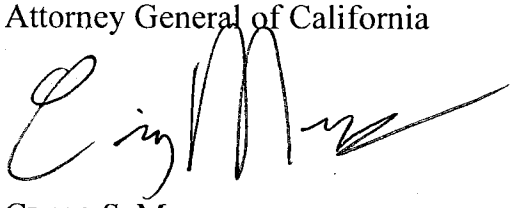
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON MERITS** uses a 13 point Times New Roman font and contains 6,511 words.

Dated: March 21, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mil**
No.: **S184665**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 21, 2011, I served the attached **ANSWER BRIEF ON MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2011, at Sacramento, California.

_____
Declarant

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