# In the Supreme Court of the State of California

| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br>v.<br>ANDRE MERRITT,<br>Defendant and Appellant. | Case No. S231644 |
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Fourth Appellate District, Division Two, Case No. E062540
San Bernardino County Superior Court, Case No. FVI1300082
The Honorable Debra Harris, Judge

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## INTRODUCTION

Appellant Andre Merritt was convicted of two counts of second degree robbery for robbing two separate store clerks at gunpoint on the same night. At trial, appellant conceded every element of robbery and contested only identity. Store surveillance footage captured appellant committing the robberies, and both store clerks immediately identified appellant as the robber. Though both the prosecutor and defense counsel listed the elements of robbery for the jury during their closing arguments, the trial court failed to read the standard instruction on the elements of robbery to the jury.

The Court of Appeal reversed appellant's two robbery convictions, holding that the failure to instruct the jury on substantially all the elements of robbery was structural error not amenable to harmless error review. The court relied exclusively on this court's decision in *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*). But after *Cummings*, the United States Supreme Court in *Neder v. United States* (1999) 527 U.S. 1 (*Neder*) clarified the law concerning whether harmless error analysis applies to such instructional errors of constitutional dimension and held that it does. And, in *People v. Mil* (2012) 53 Cal.4th 400 (*Mil*) and *People v. Aranda* (2012) 55 Cal.4th 342 (*Aranda*), this court followed *Neder* and reached the same conclusion. However, this court did not expressly disapprove of *Cummings* on this point, and lower courts have been struggling to reconcile the decisions ever since. While the facts of *Mil* did not require the court to overrule *Cummings*, the reasoning of *Mil*, *Neder*, and other post-*Cummings* cases do not support retaining the *Cummings* rule.

Application of the rule in *Cummings* leads to arbitrary results, while application of the rule in *Neder* and *Mil* preserves judgments obtained from fundamentally fair trials where the People prove the error was harmless beyond a reasonable doubt. This case illustrates this point: appellant

received a fundamentally fair trial and the record affirmatively shows that any error was harmless. Accordingly, this court should expressly overrule *Cummings* and hold that error in failing to instruct on any number of the elements of the charged offense is subject to harmless error review.

## ISSUE PRESENTED

Is the failure to instruct the jury on the elements of a charged offense subject to harmless error review under *Neder v. United States* (1999) 527 U.S. 1?

## STATEMENT OF THE CASE AND FACTS

On December 19, 2012, a man, later identified as appellant, entered a Storage Direct in Victorville, California, pulled out a gun, and told a store employee, Kristen Wickum, to give him all the money. (1 RT 89.) Wickum was scared and gave appellant all the money in the countertop drawer. (1 RT 89-90.) Surveillance video showed appellant robbing the store (1 RT 56), and Wickum could see his face, which was not covered. (1 RT 92.) The surveillance footage showed appellant wearing a black hooded sweatshirt. (1 RT 116.) He told Wickum to get on the floor. He asked for Wickum's cell phone, and she pleaded with him not to take it. He then took the office phone and broke it. (1 RT 92.) Wickum was afraid that appellant might shoot her. (1 RT 92.) Wickum, who was shaking and crying, called the police at 5:06 p.m. after appellant left with the money. (2 RT 240.)

San Bernardino County Sheriff's Deputy Travis Buell quickly arrived at the Storage Direct after he received a call that an armed robbery had occurred. (1 RT 43, 45.) Deputy Buell spoke to Wickum, who told the deputy that a man robbed her of $338. (1 RT 42, 49.) Wickum was visibly upset and her hands were shaking. (1 RT 44.) She told the deputy that the man who robbed her was a Black male who was approximately 20 years

old and five feet, eleven inches tall. He was carrying a black handgun that was scuffed and scratched, and wearing a blue hooded sweatshirt, gray shorts, and black Chuck Taylor shoes. (1 RT 46.) Deputy Buell reviewed the surveillance footage from the store. (1 RT 46.) Later, Wickum almost immediately identified appellant as the robber in a photographic lineup. (1 RT 105.)

Shortly after Deputy Buell responded to the robbery at the Storage Direct, he received another dispatch call reporting an armed robbery at La Mexicana, a convenience store. (1 RT 46-48.) The 911 call from La Mexicana was placed at 6:21 p.m. (2 RT 240.) Christian Lopez, the store clerk, was closing the shop when a man came into the store and pointed a gun at him. The man said, "[G]ive me the money muthafucker," and Mr. Lopez gave him the money—about $700—from the register. (1 RT 69-70.) Lopez got a good look at the man's face. (1 RT 75.) The man then told Lopez to lie down and put his face down on the floor. (1 RT 70.) Lopez was afraid that the robber was going to shoot him. (1 RT 70.) The man then kicked Lopez in the back and left the store. (1 RT 70-71.) Surveillance footage showed appellant robbing La Mexicana. It also showed appellant kick Lopez in the back. (1 RT 73-74.)

Once he arrived at the store, Deputy Buell spoke with Lopez, who appeared scared. (1 RT 47-48.) Lopez told the deputy that he was robbed at gunpoint by a Black male in his twenties. The robber was about six feet tall and he wore a black shirt, khaki shorts, and was armed with a silver handgun. (1 RT 49.) Lopez identified appellant as the robber right away when the police showed Lopez a photographic lineup. (1 RT 79.)

On January 4, 2013, Detective Heather Forsythe executed a search warrant at a residence in Victorville. (1 RT 111.) Detective Forsythe contacted three people in the home, including appellant. The detective searched appellant's bedroom and found some ammunition, a black

bandana, and some baseball hats. (1 RT 111-112.) Appellant's mother, Charlene Butts, told the detective that appellant kept some of his clothes in an adjacent room. (1 RT 113.) In that room, Detective Forsythe found cargo-style men's shorts, two black hooded sweatshirts, and a pair of Chuck Taylor Converse shoes. (1 RT 114.) Appellant's family confirmed that these were appellant's clothes. (1 RT 115.)

Appellant's mother, Charlene Butts, testified in appellant's defense. She said that she drove appellant home from jail on December 18, 2012. (1 RT 180-181.) Several family members were at Butts's home to celebrate appellant's release from jail. (1 RT 181.) Appellant and his family members smoked marijuana and played video games for two or three days. (1 RT 181-182.) Butts and appellant's brother testified that appellant stayed at the house and did not leave the night of December 19, 2012. (1 RT 182, 200.) Yet, appellant told Detective Paul Solorio that he left his house on that night and walked to a friend's house. He told the detective that he spent the night at his friend's house. (1 RT 227.)

The San Bernardino District Attorney charged appellant with two counts of second degree robbery (Pen. Code, § 211) and alleged that appellant personally used a firearm in the commission of the offenses (§ 12022.53, subd. (b)).[1] (1 CT 1-2.) During their respective closing arguments, both counsel listed the elements of robbery for the jury. (2 RT 265, 281.) The trial court, however, failed to instruct the jury with CALCRIM number 1600, the standard instruction on the elements of robbery. The court did instruct on the requisite intent to rob (CALCRIM No. 251) and on the elements of the personal gun use enhancement (CALCRIM No. 3146). (1 CT 142, 160.) A jury subsequently convicted

[1] All further statutory references are to the Penal Code unless otherwise indicated.

appellant of two counts of second degree robbery and found true that he personally used a firearm in the commission of the offenses. (2 CT 183-184.) The trial court sentenced appellant to prison for 19 years four months. (2 CT 210, 211.)

On appeal, appellant claimed, in relevant part, that the trial court erred in failing to instruct the jury on the elements of robbery, and that such error was reversible per se under *People v. Cummings*, *supra*, 4 Cal.4th 1233.[2] The People conceded that the court erred in failing to instruct on some elements of robbery, but argued that the error was subject to harmless error review pursuant to *People v. Mil, supra,* 53 Cal.4th 400, which relied on *Neder v. U.S.*, *supra*, 527 U.S. 1. The People argued that any error was harmless beyond a reasonable doubt because (1) the court's other instructions required that the jury find multiple elements of robbery beyond a reasonable doubt; (2) appellant conceded all of the elements of robbery and contested only identity; (3) counsel for both sides listed all of the elements of robbery for the jury during argument; and (4) overwhelming evidence proved appellant was the person who committed the robberies.

The Court of Appeal reversed appellant's two robbery convictions on the ground that the failure to instruct on substantially all of the elements of the charged offenses was reversible per se under *Cummings, supra,* 4 Cal.4th 1233. (*People v. Merritt*, *supra*, slip op. at p. 9.) The court did not address *Mil*, *supra*, 53 Cal.4th 400, cited by the People, which holds that

[2] Appellant raised a second claim that the trial court prejudicially erred in instructing the jury that the People need only prove that the offenses occurred "on or about" an exact date because appellant raised an alibi defense. The Court of Appeal declined to address this issue after it held appellant was entitled to relief based on his instructional error claim. (*People v. Merritt* (2015) E062540, slip op. at pp. 9-10.)

failure to instruct on multiple elements of the charged offense is subject to harmless error review.

The People filed a petition for rehearing, which the Court of Appeal denied without comment. The People then filed a petition for review, and this court granted review of the sole issue presented.

## ARGUMENT

### I. THE TRIAL COURT'S FAILURE TO INSTRUCT ON SUBSTANTIALLY ALL OF THE ELEMENTS OF THE CHARGED OFFENSE IS SUBJECT TO HARMLESS ERROR REVIEW

The Court of Appeal, in reversing appellant's two robbery convictions for failure to give CALCRIM number 1600 (setting forth the elements for robbery), held that the error was structural and not amenable to harmless error review. It did so based solely on this court's decision in *People v. Cummings, supra,* 4 Cal.4th 1233. (*People v. Merritt*, *supra*, slip op. at p. 9.) But since *Cummings*, the United States Supreme Court in *Neder* clarified that harmless error analysis applies to instructional errors concerning the omission of an element of the offense. And subsequently, in *People v. Mil*, this court, relying on *Neder*, held the failure to instruct on more than one element was subject to harmless error review. The rule in *Cummings* is no longer viable in light of these more recent opinions.

Moreover, application of the rule in *Cummings* leads to arbitrary results, while application of the rule in *Neder* and *Mil* preserves judgments obtained from fundamentally fair trials where error is proven harmless beyond a reasonable doubt. This case aptly demonstrates how the omission of an instruction on a substantive offense does not *always* and *necessarily* render the trial fundamentally unfair, nor does it necessarily result in an unreliable determination of guilt or innocence. Instead, as the record here shows, such error can be assessed under the harmless error standard. Accordingly, this court should revisit *Cummings* and hold that error in

failing to instruct on any number of the elements of the charged offense is subject to harmless error review.

### A. Legal Background

In *Cummings*, codefendant Kenneth Earl Gay was convicted of premeditated first degree murder of a police officer, two counts of attempted robbery, and ten counts of robbery. (*Cummings*, *supra*, 4 Cal.4th at p. 1256.) The jury returned a penalty verdict of death for the capital murder offense. (*Ibid.*) During trial, the trial court failed to give the standard instruction for robbery, which was the subject of ten charges against Gay. (*Id.* at p. 1312.) The court did instruct on the specific intent element in a separate instruction, which read " 'robbery requires ... the specific intent to permanently deprive the owner of its property.' " (*Id.* at p. 1312, fn. 52.) The jury was not formally instructed on the remaining elements. (*Id.* at p. 1312.) At the time *Cummings* was decided, state and federal courts lacked guidance from the United States Supreme Court concerning whether harmless error analysis could apply to instructional error concerning omitted elements of charged offenses or whether such error was reversible per se. The *Cummings* court examined three United States Supreme Court cases involving improper instructions on an element of the charged offense. (*Id.* at pp. 1313-1314.) In *Rose v. Clark* (1986) 478 U.S. 570, the Supreme Court held the harmless error standard applied to an erroneous malice instruction that all homicides are presumed to be malicious in the absence of evidence which would rebut that presumption. (*Rose v. Clark*, *supra*, at p. 584.) In *Pope v. Illinois* (1987) 481 U.S. 497, the Supreme Court held harmless error review applied to an instruction containing an erroneous definition of "obscene materials," an element of the charged offense of obscenity. (*Pope v. Illinois*, *supra*, at p. 503.) In *Carella v. California* (1989) 491 U.S. 263, the Supreme Court held harmless error review applied to erroneous instructions that imposed

conclusive presumptions as to essential elements of the charged offense. (*Carella v. California*, *supra*, at p. 266.) As noted, all three cases analyzed the respective error under the harmless error test. But the *Cummings* court distinguished these cases and found that they made "a clear distinction between instructional error that entirely precludes jury consideration of an *element of the offense* and that which affects only an *aspect of an element*." (*Cummings, supra,* at p. 1315, emphasis added.) The *Cummings* court held that harmless error review was inapplicable to an instructional error that withdrew from the jury's consideration "substantially all" of the elements of an offense, unless, through other instructions, the jury found all the facts necessary to support a conclusion that the omitted elements were proven. (*Ibid.*)

Five years after *Cummings*, this court decided *People v. Flood* (1998) 18 Cal.4th 470 (*Flood*) and held harmless error review applied where the trial court erroneously precluded the jury from finding an essential element of the charged offense. A jury found Flood guilty of evading a vehicle operated by a pursuing police officer, but the trial court instructed the jury that the police officers in the vehicle *were* peace officers, effectively removing the element of whether the police were "peace officers" from the jury's consideration. (*Id.* at pp. 478-479.) The *Flood* court held the error was subject to harmless error review because it did not prevent the defendant from presenting evidence concerning contested elements of the crime, and thus the error did not affect the content of the record or impair the court's ability to evaluate the error. (*Id.* at p. 504, citing *Rose v. Clark*, *supra*, 478 U.S. at p. 579, fn. 7.) The *Flood* court cited *Cummings* in passing, but did not discuss or distinguish *Cummings*. (*Id.* at pp. 495, 511.)

One year later, the United States Supreme Court addressed the issue in *Neder*, *supra*, 527 U.S. 1. In *Neder*, the trial court failed to instruct the jury on one element of the charged offense, which the Supreme Court

found was error in violation of the defendant's Sixth Amendment right to a jury trial. (*Id.* at p. 12.) Specifically, Neder was charged with and convicted of two counts of filing a false tax return. (*Id.* at p. 6.) "Materiality" was a necessary element of the offense, yet the district court instructed the jury that it "need not consider" the materiality of any false statements and instructed that materiality was "not a question for the jury to decide." (*Id.* at pp. 6, 8.) The Supreme Court concluded the omission of the materiality element was constitutional error and then assessed whether the error was amenable to harmless error review. (*Id.* at p. 12.) It examined the same three cases that the *Cummings* court examined—*Rose v. Clark*, *Pope v. Illinois*, and *Carella v. California*—as well as post-*Cummings* cases. (*Neder*, at p. 14.) The court explained that an instructional error omitting an element of the offense is not structural error requiring automatic reversal because it is possible to determine whether the error is harmless from the record. (*Id.* at p. 12.) Unlike in *Sullivan v. Louisiana* (1993) 508 U.S. 275, in which the court held that giving a defective reasonable doubt instruction is structural error because it "vitiates all the jury's findings," omitting the elements of an offense does not *necessarily* "vitiate all the jury's findings" because the consequences of the error may be determined and quantified. (*Neder,* at p. 12.)

In *Neder*, the United States Supreme Court rejected the rule that Neder proposed, which was the same rule adopted in *Cummings*—that an instructional error that omits an element of the crime is only subject to harmless error review when the jury is required to find other facts that necessarily satisfy the omitted element or elements. (*Neder*, *supra*, 527 U.S. at p. 14.) The court determined the rule was fundamentally flawed because it "imports into the initial structural-error determination (i.e., whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (i.e., whether an error

is harmless). Under our cases, a constitutional error is either structural or it is not." (*Ibid.*) Thus, the high court held the error in failing to instruct on an element of the offense was subject to traditional harmless error review.

Subsequent decisions of this court have followed suit and applied harmless error analysis to instructional errors of constitutional dimension. Most importantly, in *Mil*, this court held that failure to instruct on two out of three elements of the alleged felony-murder special circumstance was not structural error but was subject to harmless error review. (*Mil*, *supra*, 53 Cal.4th at p. 410.) The *Mil* court relied heavily on *Neder* and reasoned that most instructional errors are subject to harmless error review, and *Neder*'s holding was not limited to the omission of *one* element. (*Id.* at pp. 412-413.) In *Aranda*, this court held that the failure to give the standard reasonable doubt instruction was constitutional error subject to harmless error review. (*Aranda*, *supra*, 55 Cal.4th at p. 363.) The *Aranda* court again relied on *Neder* and recognized that most instructional errors of constitutional dimension are subject to harmless error review because it is possible to determine the effect of the error on the verdict. (*Ibid.*) Also, in *People v. Gonzalez* (2012) 54 Cal.4th 643, this court relied on *Neder* and held instructional error in giving conflicting instructions on the mens rea element of first degree murder was subject to harmless error review. (*Id.* at pp. 662-663.)

### B. The Error in Failing to Instruct on Substantially All Elements of the Charged Offense is Not Structural Error Requiring Automatic Reversal

In *Neder*, the United States Supreme Court explained that most constitutional errors are amenable to harmless error review, and very few are structural errors requiring automatic reversal. (*Neder*, *supra*, 527 U.S. at p. 8 [limited class of structural error includes complete denial of counsel, biased trial judge, racial discrimination in jury selection, denial of self-

representation at trial, denial of public trial, and defective reasonable doubt instruction]; also *Arizona v. Fulminante* (1991) 499 U.S. 279, 310 [recognizing a limited class of structural errors].) Even before *Neder*, this court recognized that "instructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal." (*Flood*, *supra*, 18 Cal.4th at p. 499.) Post-*Neder*, this court in *Mil* again recognized, "[a]n error is structural, and thus subject to automatic reversal, only in a *very limited class of cases*, such as the complete denial of counsel, a biased decisionmaker, racial discrimination in jury selection, denial of self-representation at trial, denial of a public trial," and denial of any instruction on the burden of proof. (*Mil, supra,* 53 Cal.4th at p. 410, emphasis added, internal quotations omitted, citing *Neder*, *supra*, 527 U.S. at p. 8; see also *Aranda*, at p. 363 ["[M]ost errors implicating a federal constitutional right, including most instructional errors, are amenable to harmless error analysis and that only a 'very limited class of cases' are subject to per se reversal."].)

Only certain very rare instructional errors are structural and reversible per se. These errors to which harmless error review does not apply "are the exception and not the rule." (*Mil*, *supra*, 53 Cal.4th at p. 410, quoting *Rose v. Clark*, *supra*, 478 U.S. at p. 578.) For example, in *Sullivan v. Louisiana*, the Supreme Court held that the trial court committed structural error when it gave the jury a defective "reasonable doubt" instruction because the effect of such error on the verdict could not be determined from the record. (*Neder*, *supra*, 527 U.S. at pp. 10-11, discussing *Sullivan*, *supra*, 508 U.S. at p. 281.) The *Sullivan* court found that the instruction at issue effectively lowered the prosecution's burden of proof. Given the lower burden, it was impossible to assess whether the jury verdict was premised on factual findings beyond a reasonable doubt as required by the Constitution or on

some lower standard. The nature of the error precluded an assessment of the effect of the error on the verdict—rendering the error structural. (*Sullivan*, *supra*, 527 U.S. at p. 281.)

*Neder* explained that an error is structural if it is so "intrinsically harmful" that it defies "analysis by 'harmless error' standards." (*Id.* at p. 7.) Structural errors are defects that affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at p. 8, internal citation omitted.) Such errors "infect the entire trial process" and "necessarily render a trial fundamentally unfair." (*Ibid.*, internal citations omitted.) Quoting *Neder*, this court in *Mil* noted that structural errors "deprive defendants of basic protection without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." (*Mil,* at p. 410, internal quotations omitted, quoting *Neder*, *supra*, 527 U.S. at pp. 8-9.)

In *Aranda*, this court again concluded that most instructional errors of constitutional dimension are not structural errors requiring automatic reversal. The *Aranda* court held that the failure to give the standard reasonable doubt instruction was constitutional error subject to harmless error review. (*Aranda*, *supra*, 55 Cal.4th at p. 364.) The *Aranda* court relied on *Neder* and other United States Supreme Court cases and recognized that most instructional errors of constitutional dimension are subject to harmless error review because it is possible to determine the effect of such error on the verdict. (*Ibid.*) This court recognized that in *Sullivan v. Louisiana*, *supra*, the trial court gave a *misleading* description of the reasonable doubt standard, which amounted to structural error because the consequences of the error were "necessarily unquantifiable and indeterminate." (*Aranda*, *supra*, at p. 365, quoting *Sullivan v. Louisiana*, *supra*, 498 U.S. at p. 282.) However, the *Aranda* court held that, unlike the

*misdescription* of the reasonable doubt standard, harmless error analysis applied in the context of an *omission* of the standard reasonable doubt instruction because the court could assess the effect of that error on the verdict. (*Ibid.*)

Error in failing to instruct on elements of the charged offense is not structural error because it does not vitiate all of the jury's findings. The court in *Neder* held that unlike error in giving a defective reasonable doubt instruction, "a jury instruction that omits an element of the offense [] differs markedly from the constitutional violations [the Supreme Court has] found to defy harmless-error review" because such error, "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder*, *supra*, 527 U.S. at pp. 8-9.) Error in failing to instruct on an element of the offense does not require *automatic* reversal because it is *possible* to determine whether the error is harmless from the record. (*Id.* at p. 12.)

The court's holding in *Neder* is not limited to error in failing to instruct on *one* element because the holding did not turn on the number of elements omitted but rather on the nature of the error. (See *Neder*, *supra*, 527 U.S. at p. 12.) In fact, in *Mil*, this court held that error in omitting two out of three elements of the charged offense is not structural error: "The critical inquiry, in our view, is not the number of omitted elements but the nature of the issues removed from the jury's consideration." (*Mil*, *supra*, 53 Cal.4th at p. 413.) *Neder* held that instructional error is not reversible per se because it is *possible* to determine the error's effect on the verdict. (*Neder*, *supra*, 527 U.S. at p. 12.) It is possible to determine whether error in failing to instruct on all elements of the offense is harmless, for example, by looking to the entire record and examining overlapping instructions, overlapping facts found in other verdicts, overwhelming evidence of guilt, whether the defendant conceded certain elements, whether counsel

explained the elements of the offense to the jury, and whether it was impossible for the defendant to contest certain elements. (See, e.g., *Neder*, *supra*, 527 U.S. at p. 19 [overwhelming evidence of guilt shows harmlessness]; see also *Mil, supra,* 53 Cal.4th at p. 411 [harmless error review applies where elements were uncontested and supported by overwhelming evidence]; see also *People v. Gonzalez*, *supra*, 54 Cal.4th at p. 663 [overwhelming and uncontroverted evidence established the jury would have found defendant guilty absent instructional error].) Thus, such error is *subject* to harmless error review even if courts often find such error is harmful. As this court reasoned in *Mil*, while establishing harmlessness may prove more difficult in the context of multiple omissions, "that is not a justification for a categorical rule forbidding an inquiry into prejudice." (*Mil, supra,* 53 Cal.4th at p. 412.) The error here is subject to harmless error review because it did not vitiate all the jury's findings and it is possible to determine the effect of the error on the verdict.

Furthermore, the error here should be subject to harmless error review because appellant received a fundamentally fair trial. As *Neder* pointed out, an instructional error cannot be structural where the record shows the defendant received a fundamentally fair trial. (*Neder*, *supra*, 527 U.S. at pp. 8-9.) And the trial in this case was fundamentally fair. There is no dispute that appellant was tried before an impartial judge with the full panoply of constitutional rights—counsel, confrontation rights and presentation of evidence. (See *Mil, supra*, 53 Cal.4th at p. 410.)

Appellant's trial was fundamentally fair because it was a reliable vehicle to determine appellant's guilt or innocence. (*Mil, supra,* 53 Cal.4th at p. 411.) Appellant contested only identity at trial, and the arguments of counsel, jury instructions, jury questions, and verdicts overwhelmingly established that the jury properly considered identity and found against appellant. In closing, appellant's counsel stated, "Now, there is no question

here, as [the prosecutor] said, no question these people were robbed, okay. Our only contention is with Element Number 1 that it was not the defendant." (2 RT 281.) The trial court instructed on appellant's alibi defense and that the People must prove identity, stating, "The People must prove that the defendant committed the crimes charged" and "The People must prove that the defendant was present and committed the crimes with which is he charged. If you have any reasonable doubt about whether the defendant was present when the crime was committed, you must not find him guilty." (1 CT 154.) Additionally, the court instructed on specific intent, stating, in part, "The People must prove not only that *the defendant* did the acts charged, but that *he* acted with a particular intent and mental state." (1 CT 139, emphasis added.) The court also instructed on the personal firearm use allegation, which stated the People must prove "that *the defendant* personally used a firearm during the commission of the crime." (1 CT 160, emphasis added.) The record also demonstrates that the jury understood its duty to resolve the factual issue of identity and in fact deliberated on identity. During deliberation, it asked four questions regarding identity including a question regarding appellant's height and weight and whether the jury could view a picture of appellant from head to toe. (2 CT 179-181.) Finally, the jury necessarily found that appellant was the person who committed the charged offenses because it found true the firearm allegation that "*the defendant*" personally used a firearm during the commission of the crime. The jury found appellant guilty of robbery after being instructed that it must find *appellant* was the person who committed the offenses. (2 CT 183-184.)

Notably, the United States Supreme Court has applied harmless error review where the trial court instructed the jury with a mandatory rebuttable presumption (*Rose v. Clark*, *supra*, 478 U.S. 570) and a mandatory conclusive presumption (*Carella v. California*, *supra*, 491 U.S. 263). Also,

the United States Supreme Court and this court have applied harmless error review where the trial court *precluded* jury consideration of an element. The trial court in *Neder* explicitly instructed the jury not to decide materiality, and the trial court in *Flood* instructed the jury that the police officers *were* "peace officers." The error in this case is less egregious in that the trial court did not direct the jury not to consider the elements of robbery, it simply omitted the elements. If the errors in *Rose v. Clark*, *Carella v. California*, *Neder* and *Flood* are amenable to harmless error review, so is the error in this case.

All of this demonstrates that the omission of CALCRIM number 1600 was "simply an error in the trial process" and not the type of error that infects the entire trial framework, necessarily rendering the trial fundamentally unfair. Identity was the only contested issue. Appellant received and made use of all of his constitutional rights to contest that issue—he was represented by counsel, he confronted and cross-examined witnesses, he presented evidence and argument on the issue, the jury was properly instructed that it must resolved the contested issue, and the record shows the jury understood that instruction and performed its duty. Appellant's trial represents a reliable determination of guilt or innocence and was fundamentally fair. The instructional error here does not require automatic reversal.

### C. *Cummings* Erred in Focusing on the Number of Elements Omitted

In 1993, *Cummings* held the failure to instruct on "substantially all" elements of the charged offense was structural error requiring automatic reversal. (*Cummings*, *supra*, 4 Cal.4th at p. 1315.) But, this rule has since been eclipsed by more recent United States Supreme Court and California Supreme Court authority.

In reaching its conclusion that instructional errors that omit substantially all elements of the offense are structural errors, *Cummings* drew a distinction between cases in which error precludes jury consideration of an element of an offense and those in which an error affects only an *aspect* of an element. (*Cummings*, *supra*, 4 Cal.4th at p. 1315.) The *Cummings* court next reasoned that "none [of the United States Supreme Court cases that applied harmless error analysis to instructional errors] suggests that a harmless error analysis may be applied to instructional error which withdraws from jury consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*Ibid.*)

*Cummings*'s first point was necessarily rejected in *Flood* and *Neder*. In both *Flood* and *Neder*, the instructional error at issue removed from the jury's consideration an entire element of the charged offense—not simply an "aspect" of an element. In *Flood*, the jury was necessarily precluded from deciding whether the officers were "peace officers" within the meaning of the law. This court nonetheless held that the instructional error was harmless because the defendant conceded the issue. (*Flood*, *supra*, 18 Cal.4th at pp. 503-504.) In *Neder*, the jury was necessarily precluded from deciding the element of materiality, but the United States Supreme Court held such error was subject to harmless error review. (*Neder*, *supra*, 527 U.S. at p. 9.) The Supreme Court explained that "answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee" where the state's evidence with respect to the omitted element is overwhelming. (*Id.* at p. 19.) In *Mil*, this court agreed, stating that "[w]here an instruction omits some elements of the offense ..., but the elements were uncontested and supported by overwhelming evidence, it would not necessarily follow

that the trial was fundamentally unfair or an unreliable vehicle for determining guilt...." (*Mil, supra,* 53 Cal.4th at p. 411.)

The second part of the holding in *Cummings*, regarding withdrawal of substantially all the elements, was also rejected in *Neder*. The defendant in *Neder* argued for the test adopted in *Cummings*—he asked the court to find instructional omissions reversible per se unless, through other counts and instructions, the jury was required to find all the facts necessary to convict on the omitted charge. (*Neder*, *supra*, 527 U.S. at p. 14.) The court found that proposed rule fundamentally flawed because it "imports into the initial structural-error determination (i.e., whether an error is structural) a case-by-case approach that is more consistent with our traditional harmless-error inquiry (i.e., whether an error is harmless). Under our cases, a constitutional error is either structural or it is not." (*Ibid.*) The absence of a "complete verdict" on every element of the offense establishes error, but it does not establish whether harmless error analysis applies. (*Id.* at p. 12.) Contrary to *Neder, Cummings* requires an examination of the other instructions, essentially a limited harmless error review, to determine whether the instructional error is reversible per se. (*Cummings*, *supra*, 4 Cal.4th at p. 1315.) This process of first looking to overlapping instructions to determine whether an instructional error is reversible per se is improper because, as the Supreme Court explained in *Neder*, "a constitutional error is either reversible per se, or it is not." (*Neder*, *supra*, 527 U.S. at p. 12.) Structural errors are categorical and result in reversal without consideration of anything else in the record. In other words, a structural error requires reversal on *any* record. The *Cummings* approach calls for a limited review of the record to determine if the error is structural. This analytical approach contradicts the United States Supreme Court's definition of structural error and was specifically rejected in *Neder*.

Further, the *Cummings* rule that harmless error review applies only where omitted elements are necessarily covered by other overlapping instructions is flawed because there is *no constitutional error* where overlapping instructions cover the omitted instruction. (See *Aranda*, *supra*, 55 Cal.4th at p. 356 [trial court's omission of the "presumption of innocence" instruction was not constitutional error since another instruction described the presumption of innocence].) It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court. (E.g. *People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved of on another ground by *People v. Reyes* (1998) 19 Cal.4th 743; also *Boyd v. United States* (1926) 271 U.S. 104, 107.) "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." (*People v. Burgener*, *supra*, 41 Cal.3d at p. 539, internal citation omitted.) If, after looking to the whole charge, an instructional omission is covered by other instructions, there is no constitutional error. (E.g. *People v. Coffman* (2004) 34 Cal.4th 1, 107 [no constitutional instructional error where omitted instructions were duplicative of other properly given instructions].) Thus, the *Cummings* rule allows harmless error review only where there is no error in the first place. This rule defies United States and California Supreme Court authority holding that the existence of constitutional error does not mandate reversal. (*Neder*, *supra*, 527 U.S. at pp. 12-13.)

Although *Cummings* is inconsistent with *Neder* and *Mil*, this court never disapproved *Cummings,* and it indicated in dicta in *Mil* that *Cummings*'s "substantially all" test was still viable. (*Mil*, *supra*, 53 Cal.4th at pp. 413-414.) In *Mil,* two of the three elements of the charged felony-murder special circumstance allegation were omitted, whereas in *Cummings*, four of the five elements of the charged robbery offense were missing from the jury instructions. (*Ibid.*) The *Mil* court distinguished

*Cummings* and relied primarily on *Neder*. (*Id.* at pp. 409-412.) But while the facts of *Mil* did not require the court to overrule *Cummings*, nothing in the reasoning of *Mil*, *Neder*, or other post-*Cummings* cases supports retaining the *Cummings* rule. The United States Supreme Court's holding in *Neder* did not turn on the number of elements omitted, but instead on the nature of the error; it examined simply whether the error was structural or not. As *Neder* explained, an error is structural if it is so "intrinsically harmful" that it defies "analysis by 'harmless error' standards." (*Neder*, *supra*, 527 U.S. at p. 7.) Because structural errors cannot be reviewed for harmlessness, they result in automatic reversal. But where an error can be evaluated, harmless error analysis applies. The approach in *Cummings* is inconsistent with the nature of structural error because it requires a case-by-case analysis of the number of missing elements and whether that number constitutes "substantially all" of the elements. In fact, in *Mil*, this court stated, "[t]he critical inquiry, in our view, is not the number of omitted elements but the nature of the issues removed from the jury's consideration." (*Mil*, *supra*, 53 Cal.4th at p. 413.) The *Mil* court conducted a lengthy analysis on the arbitrary nature of a "counting game" in this context. (*Id.* at pp. 412-413.) The defendant in *Mil* tried to distinguish *Neder* by arguing that the omission of one element could be reviewed for harmless error, but the omission of more than one element was necessarily structural. This court rejected the argument and noted that it was an "utter[ly] artificial [] . . . line. . . to draw." (*Id.* at p. 412.) But, application of *Cummings*'s "substantially all" test results in a nearly identical arbitrary counting game as to how many elements constitutes "substantially all" such that the case must be automatically reversed versus how many is few enough that a harmless error analysis can be conducted. Accordingly, under the court's reasoning in *Neder* and this court's reasoning in *Mil*, *Cummings* erred in finding the instructional error reversible per se.

Furthermore, this court should revisit its decision in *Cummings* because the "all or substantially all" language in *Cummings* is a vague and unworkable standard that has led to and will continue to lead to arbitrary and conflicting results. *Mil* attempted to limit the holding in *Cummings*, but the limitation left the "substantially all" test in place. (*Mil*, *supra*, 53 Cal.4th at pp. 413-414) The preservation of this test has confused courts ever since. For example, in this case, the Court of Appeal determined the trial court omitted "substantially all" the elements of robbery, thus it reversed appellant's convictions based solely on *Cummings*. (*People v. Merritt*, *supra*, slip op. at p. 9.) While the trial court omitted CALCRIM number 1600, four of six elements were covered by other instructions. Thus, if left intact, the rule in *Cummings* (after *Mil*) seems to suggest omission of four of five or four of six elements is "substantially all," but omission of two of three is not. Notably, despite reliance on *Mil* and *Neder* in the briefs and discussion of *Mil* at argument, the Court of Appeal made no mention of *Mil* in its opinion. Given the factual similarities between this case and *Cummings*, the court was bound to apply *Cummings* (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455), but nothing in its opinion suggests any way of reconciling *Cummings*'s holding with the holding in *Mil*.

As noted above, the "substantially all" rule is unworkable because it results in the very same arbitrary counting game of which the court warned in *Mil*. As this court recognized in *Mil*, "defining an 'element' of an offense is more of an art than a science, inasmuch as an element can, without reference to objective or standardized criteria, be further subdivided into separate elements or, alternatively, integrated with other aspect into a single element." (*Mil*, *supra*, 53 Cal.4th at pp. 412-413.) This court has expressly recognized that limiting harmless error review to the omission of a designated number of elements "is simply unworkable." (*Id.*

at p. 413.) The *Mil* court reasoned that such a task is unworkable in part because there is no requirement that a court specifically label each element as "an element"; some crimes incorporate all the elements of another crime as *one* element, and the labeling of elements varies between jurisdictions and between standard jury instructions. (*Ibid.*) The number of elements of an offense is not necessarily clear since criminal statutes do not often separate and number the elements. Standard pattern instructions generally attempt to number the elements from the language of the criminal statute, but instructions like CALJIC and CALCRIM are not law and are not authority to establish legal principles. (*People v. Morales* (2001) 25 Cal. 4th 34, 48.) Also, jury instructions vary regarding how they break up and number the elements of an offense. This case is a perfect example: in *Cummings*, this court stated that robbery is composed of five elements because CALJIC number 9.40, the standard instruction for robbery at the time, delineated section 211 into five elements. (*Cummings*, *supra*, 4 Cal.4th at p. 1312, fn. 53.) But, CALCRIM number 1600, the new pattern instruction, defines robbery as composed of *six* elements. Both instructions are derived from the same language in Penal Code section 211, which was enacted in 1872 and never amended. These varying instructions illustrate the difficulty of determining whether "substantially all" elements of an offense have been omitted and how that inquiry results in an arbitrary counting game to determine whether an error is structural or amenable to harmless error review.

Finally, applying *Cummings* contradicts public policy because it results in reversal of fundamentally fair trials like this one. As discussed above, appellant received a fundamentally fair trial, and the error in this case may be assessed and determined by examination of the record. Criminal trials "are conducted to resolve *contested* issues of fact" (*Mil*, *supra*, 53 Cal.4th at p. 414) and appellant did not contest any of the omitted

elements of robbery. In fact, appellant expressly conceded the elements of robbery. (2 RT 281.) Reversal would serve no valid interest. (See *Flood*, *supra*, 18 Cal.4th at p. 504.) The United States Supreme Court has held that rules requiring harmless error analysis are essential because they uphold valid convictions in which trial errors or defects did not affect the outcome of the trial. (*Chapman v. California* (1967) 386 U.S. 18, 22.) In *Rose v. Clark*, the Supreme Court reasoned that "[t]he harmless-error doctrine recognizes the principal that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence [citation], and promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." (*Rose v. Clark* (1986) 478 U.S. 570, 577, citing R. Traynor, The Riddle of Harmless Error 50 (1970) ["Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."].)

In sum, courts are struggling to apply the rule articulated in *Cummings*, which leads to unpredictable and irrational results. Error in failing to instruct on the elements of an offense, regardless of the number omitted, should be subject to standard harmless error review under *Neder*'s and *Mil*'s reasoning. Though error in failing to instruct on all or "substantially all" elements of the charged offense may often be prejudicial, it is *subject* to harmless error analysis because it is possible to determine whether the error is harmless from the record. (See *Neder*, *supra*, at p. 12.) The People, of course, bear the burden of proving harmlessness beyond a reasonable doubt; and in cases like this one, where all or nearly all of the elements of a charged offense are omitted, it may well be difficult to carry that burden. Conclusions of harmlessness will presumably be correspondingly rare. But showing harmlessness in such a case is not impossible—as this case demonstrates. As *Neder* explained, because the

effect of the error can be evaluated and quantified, the error should be reviewed under harmless error principles.

### D. Other Jurisdictions Properly Hold That Error in Failing to Instruct on All Elements of an Offense is Subject to Harmless Error Review Under *Neder*

Post-*Neder*, jurisdictions outside California have also examined whether the failure to instruct on all the elements of the offense is subject to harmless error review. The Eleventh Circuit, the Maryland Court of Special Appeals, and the North Carolina Supreme Court have all held that such error is subject to harmless error review. (*Parker v. Secretary for Dept. of Corrections* (11th Cir. 2003) 331 F.3d 764, 781 [complete omission of oral instruction on felony-murder is subject to harmless error review in light of *Neder*]; *Martin v. State* (Md. Ct. Spec. App. 2005) 165 Md.App. 189, 204 [failure to instruct on all elements of conspiracy is not structural error but rather subject to harmless error review under *Neder*]; *State v. Bunch* (2010) 363 N.C. 841, 845 [omission of any number of elements is subject to harmless error review, though only two of three elements of felony-murder offense omitted].)

The supreme courts of Mississippi and Michigan have held that the failure to instruct on all elements of an offense is structural error. (*Harrell v. State* (Miss. 2014) 134 So.3d 266, 273; *People v. Duncan* (2000) 462 Mich. 47, 54 (*Duncan*).) However, the Mississippi decision was based on state law grounds. The Mississippi Supreme Court had to distinguish the Mississippi Constitution from the United States Constitution to avoid applying harmless error review under *Neder*. (*Harrell v. State*, *supra*, 134 So.3d at p. 271 ["However, [contrary to *Neder*'s application,] Mississippi has its own constitution, wherein the right to a trial by jury also is protected, and via language stronger than that found in its federal counterpart."].) But this court has specifically rejected the argument that

the California Constitution affords greater protection regarding instructional errors of constitutional dimension. (*Flood*, *supra*, 18 Cal.4th at p. 487 ["On its face. . . the California Constitution does not support a rule that treats the failure to instruct on an element of a crime (uniquely, among instructional errors) as reversible per se"].) Thus, the Mississippi Supreme Court's reasoning actually supports respondent's position.

The Michigan opinion is unpersuasive because it relies on a pre-*Neder* case, *Harmon v. Marshall* (9th Cir. 1995) 69 F.3d 963 (*Harmon*), rather than applying *Neder*'s analysis. (*Duncan*, *supra*, 462 Mich. at pp. 56-57.) The lengthy dissenting opinion in *Duncan* explains that *Harmon* relied on precedent holding the failure to instruct on *one* element of the charged offense was structural error; thus *Harmon* is no longer good law in light of *Neder*, and *Duncan*'s reliance on it is misplaced. (*Duncan*, *supra*, at p. 60.) The dissent also correctly reasoned that harmless error analysis should have applied to the omission of an instruction on the felony-firearm offense in *Duncan* because, as part of its other findings, the jury necessarily found facts sufficient to establish the defendant's guilt of that offense. (*Id.* at pp. 62.) The dissent further explains why the defendant in *Duncan* received a fundamentally fair trial. (*Id.* at p. 61.) Given this court's holding that the California Constitution does not afford greater protection in this context and this court's prior reliance on *Neder* (*Mil*, *supra*, 53 Cal.4th at p. 410; *Aranda*, *supra*, 55 Cal.4th at p. 363), the opinions from the Eleventh Circuit, Maryland Court of Special Appeals, and North Carolina Supreme Court are more persuasive than *Harrell* and *Duncan*, and provide further support for the application of harmless error review in this case.

## II. THE ERROR IN THIS CASE WAS HARMLESS BEYOND A REASONABLE DOUBT

In this unusual case, omission of any instruction defining robbery was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The jury was familiar with the elements of robbery, since both the prosecutor and defense counsel listed the elements in their closing statements. Appellant conceded every element of robbery at trial. Other instructions required the jury to find four out of six elements of robbery. The jury was properly instructed on identity and found against appellant, and overwhelming evidence supports the robbery convictions.

A "robbery" is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) CALCRIM number 1600 lists the elements of robbery as follows: the defendant (1) took, (2) another person's property, (3) from the victim's person or immediate presence, (4) against the victim's will, (5) accomplished by means of force or fear, and (6) with the specific intent to permanently deprive the victim of the property. Though the People must prove identity, identity is not an element of robbery. (*People v. Foster* (2010) 50 Cal.4th 1301, 1345.)

First, the record shows the jury was familiar with the elements of robbery since both the prosecutor and defense counsel listed the elements of robbery as set forth in the standard CALCRIM number 1600 in their closing arguments. (2 RT 265, 281.) The trial court's error in failing to instruct the jurors on the elements of robbery was thus harmless in light of the express recitation of the same elements by both the prosecutor and defense counsel. (Cf. *Cummings*, *supra*, 4 Cal.4th at 1312, fn. 52 [noting that the record contained little that might have offset the trial court's omission of elements—the trial court did not read the information to the

jury, and the prosecutor's closing statement did not list the elements of robbery]; *People v. Beeler* (1995) 9 Cal.4th 953, 984, abrogated on other grounds as stated in *People v. Edwards* (2013) 57 Cal.4th 658, 704-705 ["the prosecutor's closing argument foreclosed any realistic possibility of the jury not believing they had to find intent to kill"]; *People v. Champion* (1995) 9 Cal.4th 879, 950, overruled on another point in *People v. Combs* (2004) 34 Cal.4th 821, 860 [prosecutor's argument showed "no reasonable possibility that the outcome of the penalty phase was affected by the trial court's failure to instruct" on a given point]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1111 ["such detailed argument supports our conclusion that the error in refusing the instruction was harmless"].) Importantly, as noted above, and in contrast to the instructional omissions in *Neder* and *Flood*, the jury in this case was not expressly precluded from considering any of the elements of robbery. In both *Neder* and *Flood*, the court found the error harmless, and the omission here was less prejudicial.

Second, appellant conceded every element of robbery at trial. An instructional error may be harmless where the defendant does not contest the omitted elements. (E.g. *Mil, supra,* 53 Cal.4th at p. 411; also *Flood*, *supra*, 18 Cal.4th at p. 504.) Here, appellant contested only identity and conceded all the elements of robbery. In closing, appellant's counsel stated, "Now, there is no question here, as [the prosecutor] said, no question these people were robbed, okay. Our only contention is with Element Number 1 that it was not the defendant." (2 RT 281.) Since identity is not an element of robbery (*People v. Foster*, *supra*, 50 Cal.4th at p. 1345), appellant conceded every element of the charged offense.

Third, the court's other instructions required the jury to find four out of six elements of robbery. (*Mil, supra,* 53 Cal.4th at p. 413.) Although the trial court failed to instruct the jury with CALCRIM number 1600 either orally or in writing, it did instruct the jury on the requisite intent to rob

(CALCRIM No. 251)[3] and on the elements of the personal gun use enhancement (CALCRIM No. 3146).[4] (1 CT 142, 160.) Elements 1 (taking), 2 (another person's property), and 6 (intent) were covered by CALCRIM number 251, which required the jury to find beyond a reasonable doubt that appellant had the specific intent to permanently deprive (intent) the owner of the property (another person's property) when it was taken (taking). CALCRIM number 3146 overlapped with element 5 (the use of force or fear). The jury necessarily found that appellant used force or fear to commit the robberies because it found true that appellant

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[3] The instruction on intent stated, in part, "The specific intent and mental state required for the crime of Robbery is the specific intent to permanently deprive the owner of the property when it is taken." (1 CT 142.)

[4] The instruction on the personal firearm use enhancement stated in relevant part as follows:

> If you find the defendant guilty of the crimes charged in Count 1 SECOND DEGREE ROBBERY, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant personally used a firearm during the commission of that crime. You must decide whether the People have proved this allegation for each crime and return a separate finding for each crime.
>
> [. . .]
>
> Someone personally uses a firearm if he or she intentionally does any of the following:
>
> 1. Displays the weapon in a menacing manner;
>
> 2. Hits someone with the weapon;
>
> OR
>
> 3. Fires the weapon.
>
> The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

(1 CT 160.)

personally used a firearm during the commission of the offenses. To find that appellant used a firearm during the commission of the robberies, the jury had to find beyond a reasonable doubt that appellant displayed the weapon in a menacing manner, hit someone with the weapon, or fired the weapon. Any of those three would also show the use of force or fear. Here, specifically, there was no evidence that appellant hit anyone with the gun or fired the weapon, so we can confidently conclude the jury found he displayed the weapon in a menacing manner. The intentional display of a gun in a menacing manner during the commission of a robbery is necessarily the equivalent of the use of fear. Thus, these instructions cover four out of six elements of robbery. The only two elements not covered were that the property was taken "from the victim's person or immediate presence" and "against the victim's will." (CALCRIM No. 1600.) But appellant conceded these two elements, surveillance video showed appellant's proximity to the victims, each victim testified that appellant took the money from his or her immediate presence and against his or her will, and there was no evidence of collusion.

Fourth, as discussed above, the only contested issue at trial was identity, and the record affirmatively shows the jury was instructed on identity and found against appellant. The trial court gave multiple instructions on identity, including an alibi instruction that stated, "The People must prove that the defendant committed the crimes charged" and "The People must prove that the defendant was present and committed the crimes with which is he charged. If you have any reasonable doubt about whether the defendant was present when the crime was committed, you must not find him guilty." (1 CT 154.) Also, the record demonstrates that the jury understood its duty to resolve the factual issue of identity because

it asked four questions regarding identity during deliberation.[5] (2 CT 179-181.) Finally, the jury necessarily found appellant's identity as the offender because it found true the firearm allegation and found appellant guilty of robbery after being instructed that it must find *appellant* was the person who committed the offenses. (2 CT 183-184.)

Fifth, the error is harmless because overwhelming evidence supported all elements of robbery and supported identity. (*Neder*, *supra*, 527 U.S. at p. 19.) Surveillance footage showed appellant at the scene of each crime and showed appellant taking money from the store clerks at gunpoint. (1 RT 73-74, 116.) Wickham testified that she gave appellant money out of fear after appellant showed her a gun and demanded the money. (1 RT 89-90.) Lopez testified that he gave appellant money after appellant came into the store, pointed a gun at him, and said, "give me the money muthafucker." (1 RT 69-70.) Each victim saw the suspect's face (1 RT 75, 92), and both victims immediately identified appellant in photo lineups as the person who robbed them (1 RT 79, 105). Detective Forsythe found appellant's clothing in appellant's home (1 RT 114)—clothing that matched the victims' descriptions of the suspect's clothing (1 RT 46, 49, 116). Appellant admitted to the police that he was not home during the night of the robberies, which contradicted his alibi. (1 RT 227.) This evidence alone shows beyond a reasonable doubt that no rational juror, if properly instructed, could have found that robberies were not committed.

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[5] The jury posed the following four questions to the trial court: (1) "Would it be possible to know what Mr. Merritt's height and weight is?" (2) "Would it possible [sic] to see Mr. Merritt standing either in our person or via a picture showing him from head to toe from the front?" (3) "How many six packs of photos were shown to Christian Lopez & Kristin Wickum each time?" (4) "Is there a still picture of the car at the back gate of the storage complex (Storage Direct)? If so, may we see it?" (2 CT 178-181.)

Finally, reversal under these circumstances would be essentially meaningless because a retrial would not focus on contesting any of the omitted elements. *Neder* reasoned that, "[r]eversal without any consideration of the effect upon the verdict would send the case back for retrial—a retrial not focused at all on [the omitted element], but on contested issues on which the jury was properly instructed." (*Neder*, *supra*, 527 U.S. at p 15). This court has also recognized that reversal is not warranted where the defendant did not contest the omitted elements. (*Mil*, *supra*, 53 Cal.4th at p. 412 ["defendant did not, and apparently could not, bring forth facts contesting either of *two* omitted elements]; *Flood*, *supra*, 18 Cal.4th at p. 503 ["defendant made no attempt, either in the trial court or on appeal, to argue the officers were not peace officers"].) To reverse the judgment here and remand for a pointless retrial would, to quote the words of Chief Justice Traynor as quoted by the United States Supreme Court, "bestir the public to ridicule [the judicial process]." (*Rose v. Clark*, *supra*, 478 U.S. at p. 577.) The constitutional error in this case had no effect on the outcome of the trial, and it did not violate appellant's fundamental rights.

This case exemplifies the arbitrariness of *Cummings*'s "substantially all" standard for determining whether an instructional error is structural error. The harmless error standard protects the interests of the defendant, the victims, and the People in a fair trial and in the finality of judgment. Accordingly, respondent requests this court hold that error in failing to instruct on the elements of the charged offense is subject to harmless error review regardless of the number of elements omitted, and that the error here was harmless based on the facts of this case.

## CONCLUSION

The People respectfully request that this court reverse the judgment of the Court of Appeal and hold that error in failing to instruct on the elements of the charged offense is subject to harmless error review and that the error here was harmless beyond a reasonable doubt.

Dated: June 1, 2016

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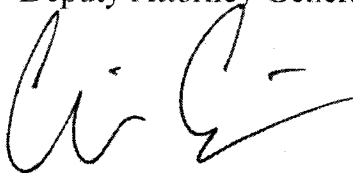

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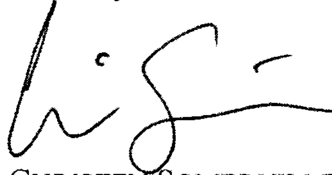
## CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **10,063** words.

Dated: June 1, 2016

KAMALA D. HARRIS
Attorney General of California



CHRISTEN SOMERVILLE
Deputy Attorney General
*Attorneys for Respondent*

## DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Merritt** No.: **S231644**

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 June 6, 2016, I served the attached **OPENING BRIEF ON THE 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

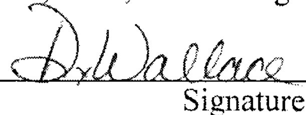
The Honorable Debra Harris
San Bernardino County Superior Court
Victorville District
14455 Civic Drive
Department V4
Victorville, CA 92392

Michael A. Ramos
District Attorney - San Bernardino County
Specialized Prosecutions Division
412 W. Hospitality Lane, First Floor
San Bernardino, CA 92415-0042

Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **June 6, 2016** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to John L. Dodd , Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at jdodd@Appellate-Law.com.

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 June 6, 2016, at San Diego, California.

| D. Wallace |  |
|---|---|
| Declarant | Signature |

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