Supreme Court No. 184665

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.

On Review of an Opinion and Decision of the Court of Appeal
Fifth Appellate District, No. F056605
Affirming the Judgment of the Superior Court
County of Kern Case No. BF11667B
Hon. Kenneth C. Twisselman, II, Judge

MR. MIL'S REPLY BRIEF ON THE MERITS

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and respondent, vs. EDUARDO MIL, JR., Defendant and appellant.	No. S184665 Court of Appeal No. F056605 Superior Court No. BF116677B

Review of an Opinion and Decision of the Court of Appeal, Fifth Appellate District, No. F056605, affirming the Judgment of the Superior Court, County of Kern Case No. BF11667B.

REPLY BRIEF ON THE MERITS OF EDUARADO MIL, JR

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REPLY BRIEF ON THE MERITS OF EDUARADO MIL, JR

PREFACE

In this brief the appellant will respond to portions of the Attorney General's answering brief where additional comment appears likely to be helpful to the Court in deciding this case. To the extent consistent and possible with that objective repetition of the appellant's earlier briefing will be avoided. The appellant continues to rely on his earlier briefing, and the absence of additional comment on aspects of the Attorney General's brief in this reply should not be taken as a concession of any nature. This effort to keep the briefing as short as possible should not be seen as a lack of confidence in the merits of the matters not addressed. The case and facts are fully and accurately stated in the appellant's opening brief.

ARGUMENT

I. HARMLESS ERROR ANALYSIS WHERE THE INSTRUCTIONS OMIT MULTIPLE ELEMENTS THE JURORS MUST FIND TO CONCLUDE A SPECIAL CIRCUMSTANCE WAS PROVEN IS UNSUPPORTED, IMPRACTICAL, AND ANTITHETICAL TO THE HISTORICAL BACKGROUND OF THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL.

Introductory Note regarding forfeiture.[1]

Despite the fact that the Court of Appeal rejected respondent's forfeiture suggestion (AG-RB 17 (Court of Appeal brief)) by simply reaching the merits, and despite his agreement there (ibid) and here (AG (Answer Brief) 9) that there was an objection to giving CALJIC rather than CALCRIM and agreement that there is a *sua sponte* obligation (AG 9-20), the Attorney General claims the error here was forfeit.

The CALCRIM special circumstance definition has a separate instruction for accomplices to the actual killer. (CALCRIM No. 703.) The

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[1] Respondent's efforts to forfeit issues may extend to anticipatory efforts at forfeiture of different claims in the federal courts. Respondent's footnote 1 to his "Statement of the Case" (which omits a great deal) states the appellant's petition for review only sought review on the issue on which review was granted. (AG 1, n.1.) This is inaccurate. (See Petn. Review 1-2, Questions Presented, 3-4, Necessity for Review, 16 Conclusion asking review of questions presented.) Counsel must present federal questions, and has, particularly in a case where success on the issue most fitting the criteria for actual review by this court would leave his approximately 40 years old client with a resentence to life with a minimum sentence and parole eligibility of 25 years. Therefore, he wishes to make it clear there is no concession of the remaining questions and no intention to forfeit or waive those issues, even if not expressly reached by this Court.

CALCRIM use note instructions to instruction 703 could not be more clear that the court has a sua sponte duty to provide that instruction. (See note and case cited; see also *People v. McGee* (2003) 107 Cal.App.4th 188, 192 [appellant entitled to instruction and finding on elements]; *United States v. Gaudin* (19950 515 U.S. 506, 509-510; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *People v. Flood* (1998) 18 Cal.4th 70, 480, 481 (*Flood*); cf. Pen. Code § 1259; *People v. Carpenter* (1997) 15 Cal.4th 312, 381; *People v. Wickersham* (1982) 32 Cal.3d 28, 33, fn 10..)

Despite having had the inapposite nature of *People v. Bolin* (1998) 18 Cal.4th 297, 326, and *People v. Stone* (2008) 160 Cal.App.4th 323, 331, already pointed out to her (see Appellant's Reply Brief 12 [Court of Appeal]), the Attorney General relies upon these for a far different error. Those cases dealt with a preference of wording, not the omission of elements.

The trial court has specific obligations and the general obligation to insure the right to a jury trial by providing instructions (see *People v. Dominguez* (2006) 39 Cal.4th 1141, 1158), thus avoiding gamesmanship of this variety (see *People v. Roehler* (1985) 167 Cal.App.3d 353, 394). The Attorney General's forfeiture argument lacked merit below and is without any merit or application here.

A. The Attorney General's Authority and Position

The Attorney General places heavy reliance upon *People v. Odle* (1988) 45 Cal.3d 386 as a case supporting harmless error where there are multiple omissions of elements of the offense. *Odle* does not stand for that proposition, it is outdated in part, and in any event involved a single omission.

This court's opinion in *People v. Prieto* (2003) 30 Cal.4th 226, 256-

257 (*Prieto*), dealt with the out-dated nature of *Odle* by stating the opinion in *Odle* holding there was no federal constitutional right to have a jury "is now erroneous after *Ring v. Arizona* (2002) 536 U.S. 584, 609 [122 S. Ct. 2428, 2443, 153 L. Ed. 2d 556]. By analogy to *Neder v. United States* (1999) 527 U.S. 1, 15 [144 L.Ed.2d 35, 119 S.Ct. 1827] (*Neder*) - holding omission of "an" element of a substantive offense can be harmless - *Prieto* said the "core" holding of *Odle* remained valid. As a result, omission of "an" element, a single element, of a special circumstance is still subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18.

Appellant has not suggested that omission of a single element can never be harmless. The question here is the effect of multiple omissions.

Prieto found, based on *Odle*, that an omission from a special circumstance instruction was analogous to one from a substantive offense. The "core" holding of *Odle* was that there was no relevant substantial difference between the special circumstance and the substantive offense. But, *Prieto* relied upon *Neder*, not *Odle*, for the holding that omission of a single element could be harmless and how that test would be applied.

In *Neder* the missing element was whether an omission on a tax return was "material." The omitted element was whether the failure to report five million dollars ($5,000,000) on the return has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." (*Neder* at p. 16.) Neder did not contest his failure to report that amount would influence the tax collector's decision on the taxes he owed. "In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the

erroneous instruction is properly found to be harmless. We think it beyond cavil here that the error 'did not contribute to the verdict obtained.' *Chapman, supra*, at 24." (*Neder v. United States, supra,* 527 U.S. at p. 17.)

However, the *Neder* court recognized it could not substitute itself for the jury, that is must find it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. The opinion cogently explained that the reviewing court was not making a finding reserved for the jury (i.e., whether or not there was in fact a failure to report that was "material") but rather was making a finding that there was no evidence on which a rational juror properly instructed could have found the non-existence of the element. In the Court's words:

> "we have recognized that trial by jury in serious criminal cases 'was designed to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'" *Gaudin, supra* [2], at 510-511 (quoting 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873)). In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, 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.

(*Neder, supra,* at p. 19.)

The Court continued:

> "Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict

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[2] *United States v. Gaudin* (1995) 515 U.S. 506 [132 L.Ed.2d 444, 115 S.Ct. 2310].

> would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless."

(*Ibid.*)

It concluded this explanation more generally:

> "A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, 'become in effect a second jury to determine whether the defendant is guilty.' Traynor, supra, at 21. Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no,' holding the error harmless does not 'reflect a denigration of the constitutional rights involved.' *Rose*[3], 478 U.S. at 577. On the contrary, it 'serves a very useful purpose insofar as [it] blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.' *Chapman*, 386 U.S. at 22."

(*Neder v. United States, supra*, at p. 19.)

Thus, while appellant agrees that for the omission of a single element a harmless error analysis was found appropriate in *Prieto*'s authority, and while appellant agrees that *Odle* still stands for the proposition that for this purpose a special circumstance stands in no different position than a substantive offense, appellant does not agree with the Attorney General's expansion of *Prieto* to encompass multiple elements. The opinion in *Neder* observed that it was a narrow holding, and it did so in reference to fears it would be expanded too broadly.

> "Justice Scalia, in dissent, also suggests that if a failure to charge on an uncontested element of the offense may be harmless error, the next step will be to allow a directed verdict

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[3] *Rose v. Clark* (1986) 478 U.S. 570 [92 L. Ed. 2d 460, 106 S. Ct. 3101].

> against a defendant in a criminal case contrary to *Rose v. Clark*, 478 U.S. 570, 578, 92 L. Ed. 2d 460, 106 S. Ct. 3101 (1986). Happily, our course of constitutional adjudication has not been characterized by this 'in for a penny, in for a pound' approach. We have no hesitation reaffirming *Rose* at the same time that we subject the narrow class of cases like the present one to harmless-error review."

(*Neder* at p. 17, fn 2.)

Where multiple elements are involved, one goes beyond the narrow class of single omissions into more complex considerations and more problematic findings. Most importantly a reviewing court then delves beyond whether a rational juror could not have found the necessary element if it were presented. For multiple elements the reviewing court would have to examine into whether a rational jury could not have found any or all of the missing elements.

Missing findings on multiple elements would require an analysis of the jury findings to determine which evidence and other elements actually found could be used, as well as a cumulative effect. Finding in a multiple omission situation that one element could not be rejected as a matter of law does not constitute a finding that all missing elements were not contested or that together there was no cumulative effect.

It is also questionable whether *Odle* found that multiple elements were missing. The problem stated there was:

> "The amended information alleged the special circumstance in the language of subdivision (a)(7), and included the charge that defendant knew or should have known Swartz was a peace officer engaged in the performance of his duty. The court, however, gave no instruction on the special circumstance. The jury found true 'the Special Circumstance allegation that Defendant, James Richard Odle, intentionally killed Floyd Swartz, a peace officer engaged in the performance of his duty . . . .' The finding did not state

> whether defendant knew or should have known Swartz was a peace officer engaged in the performance of his duty. The Attorney General does not dispute this was error, but claims the special circumstance finding may nonetheless be upheld, because the error did not 'prejudice' the jury's result on this issue."

(*People v. Odle, supra*, at p. 410.)

This was confirmed by the actual harmless error finding: "Initially, we note that the first two elements of the special circumstance -- that Swartz was a peace officer engaged in the performance of his duty -- were expressly stipulated to by defense counsel. Additionally, the jury expressly found the third element, intentional killing, in the course of its other findings. After careful consideration, we conclude that failure to instruct the jury on the last element -- that defendant 'knew or reasonably should have known that his victim was a peace officer engaged in the performance of his duties' -- was harmless beyond a reasonable doubt." (*Id.* at p. 415.)

Thus, although *Odle* was decided under circumstances where the existing belief was that the right to a jury trial did not extend to include all the elements of the special circumstance (*Prieto, supra*), and that necessarily impacted the reasoning and language of the application (*People v. Cummings* (1993) 4 Cal. 4th 1233, 1313), the court did apply the *Chapman* test to a single element that had not been found by the jury.[4] There was no evidence that the defendant should not reasonably have known the victim was not engaged in the performance of his duties as a police officer. *Odle* is thus outdated in ultimately concluding that because

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[4] In *Odle* the trial court had omitted all of the special circumstance instruction, but the jury necessarily reached express findings on all but one of the elements and, as in the present case, expressly found the special circumstance charge to be true on such elements as it was instructed to find.

state standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, was sufficient. *Chapman* was found satisfied as well, as there was no basis to not to find the element. *Odle* is also not helpful in this different case where the jury was not presented at all with multiple elements missing from the jury's findings. *Odle* had unquestioned evidence of the element (whether it would be reasonable to know the police officer was engaged as a police officer), and there was no evidence or effort whatsoever of anything to offset that overwhelmingly strong evidence of reasonable knowledge.

Respondent seems to believe that her quotation from *People v. Cummings*, *supra*, 4 Cal.4th at pp. 1312-1313 (AG 11) stating that in *Odle* "the trial court had omitted instructions on the elements of the special circumstances" by its reference to "elements" meant that the *Odle* jury did not have instruction to find multiple elements. As already discussed, that is not the case. Similarly, respondent cites *Odle* as supporting the proposition that "there is no indication that the *Chapman* test cannot be applied when more than one element is missing." There is similarly no indication that *Chapman* can be applied. While the findings in *Odle* were all but one necessarily made by the jury, the opinion simply does not deal with instances where more than one determinations were not made by the jury.

Respondent's reliance on other cases where a single element (intent to kill) was missing -- *People v. Johnson* (1993) 6 Cal.4th 1, 45, and *People v. Osband* (1996) 13 Cal.4th 622, 681 – as examples are similarly of no help to him. The issue here is whether harmless error applies to the omission of *multiple* elements and, if so, what the application of that doctrine might be and how it would resolve the present case.

Respondent's quotation from *People v. Flood, supra,* is notable for its final sentence's restriction, referencing the United States Supreme

Court's opinions: "'Indeed, the high court never has held than an erroneous instruction affecting *a single element* of a crime will amount to structural error [citation], and the court's most recent decision 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.)" (AG 13, emphasis added.)

The *Cummings* case dealt with the omission of four elements. This Court stated regarding the federal cases:

> "These decisions make a clear distinction between instructional error that *entirely precludes jury consideration of an element of an offense* and that *which affects only an aspect of an element.*"

(*People v. Cummings, supra,* at p. 1315, italics added.)

This statement is useful in understanding why the Attorney General's concern 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" (AG 13) is simply a mouse trying to move a mountain. His example of *People v. Davis* (2005) 36 Cal.4th 510, 567-569, further illustrates this. The failure to instruct on whether the murder was committed to further the robbery or whether the robbery was merely incidental to the murder are both statements of the same single requirement. If one or the other alternative portion were not presented, at least a portion of the element would be, and more importantly if neither were, it would be the same element. It is true that the element would not be fully presented to the jury because some aspect was omitted, but whether in whole or in part it would still be the single element which was omitted.

Returning to the question of omission of *multiple* elements, the *Cummings* opinion continued by stating:

> "Moreover, none [of the federal Supreme Court cases discussed] 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.*)

The Attorney General acknowledges this fact and that fundamental fairness is implicated in that omission of multiple elements and that automatic reversal is required in such an instance. She then attempts to go forward by summarily denying that happened in this case. (AG 11-12, "However, this did not occur in this case." at p. 12.) She does not say why or how she so concluded. Unfortunately for respondent, it did occur.

The liability for a special circumstance of an aider and abetter who is not the actual killer and has no intent to kill is expressly established in California by statute. (Pen. Code § 190.2, subds. (b) [aider and abetter who does not kill but intends to kill], (c) [aider and abetter who does not kill but aids (1) with reckless indifference to human life *and* (2) as a major participant].) They are also required as a constitutional minimum. (*Tison v. Arizona* (1987) 481 U.S. 137, 158 [95 L.Ed.2d 127, 107 S.Ct. 1676].)[5]

Absent these two elements, an aider and abetter of a robbery during

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[5] In a predecessor to *Tison*, the Court observed the generally disparate nature of equating the liability of the actual killer to the accomplice without any intent to kill: "Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment." (*Enmund v. Florida* (1982), 458 U.S. 782, 798 [73 L.Ed.2d 1140, 102 S.Ct. 3368].) Here, the actual killer got by far the comparatively minimal punishment.

which someone else actually kills the victim is guilty of felony-murder but not of special circumstance murder. In short, these two elements are *the* elements which make the non-intentional non-killer accomplice in murder responsible. They are "substantially all" of the elements (*Cummings, supra*). They are effectively the primary or the only elements making such a person, who must previously have been found guilty of aiding and abetting a felony during which someone is killed, also guilty of having aided the felonhy under special circumstances warranting additional and harsher punishment.

The Attorney General suggests the same rationale applies to multiple elements as applies to a single element. That overlooks not only the difficulties mentioned earlier, but the right to a jury trial. In *Cummings* this court said that four elements were too many, but the same rationale would in the Attorney General's view apply to four as to three or two or all of the elements.

Because the special circumstance situation has been found the same as the underlying offense situation (*Odle, supra*), reviewing courts could in respondent's view declare that no reasonable jury would fail to find guilt of the crime and its penalty increasing factors; and, thus. find that dispensing with the jury instructions entirely was harmless so long as the jurors sat in the box at trial and returned some form of verdict. That is absurd, but that is where such reasoning leads when applied to multiple elements of the offense. The destruction of a jury trial right in this manner is a defect affecting the fundamental framework of the jury trial rather than a mere trial process error.

The Attorney General's view that the jury "should have been instructed" does not demonstrate that the failure to do so did not undermine the structure of a jury trial. It merely states the conclusion he desires, but

since the jury was not so instructed it is worthless.

She concludes without reasoning and without consideration of consequences or whether that view is compatible with history in this country. Respondent says that Mr. Mil was represented by a competent attorney, but a competent attorney has nothing to do with a jury that does not decide the elements it must find to foreclose parole forever.

Respondent says that Mr. Mil was afforded an impartial jury, so "the impact of the error on the jury's decision-making process may be assessed." (AG 15 citing *Neder* at p. 9, and citing the concurring opinion of Justice Werdegar in *Flood* at p. 511.) The impact, of course, was that the jurors simply found there was a robbery in the course of which a death occurred, and appellant was an accomplice of some sort in that robbery. The omission of multiple elements and its instruction on special circumstances required no more of this jury. The assessment is that the elements were not found.

The opinions in *Flood* and *Neder* both were in regard to a single element, and their approach was to look to the strength of the evidence of that element and the absence of any evidence to the contrary so that they could find, "where a defendant did not, and apparently could not, bring forth facts contesting the omitted element" (*Neder,* at p. 9) the jury could not have found the non-existence of the uncontestably shown element.

That rationale does not apply to multiple elements because it has no stopping place thereafter. This is what *Cummings* was saying. This is why the Court was so careful in *Neder* to make it clear the holding was narrow even as to a single element, and that despite Justice Scalia's concerns about multiple elements the majority was not addicted to expanding to a multiple elements "'in for a penny, in for a pound' approach.'" The Attorney General is here urging the opposite without a sense of balance between

reversals for insignificant matters and the right to a jury determination. This is why in *Flood* this Court limited its comments to "a single element." To excuse or justify multiple failures to instruct and say the defendant had a fair jury trial is beyond complex and impractical; it is to back away from the historical right and reasons this country adopted a jury trial system and wrote it as a Sixth Amendment to the United States Constitution.

B. Centuries of History – the Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." (U.S. Const., Amend. VI.) The history of the jury trial right in the United States has often been told. (E.g., *Duncan v. Louisiana* (1968) 391 U.S. 145, 151-158 [20 L. Ed. 2d 491, 88 S. Ct. 1444].) It provides "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." (*Id.*, at p. 156.) Although the Sixth Amendment is most often seen as a protection for the accused, Article III of the federal Constitution also has a protection which states: "The Trial of all Crimes, except in Cases of Impeachment, *shall be by Jury*; and such Trial shall be held in the State where the said Crimes shall have been committed." (U.S. Const., Art. III.) This dual set of provisions demonstrates the strong feelings of both the Federalists and the Anti-Federalists that the right to a jury trial was a critical protection for society as well as the individual. "Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion. See supra, at 17-20. One contributor to the ratification debates, for example, commenting on the jury trial guarantee in Art. III, § 2, echoed Blackstone in warning of the need 'to guard with the

most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY." A [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997)" (*Jones v. United States* (1999) 526 U.S. 227, 248 [143 L. Ed. 2d 311, 119 S. Ct. 1215].)

The courts have struck a balance between minuscule mistakes that could not matter to the outcome, such as the cases finding omission of a single element harmless, and drawing a line which avoids the risk of eroding the fundamental right to a jury determination of culpability.

> "As we have, unanimously, explained [citation], the historical foundation for our recognition of these principles extends down centuries into the common law. 'To guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' [citation], trial by jury has been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .' [Citations.]"

(*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [147 L. Ed. 2d 435. 120 S. Ct. 2348].)

Thus, for historical purposes, as well as the previously discussed practical reasons and precedent, it is respectfully submitted that omission of multiple elements the jury must find is not and by policy should not suffer from an extension of the single omission analysis. The former is not merely an aggregate of the latter, and the extension would unduly encourage other extensions as plausible and would erode the incentive to instruct with responsible care. As individual cases arose, judicial resources would be exhausted with the likelihood of conflicting or disparate results as reviewing courts sought to wade through the morass, and summary

pronouncements could substitute for fully reasoned explanations. Most importantly, the right to be tried by one's peers and the public's right to their part in the adjudicative process would be eroded.

It is, therefore, respectfully submitted, that the failure to instruct on multiple elements should result in automatic reversal (see, e.g., *Cummings, supra*), and the Attorney General has offered no authority and no significant reason for a different result.

II. THE ERRORS IN THIS CASE HAVE NOT BEEN PROVEN HARMLESS BEYOND A REASONABLE DOUBT UNDER ANY STANDARD, BUT RESPONDENT PERPETUATES THE ERROR OF THE COURT OF APPEAL IN HIS EFFORT TO DO SO.

A. The Required Analysis[6]

Respondent begins by trying to suggest that this Court in *Flood* and

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[6] Appellant admits to some confusion over footnote 4 at page 16 of the Attorney General's brief. Since respondent did not petition for review, appellant assumes that the footnote means the appellant did not raise the issue of the standard to be applied. Appellant does not see how one can assess whether the Court of Appeal reached the correct or incorrect decision without discussing the standard of review, and in his argument clearly indicated the court used the wrong standard. (Petn.Rev. 6 et seq., see esp.p. 9 last sentence of first paragraph.) Appellant's concern was that the proper standard was not used because the Court of Appeal simply applied a substantial evidence test under which any error would be harmless because the only evidence considered would be that favorable to the prosecution. If that test were not met, prejudice would never arise since the evidence would be insufficient to support the conviction. However, so far as the proper standard is concerned, the petition clearly specified: "the standards being used for prejudice . . . " (Id., p. 16.) The issue would also be "fairly included" in the issues on which review was granted. (Cal.Rules of Court, rule 8.516.)

the United States Supreme Court in *Neder* were not stating minimum requirements for applying the *Chapman* standard of proof the error was harmless beyond a reasonable doubt. Respondent only offers that 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." (AG 16.)

On this point, *Flood*, which was applying *People v. Watson, supra,* did not say that it was applying a minimum standard, but then it did not say otherwise. What it did say was:

> "Reviewing the trial court's constitutional error under the *Watson* standard, we find no reasonable probability that the outcome of defendant's trial would have been different had the trial court properly instructed the jury to determine whether Officers Bridgeman and Gurney were peace officers. The prosecution presented *unremarkable and uncontradicted evidence* that they were employed as police officers by the City of Richmond. In addition, throughout the trial these officers and other witnesses corroborated that evidence in the course of testifying regarding other issues. *At no point during the trial did defendant contest or even refer to* the peace officer component of the distinctive uniform element of the crime. Defendant argued at trial that the police car was not distinctively marked as required by the statute but *never disputed* that it was driven by peace officers.[Note13 omitted] Furthermore, nothing in the record suggests, and *defendant does not assert, that he sought to present or was prevented from introducing evidence regarding the issue in question.*

(*People v. Flood, supra,* 18 Cal. 4th at pp. 490-491, italics added.)

The opinion in *Neder* was more specific and did state the minimum requirements for showing the error harmless beyond a reasonable doubt. If the defendant did not, and if the defendant apparently could not, bring forth facts contesting the omitted element which was otherwise established, then harmless error analysis could be appropriately applied (*Neder v. United*

States, supra, 527 U.S. at p. 19.) That is, harmless error testing could not be applied without those prerequisites (compare the quotation from *Flood* also requiring the defendant not contest or not have apparent ability to contest but be prevented from doing so, and requiring "unremarkable and uncontradicted" prosecution evidence that would clearly establish the elements with strength). If harmless error testing can be applied because those prerequisites are met, then the reviewing court must examine the entire record. "If , at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error – for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding – *it should not find the error harmless*." (*Ibid.,* italics added.)

Thus, respondent is incorrect that 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." The precise opposite is true.

Under the federal Constitution, not only does *Neder* command such consideration, it commands that the reviewing court not find the error harmless when it is contested and there is "sufficient evidence" to support a contrary finding on the missing element. While *Flood* did not expressly command the factors as necessary conditions, the similarity to the federal test is striking in its consideration and discussion reaching its conclusion under the California Constitution.

Respondent next "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 the 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." (AG 16.)

First, that flies in the face of the command of *Neder* and the reasoning in *Flood.*

Second, as *Neder* points out, the question is not whether the "jury's verdict" is supported but rather whether there was no basis whatever for the jury to have found against the element and strong credible support for the opposite conclusion. That is, the jury literally *could not* have had any basis to determine the element was missing and the element was clearly established. (*Neder, supra,* at p. 19.)

Third, the logic is fuzzy: If the jury had evidence countering the element but rejected it, the jury would have to have been instructed that it must make a finding. That is, the jury could not "reject" a conclusion as to the existence of an element on which it was not asked to make a decision.

Respondent continues to apply *Chapman* without making the necessary determinations that underlay the force of being harmless beyond a reasonable doubt. Respondent's analysis is incorrect from the start.

B. The Substantial Evidence Rule is Not a Rule of Prejudice.

As did the Court of Appeal, the Attorney General compounds her use of the incorrect test by relying upon the substantial evidence rule. Respondent states the question as one of the evidence being "overwhelming" because the verdict was inevitable based on "overwhelming evidence." (AG 17.) She then relies upon a series of cases which examine the evidence to determine if it is *sufficient to support the verdict.* That is not the question, but despite appellant's extended explicit treatment of it in his Brief on the Merits at pages 36 through 37, respondent forges ahead using the substantial evidence rule.

As explained in the previous section the substantial evidence test is

used for the opposite: i.e., for finding if there is defense evidence to the contrary. (*Neder, supra*; see *Flood, supra.*) Such evidence is discussed in the Brief on the Merits (e.g., BOM pp. 38-40, 42-43, 44.) Thus, the defense met the test of presenting substantial evidence, of having evidence to present to the jurors, and of actually contesting the elements to the extent possible. A juror could accept that evidence and find the elements missing from the instructions were unproven. Therefore, the error was prejudicial. (*Neder, supra*; see *Flood, supra.*)

Respondent's cases of *People v. Proby* (1998) 60 Cal.App.4th 922, 930-931, 934, *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1754-1755, and *People v. Hodgson* (2003) 111 Cal.App.4th 566, 578, also relied upon by the Court of Appeal, are inapposite because they are sufficiency of the evidence to support the verdict cases (see also BOM 37-39, esp. 38-39; Petn. Review 12-15, esp. 13-15.) The same is true for the cases cited only by the Attorney General. (AG 17-19.) Appellant does not dispute respondent's authorities defining "major participant" or "reckless indifference." Those definitions are not in question in this case.

The question here is not whether the jury *could* have found the special circumstance. It is whether the jury *could not* have come to any other conclusion. That is measured by the test of *Neder* and the test applied in *Flood*, not by the substantial evidence rule. Respondent's "overwhelming evidence" argument is directed at showing the decision a jury should reach, in the Attorney General's opinion. However, there was no decision actually reached because the jury was not told it needed to make the decision. The decision is constitutionally reserved for the jury, thus requiring the *Neder* application, implicit in *Flood*, to show the uncontested lack of support for a jury decision adverse to the charges. The decision is that there is no

conceivable way the reviewing court is interfering with the right to a jury determination because there are no available facts or inferences to be drawn other than those showing guilt and no contest was or will be made of those.

The Attorney General and Court of Appeal used flawed testing to arrive at their conclusion of "overwhelming" evidence. To determine whether there is evidentiary support for a conviction, the appellate court must review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the accused guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 562; accord *People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.) On review of the judgment, the court must presume in support of the judgment the existence of any facts which the jury might reasonably infer from the evidence. (See, e.g., *People v. Edelbacher, supra*, 47 Cal.3d at p. 1019; *People v. Bean* (1988) 46 Cal.3d 919, 934.) Inferences under the substantial evidence rule need only be supported sufficiently that they are not guesswork. (See *Juchert v. California Water Service Co.* (1940) 16 Cal. 2d 500, 506-508; *Estate of Braycovich* (1957) 153 Cal.App.2d 505, 512; *People v. Peloian* (1928) 95 Cal.App. 96, 98.) Inherent in such a low threshhold to recite only evidence which may support the conviction is an inability to declare that overwhelming. Because no more is analyzed, nothing is overwhelmed.

For examples: Respondent relies upon "several witnesses who [testified they] heard appellant threaten to rob Mr. Coe and 'beat the hell' out of him. (2RT 51, 192.)" (AG 19.)

The witnesses (two, not several) were McLane and Cowen. Both were highly biased witnesses.

McLane was the manager of the motel where Crystal Eyraud, the

actual killer, was engaged in her activity, and McLane was aware of this prostitution. McLane was also aware that Eyraud was inside the room of Mr. Coe, the victim, and McLane saw her there moving objects in the room after Coe had moved his things from his truck to the room. (2RT 36-37, 42-44, 73.) McLane's motivation to shift blame from Eyraud was not limited to his vulnerability to accusations of maintaining a place for prostitution and knowledge of her apparent taking of goods. He had personal interests. He had known her for several years, and he knew she was the stepdaughter of his best friend. Carl Cowen, the other witness involved, was that friend. (2RT 44, 188.) Their friendship was a strong bond as demonstrated by the fact that McLane permitted Cowen to stay at the motel and do odd jobs despite also knowing that Cowen was a felony parole absconder and aiding him in avoiding the police. (2RT 77-79.)

As noted, Cowen was the step-father of Eyraud and a felon and a parole absconder. He also knew that Eyraud was staying with Mr. Coe. In fact, it was Cowen who showed Coe to his room after Coe had told Cowen that the arrangement would be for Eyraud, Cowen's own step-daughter, to be with him in the room. (2RT 203.)

As for the specific statement McLane testified he had heard appellant make to Crystal Eyraud at the motel earlier, "I am going to rob the mother fucker," McLane said he paid no attention to it because "You hear things like that all the time." The appellant left after the statement. (2RT 51.) Even more to the point, McLane testified as well that he did not tell Deputy Sheriff Lackey that it was Cowen who saw appellant at the time. Deputy Lackey testified to the contrary. (2RT 76, 82, 127-128.)

Furthermore, "rob" is commonly used interchangeably with "steal" rather than in its legal meaning. Respondent, for example, mentions such a

use by appellant in his statement that he entered to "rob" Coe who was supposed to been unaware his property had been taken by Eyraud, whom Mil would help leave as Coe was in a drugged condition. That is no force was contemplated in the statement. Mil expressly denied that he planned a robbery, and he did not know Eyraud had a knife or the victim had been stabbed or that he took any money. (1SCT 49, 66, 75, 79, 141, 144. 148.)

Mil fought with non-lethal means, and the fight was occasioned by Coe suddenly rising in an appearance of fighting belligerence. Mil asked Eyraud to calm the man down and leave. (1SCT 65-75.) When the fight was even and Coe said "okay," Mil ran out and rode his bicycle away. He just wanted to get out when Coe was discovered awake.. (1SCT 66,75, 79.)

All of this was evidence, undiscussed and unconsidered in the Attorney General's briefing and its flat "sufficiency of the evidence" type of rendition. It contradicted reckless disregard and major participation, but it simply was regarded as unimportant because the Attorney General and Court of Appeal were not properly analyzing the prejudice issues and were using the substantial evidence rule.

As pointed out in the opening brief on the merits, Mil defended on the basis that he did not go there to rob or assault Coe, that he did not use any weapon of a deadly nature, and that there was no causal relationship to the death. (E.g. BOM 44.) Although a juror could find he was aiding Eyraud's theft by assisting in the asportation (BOM 39), that same juror reasonably could reject the notion he was a major participant in the use of force or the taking, and that same juror could reasonably find Mil did not act with disregard for life but rather sought to calm the situation and used non-deadly force, and he immediately fled when the opportunity appeared.

Thus, even under the *Neder* and *Flood* tests for omission of a single

element, the error was prejudicial and respondent has not demonstrated otherwise beyond a reasonable doubt, or at all. Instead, respondent has simply found isolated parts that support guilt and set them forth in isolation and declared them "overwhelming," all without regard for applicable standards of review. Unfortunately, the Court of Appeal subscribed to this incorrect understanding and in doing so fell victim to the same errors.

Appellant respectfully submits that even if the tests of *Neder* and *Flood* are applied to failures to instruct on multiple elements, the result is still that the judgment imposing the special circumstance should be reversed because the Attorney General has not shown the failures harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, and for those expressed in the opening brief, it is respectfully requested the judgment be reversed.

Date: March 24, 2011 Respectfully submitted,

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Certification: This brief does not exceed 8,400 words (Cal. Rules of Court, Rule 8.520(c)). It contains 7,256 words by computer count, excluding covers, tables, this certification, and the proof of service.

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DECLARATION OF SERVICE

I, the undersigned, declare as follows:I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is PMB 513, Suite D, 44489 Town Center Way, Palm Desert, CA 92260. On March _____, 2011, I served the attached material in an envelope addressed shown below, by the United States Mail in Palm Desert, California, with postage prepaid.

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