SUPREME COURT NO. S186661

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

SETH CRAVENS,
Defendant and Appellant.

Court of Appeal
No. D054613

Superior Court
No. SCD206917

APPEAL FROM THE SUPERIOR COURT OF
SAN DIEGO COUNTY

Honorable John S. Einhorn, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

In *People v. Knoller* (2007) 41 Cal.4th 139, this court cleared up decades of confusion and established a standard for determining whether a criminal defendant whose conduct resulted in an unintentional death should be convicted and punished the same as if he or she had intentionally murdered someone without premeditation and deliberation. Simply stated, that standard is whether the defendant committed an act whose natural consequences are dangerous to life, and did so consciously aware of and

disregarding the fact someone's death might reasonably follow.

Appellant Seth Cravens threw a single punch at a professional athlete, Emery Kauanui, with his non-dominant hand, causing Kauanui to fall and strike his head on the pavement. Through the expedient of charging appellant with numerous other offenses--none of which had resulted in previous arrest or attempted prosecution, and none of which had resulted in any injury even remotely life-threatening--the People were able by means of smoke and mirrors to obtain a murder conviction for Kauanui's death: Appellant was a serial brawler and a bully, therefore he was guilty of murder. Here, in their opening brief on the merits, the People devote roughly one-half of their factual recital to these other assaults. There is a good reason for this. The People still have no real evidence appellant consciously disregarded a risk to Kauanui's life when he hit him, and reinforcing the perception that appellant is a bad man is the next best thing.

Nowhere does respondent demonstrate the Court of Appeal employed an erroneous legal standard in evaluating the evidence of implied malice. *Nowhere* does respondent point to any evidence appellant had the slightest inkling Kauanui might die when he threw a single punch at him. And *nowhere* does respondent demonstrate the natural consequence of

throwing a single punch at a healthy young male is life-threatening.

Furthermore, and despite respondent's apparent desire to conflate the two, the question whether there is sufficient evidence to sustain appellant's murder conviction is entirely separate from the question whether the Court of Appeal erred in finding appellant liable by expanding an obscure theory of voluntary manslaughter. Considered in the abstract, the Court of Appeal was within its statutory authority to reduce the murder conviction to voluntary manslaughter, though it appears to have erred in expanding a non-statutory theory of voluntary manslaughter when it did so.

STATEMENT OF THE FACTS, INCLUDING DISPUTED FACTUAL CHARACTERIZATIONS IN RESPONDENT'S OPENING BRIEF ON THE MERITS

Because the question whether there is sufficient evidence of implied malice is a factual inquiry, it is necessary to pay a great deal of attention to those facts. Although the procedural history and facts are fairly stated in the Court of Appeal opinion (Typed opn. D054613 [hereafter, "Opn."], pp. 1-27), extensive comment on the version of the facts contained in respondent's opening brief on the merits [hereafter, ROBM] is necessary.[1]

"Although they [appellant, Hendricks, House, Osuna, and Yanke] knew Kauanui, they were not friends with him because he was older, and had not attended La Jolla High School." (RBOM, p. 3.) The record indicates that while appellant, Hendricks, House, Osuna, and Yanke were closer to one another because they had played football together at La Jolla High, they were friends with Emery Kauanui and his brother Nigel. (9 RT 699, lines 25-28; 9 RT 700, lines 1-10; see especially line 4: "Although they were friends, is it fair to say . . . .") Appellant was a passenger with Emery Kauanui, who was celebrating his birthday, on the New Year's Eve party

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[1]Appellant will not address the alleged "facts" contained in the introduction section (pages 1-3) of respondent's opening brief on the merits, as they are unsupported by record citation and will presumably be considered by this court as argument

bus that figures in count 7. (11 RT 1100.) A surprised Kristin Link called appellant from Los Angeles when she learned he and Kauanui had been in a fight because she thought they were friends. (9 RT 674.) Jennifer Grosso, Kananui's girlfriend, had known appellant since he moved from Hawaii in the fourth grade; she was excited to see appellant when he entered the La Jolla Brew House the night of the incident and "gave him a big hug." (6 RT 227.) Whether appellant and Kauanui were friends rather than acquaintances is a minor but not insignificant point:[2] Not only was there no previous animosity between appellant and Emery Kauanui, but relations between them were entirely amicable until the tragic events of May 23, 2007.

Respondent presents appellant's history of assaults before discussing Kauanui's death as if those prior assaults had some kind of teleological significance, all leading up to May 23.[3] They do not. As will be demonstrated below, each incident had either not been reported to

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[2]Matthew Yanke, for example, told an investigator it was evident appellant did not want to hurt Kauanui because he used his left (i.e., non-dominant) hand when he hit him. (13 RT 1559.)

[3]E.g., "Cravens's numerous other assaults in the preceding years . . . demonstrated that Cravens acted with increasing disregard for the consequences of his devastating blows" (ROBM p. 36); "Cravens's disregard for the consequences of his beatings finally became so cavalier that it clearly indicated a conscious disregard for Kauanui's life" (ROBM p. 37).

authorities or had not resulted in arrest or prosecution,[4] and each was resurrected for the sole purpose of obtaining a murder conviction following Kauanui's death by showing appellant to be, as the Court of Appeal put it (Opn., p. 33), of "evil disposition or despicable character."

Emery Kauanui's Death

Appellant takes only minor exception to respondent's recitation of the facts up to the confrontation on the street outside Kauanui's house. For example, Dylan Eckardt claimed Kauanui, who was simultaneously yelling at someone else, said to Eckardt on the phone, "Hurry up and get here. Get here. I got beef at my house." (8 RT 624.) It was, however, disputed whether Eckardt told a detective Kauanui said, "I've got beef at my house, and I'm going to kill him."[5] (8 RT 654-655; Supplemental Clerk's Transcript, p. 4.)

If Kauanui did say that, in any event, the "him" would have been Eric House rather than appellant. Kauanui's squabble at the Brew House

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[4]It is unknown whether the offense in count 11, which occurred around two weeks before Kauanui's death, would have resulted in arrest and prosecution had Kauanui not died.

[5]The transcription was disputed; see Supplemental Clerk's Transcript, p. 4 (transcript of exhibit no. 65). On several occasions during the preliminary hearing, the court indicated it could clearly hear Eckardt relate that Kauanui said, "I'm going to kill him." (6 PHT 957, 1040, 1042, 1080, 1082, 1085.)

over the spilled beer was with House, following which appellant took House's side in the argument. According to prosecution witness Jennifer Grosso, Kauanui's girlfriend who was present in the street, and whose account the prosecutor enthusiastically vouched for--"Jenny Grosso. Her testimony is 100 percent corroborated for every aspect of it." (16 RT 1894) --the only confrontation before the fatal blow was strictly between Kauanui and House. Kauanui bested House in the fight, knocking out his tooth and basically leaving him a bloody mess.[6]

For reasons expressed below, under the circumstances it matters little whether anyone other than House laid a hand on Kauanui before appellant hit him, but following respondent's recital of Erica Wortham's testimony (ROBM p. 22), appellant must take serious issue with respondent's portrayal of the prosecution's facts as if they present a coherent narrative, because they do not.[7] Different prosecution witnesses saw distinctly different events. Jennifer Grosso, who was present in the thick of things, and who knew the participants personally, said the initial

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[6]Appellant will request the photograph depicting House's condition be transmitted to this court.

[7]"Given the jumble of inconsistent descriptions of the fight, this was not a case where the jury had only to choose between the People's and the defense's version of events . . . ." (*People v. Memory* (2010) 182 Cal.App.4th 835, 863.)

fight was strictly between Kauanui and Eric House, the original disputants at the Brew House. Phillip Baltazar, on the other hand, who was viewing the proceedings from an upstairs balcony across the street in dim lighting (6 RT 341, 343, 362-363; see also 7 RT 380, 486, 493; 8 RT 627; but see 7 RT 379), claimed to have seen a group assault on Kauanui.[8]

According to Baltazar, what he saw outside "looked like a scrum. Scrum is a term in rugby where you got everyone on top of someone. It was like a cat fight. There was four guys beating on someone." (7 RT 381-382.) "[F]our guys were either kicking or punching or elbowing or kneeing." (7 RT 384.) The group ended up at a palm tree, and Kauanui got up. (7 RT 385.) At that point there were two sources of light, the light from Kauanui's house and Jennifer Grosso's headlights. (7 RT 385-386.)

According to Grosso, when she returned to Kauanui's house, the Explorer was present and there "[w]as a commotion, confrontation outside of the house." (6 RT 246.) She turned the corner and her headlights illuminated Kauanui and Eric House in the street; Kauanui was on the ground and House was on top of him.[9] The others were standing a few feet

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[8]Of the others present that evening, only Eric House acknowledged so much as touching Kauanui before he fell. See footnote 28, *post*.

[9]Respondent erroneously states Grosso "saw Kauanui on the street with House standing over him." (ROBM p. 22.) The two were grappling in the street.

behind them. (6 RT 248.) Kauanui was attempting to put House in a headlock, and House was straddling Kauanui and punching his stomach. (6 RT 249.) Grosso held her car horn down to wake the neighbors, called 911 but did not remember talking to anyone, and began "screaming and cussing and making a huge scene." (6 RT 250.) Because House did not respond to her, she began kicking House "in his back, in his side, in his head. I started violently kicking him telling him, Get off of him." She kicked House with all of her might, and House "kept saying, Get her the fuck off of me." Someone in the group--she does not know who--said, "What the fuck are you doing? You're crazy, bitch." Then someone, either Yanke or Hendricks, removed her; she knew it was not appellant or Osuna because she could see them and House.[10] (6 RT 251.) She was not violently removed: "I was kind of just picked up and put somewhere else." (6 RT 252.)

Grosso called out the names of those present "so they knew that I was going to tell the cops." (6 RT 253.) She again got no reaction so she began kicking in the headlights of the Explorer and trying to hit the top of

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[10]At this point, then, House is on top of Kauanui, Grosso is kicking House, and someone else is grabbing Grosso, something that might well look like the "scrum" or group fight Baltazar claimed he saw from his balcony.

the car; no one tried to stop her, and "they were just saying, You're crazy. Like, Let's go." (6 RT 254.) Grosso then saw that Kauanui had gotten up, approached appellant, and was speaking to him from a distance of five or six feet; appellant was standing near the Explorer where he had been the entire time. (6 RT 255-257, 277.) "And [Emery] just said, you know, How the fuck are you going to jump me at my house? And maybe his arms raised a little bit kind of like what happened." (6 RT 256.) Appellant said nothing back: "He walked up to Emery, and he just gave him one extremely hard punch, and Emery just fell back immediately. It was like the lights went out in Emery and he fell back." (6 RT 257.) Appellant hit Kauanui with his left hand. (6 RT 290.) She heard Kauanui's skull crack when it hit the pavement, a pool of blood formed beneath his head, and Grosso thought he was dead. (6 RT 257-258.)

She started "screaming like, you know, Fuck all of you guys. None of you are going to get away with this." She looked at appellant and asked why he had done this to her; he had no reaction other than to tell his friends it was time to go. (6 RT 258.) When Kauanui was on the ground two people--she knows it was neither appellant nor House--kicked him on the side, "kind of a medium kick. . . . Like we won type of a final kick" that "wasn't . . . really aggressive, but it wasn't moving him to see if he was

alive either." (6 RT 259.) She saw some of the group get in the Explorer and leave House behind; she later found out he was looking for a tooth knocked out during the fight. (6 RT 258-260.) Four people--Tommy Corona, Nur Kitmitto, Dave Woods, and Shane Niau--showed up as support for Kauanui as the police arrived. (6 RT 260.)

According to Baltazar, on the other hand, Grosso began blowing the car horn, flashing the lights, and screaming when the group assailing Kauanui moved to the palm tree. (7 RT 387.) After Kauanui got up, "someone who was wearing a black baseball cap, a black opened shirt, short-sleeve shirt, black shorts, black shoes and white socks came flying out from there and coldcocked Emery. And that's when he went down onto the ground. And as he was going down, that individual was kicking and so was--there was another gentleman without a shirt on, a blond-haired guy who ended up losing his tooth, who was also kicking Emery." (7 RT 387-388.) At that point, Baltazar said, Grosso "came running over and started kicking them to get off." Grosso, screaming, then pounded on the SUV and tried to kick in the light before returning to Kauanui, lying with "a pool of blood around his head."[11] (7 RT 388.) A couple of other guys tried to help

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[11]There is simply no way to reconcile Baltazar's account with Jennifer Grosso's. In Baltazar's version, appellant had already hit Kauanui and Kauanui's head had already struck the sidewalk, then appellant and

the victim--Baltazar did not know where they came from--whereupon the guy with the black shirt threw the two guys off Kauanui, felt his pulse, and started running before being picked up by the SUV as it fled the scene. (7 RT 389.) Baltazar identified the man in black as appellant, and was "absolutely positive" he wore a black shirt,[12] shorts, and hat. (7 RT 392-393, 401.)

Dylan Eckardt's girlfriend Karen Loftus drove him to Kauanui's house following the phone call. (7 RT 445-446.) Loftus, who remained inside her car, said she saw Kauanui on the ground and four to five people "punching, kicking, and all of that." (7 RT 449-450, 476.) Eckardt saw "[a] few men circled around someone kicking" Kauanui, and saw one person who was "thicker, taller" than Eckardt standing back from the fray. (8 RT 625-626.) Eckardt corrected himself, however, and said, "I could see at least one person kicking," in addition to, "I could only see one person kicking him." (8 RT 632.) Eckardt yelled and Kauanui stood up; Grosso grabbed Eckardt, apparently confusing him for an assailant in the dark, and swung a shoe at him before he pushed her away. (8 RT 627.) According to

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House kicked him, at the point when Grosso tried to get them off Kauanui.

[12]There was no dispute appellant was wearing a white shirt. See, e.g., 7 RT 459, 461; exhibit no. 43 [video taken at La Jolla Brew House on night of incident].

Eckardt, when appellant hit Kauanui, "It was . . . one of the hardest punches I've ever seen thrown. Like Emery was on a lower curb, and the other guy was on the curb. So it was kind of just like a hard punch to the side of the head." Eckardt believed Kauanui was unconscious when his head hit the ground: "[A]ll you heard was like boom . . . from his head hitting the concrete." (8 RT 629, 631.)

Kauanui was unconscious following the fall. (6 RT 260.) When emergency personnel attempted to secure him to a backboard, however, he became "very combative" and said he needed to get home to his mother. (7 RT 434-435.) Combativeness can be associated with both head injuries and intoxication. (7 RT 437-438.)

Respondent correctly notes the size difference between appellant and Kauanui. (ROBM p. 24.) What respondent fails to note, however, is that Kauanui, age 24 at the time of his death, was a professional surfer, a "[v]ery amazing athlete" who was "in amazing shape." (6 RT 223, 253; 8 RT 637; 13 RT 1450.) This professional athlete in amazing shape had just beat up Eric House, a former high school wrestler (14 RT 1642-1643), when he confronted appellant with his arms raised and demanded, "How the fuck are you going to jump me at my house?"

Kauanui was taken to Scripps Memorial Hospital in La Jolla. (12 RT

1324-1325.) Although he could speak for the first couple of days, his condition worsened on May 26, following which a craniotomy (an operation to open the skull and remove any mass lesions) with craniectomy (where the bone is not replaced because of swelling) was performed. (12 RT 1332-1333, 1337, 1339.) Unfortunately, surgical intervention did not relieve the pressure in his brain and he died on May 28. (12 RT 1333, 1335.) The swelling was caused by an initial injury on the back of his head--an occipital cephalhematoma--and something called a contrecoup injury, which results from the brain's movement inside the skull following the initial injury. (12 RT 1334, 1337-1338.)

An autopsy was performed on May 29. (13 RT 1427.) In this case the pathologist looked for blunt injuries "which most of us have had all three types of: contusion, or bruise; abrasions, or scrapes; and lacerations, which are actually tears in the skin" (13 RT 1432), and during the autopsy documented the following:[13]

° An abrasion on the back of the head with "a boggy area" with

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[13]Keep in mind Kauanui, shirtless and wearing shorts, was rolling around in the street during the fight with House. (7 RT 379.) Appellant invites the court to compare the injuries sustained by House with the non-fatal injuries sustained by Kauanui during the fight. (See exhibits nos. 8, 13, 14, 21, 55.) In exhibit 13, the "little abrasions" should be distinguished from the victim's armpit hair, which at first glance may appear to be--but is not--bruising. (13 RT 1473.)

blood underneath (the fatal injury).

° A "very small" (3/8") abrasion on the front of the right arm.

° On the left arm in a similar location, another small abrasion (1/4").

° On the back portion of the right arm, a small abrasion near the underarm area.

° A series of four abrasions around the right elbow, the largest of which was 1 1/8."

° Three abrasions on the left elbow.

° An abrasion (1 1/2") on the back of the left shoulder.

° "Little abrasions" over an area of the left back.

° "[N]arrow brown scratches" which were further healed than some of the other injuries on the right side of the torso and both knees.

° A bruise on the upper right buttock, 3/8" by 3/8." (13 RT 1433-1437.)

The skull fracture associated with the wound to the back of the head was severe, a fracture the pathologist associated with the force involved in car crashes or "people that have been impacted with some sort of instrument, hammer, baseball bat, tire iron." (13 RT 1444-1445.) With the exception of this fracture, however, all the injuries were "medically insignificant" or "medically trivial," and the victim died from a single

impact injury. (13 RT 1439, 1472, 1474.) The attending trauma surgeon saw no bruising on his face (13 RT 1433), and the pathologist found no evidence he had been punched repeatedly in the face (13 RT 1473). In fact, the pathologist could not even tell on which side of the face the punch had landed that caused him to fall, and thus could not tell whether his assailant used his right or left hand. (13 RT 1475.) Other than the head injury, there was no bleeding in his internal organs. (13 RT 1474.) A toxicology screen done at the time of the victim's hospital admission revealed a blood alcohol content of 0.17 and metabolites of marijuana. (13 RT 1450, 1476.)

In other words, *there was absolutely no physical evidence to indicate Kauanui had suffered any kind of group beating.*

Prior Incidents

Respondent all but admits appellant was convicted not for what he did the night of May 23, 2007, but because of appellant's involvement in prior assaults: "Because an important aspect of the proof supporting the jury's verdict of second-degree implied-malice murder in the death of Kauanui was Craven's subjective knowledge that his habit of suddenly attacking people endangered their lives, the prior incidents must be recounted." (ROBM p. 4.)

As indeed they must, because they demonstrate precisely the

opposite: Appellant's so-called "habit of suddenly attacking people" had never before resulted in any injury that was even remotely life-threatening, so that his "subjective knowledge" his punches had a potentially lethal result was nonexistent. Respondent further neglects to add these same events that are purportedly so serious they reflect appellant consciously disregarded the possibility Kauanui might die when appellant struck him had either not even been reported to the authorities or, with the possible exception of the Michael Johnson assault, had been investigated and rejected for arrest and prosecution. These incidents were resurrected after the police requested community assistance following Kauanui's death and the media published Detective Sandi Oplinger's direct phone number. (9 RT 727.)

Count One

In this count, appellant was convicted of making a criminal threat to Eric Sorensen in violation of Penal Code section 422.[14] The actual threat was made by Erik Wright, an admitted perjurer who days earlier, when appellant was not present, had assaulted Sorensen's roommate Brian Walsh so severely Walsh's face required reconstructive surgery. (9 RT 842-844, 10 RT 895-896.) Appellant was tried on the theory he aided and abetted

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[14]All further statutory references are to the California Penal Code.

the threat. (15 RT 1810.)

Respondent's recitation of the facts is notable for its lack of detail concerning exactly what it was appellant did during this incident, which is understandable because the record is virtually silent on the question.[15] At a live lineup nearly two years later, Sorensen did not even identify appellant as present during the incident, but said he had seen him driving with Wright two weeks later. (10 RT 912-914.) Sorensen said appellant had the same body type as someone who was present, then in court pointed to a picture of Nino Nunziante as "the person with the same build" he saw during the attack. (10 RT 914-915.)

Erik Wright was arrested shortly after the initial incidents as a result of police investigation, at which time he told police appellant, Decker, and Nunziante were involved. (10 RT 860, 862.) Obviously, appellant was not prosecuted for this July 2005 incident until after Kauanui's death in May 2007.

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[15]On direct appeal, appellant urged there was insufficient evidence to sustain this conviction.

Count Five[16]

This count involved a melee at Windansea Beach in August 2006. As with the previous incident at the Sorensen residence, many of the actions described by respondent regarding the beach incident were undertaken by others. And, while respondent correctly notes Shannon O'Neill testified appellant hit her while she was attempting to aid Chris Jarrett, appellant was only prosecuted for and convicted of assault by means of force likely to produce great bodily injury on Jarrett.[17] (§ 245, subd. (a)(1).)

Respondent's recitation of Jarrett's alleged injuries (ROBM pp. 7-8) omits a crucial fact: the trial court granted a section 1118.1 motion to dismiss the section 12022.7 great bodily injury enhancement for lack of evidence. (14 RT 1714.) Small wonder. Jarrett had been convicted of theft in 2004 and in 2006 gave a false name to a police officer, which may

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[16]Counts 2 and 3 both alleged violations of section 245, subdivision (a)(1). Appellant was acquitted of count 2 and the trial court granted an 1118.1 motion as to count 3. For some reason, although appellant was the only defendant named in the amended information, count 4 charged Orlando Osuna alone with violating section 245, subdivision (a)(1) with a section 12022.7 enhancement involving John Hlavac, the victim in count 10, nearly a year earlier. (2 CT 538-539.)

[17]As none of the charges involved a weapon, "felony assault" will hereafter be used as shorthand for "assault by means of force likely to produce great bodily injury."

or may not have been the reason there was a warrant for his arrest at the time of the beach incident. (11 RT 1033, 1046.) Apparently attempting to add convincing detail to his purported injuries, Jarrett claimed bruising and a possible "hairline fracture" to his "thirteenth rib," despite the fact human beings have only twelve sets of ribs. (11 RT 1048.) And despite the "very bad" pain to his rib that "lasted a couple of months," Jarrett could apparently not be bothered to seek medical attention. (11 RT 1049, 1053.) *Even if* Jarrett was telling the complete truth about the injuries or was even understating them, however, none of those injuries came close to being life-threatening.

Not only did he not seek medical attention--the event was not even worth a call to the police: "[I]t was a fight to me." (11 RT 1046.) Jarrett contacted the police following the media attention given to Kauanui's death: "I wanted to come forward and to help, you know--help this whole situation out." (11 RT 1046.)

Count Six

This count involved misdemeanor battery (§ 242) committed on a high school girl attempting to rid her house of unwanted guests. While this was a relatively minor offense, it was despicable behavior especially likely to prejudice appellant in front of a jury. The victim's father handled the

matter informally with appellant's father at the time; a neighbor informed the police of the incident following Kauanui's death. (12 RT 1242, 1249.)

Count 7

This count occurred during another melee that occurred after a party bus containing between 40 and 60 people discharged its uninvited occupants--including appellant and Emery Kauanui, who was celebrating his birthday--at a New Year's Eve party in La Jolla. Appellant was convicted of a felony assault count involving Logan Henry, and was acquitted of a felony assault count involving J.B. Haskett (count 8) and a misdemeanor battery count involving Jennifer Haskett (count 9) charged for the same incident. (5 RT 1144-1145.)

Respondent's recitation is similar to that in count 5: lots of action involving people hitting people with very little description of what appellant actually did. The prosecution's theory on this count was that appellant was guilty both as an aider and abetter and as a direct participant (15 RT 1821), and Logan Henry had no idea who hit him and kicked him once he was on the ground (11 RT 1139-1140). Henry did testify that once he got up, appellant "looked me in the face and told me that he was going to F'ing kill me, F'ing kill me," to which an angry Henry replied, "Do it, you know. Bring it." Respondent, however, omits the remainder of

Henry's testimony describing what appellant did next: "And obviously nothing happened . . . ." (11 RT 1141.)

A police officer who responded to the residence after the bus had left described the scene as "chaos," with "a lot of people running around intoxicated." (12 RT 1216.) Henry attempted to give a statement to the police, but they refused to take one and threatened to arrest him if he did not get off the street. (11 RT 1142.) Henry again contacted the police after the published phone number in the San Diego Union-Tribune following Emery Kauanui's death. (11 RT 1147-1148.)

Count 10

This conviction of felony assault involved John Hlavac, who testified under an immunity grant.[18] (12 RT 1274.) All that can be said with any certainty regarding who did what during this assault is that appellant threw a punch at Hlavac and missed; Hlavac threw a punch at Osuna and hit him in the jaw; and Osuna hit Hlavac above the right eyebrow. (12 RT 1285-1286, 1288.) Hlavac, who was intoxicated during

[18]This immunity grant was given for an earlier incident at a party where Hlavac threatened appellant with a knife and said he was going to rape his mother. Osuna then purportedly hit Hlavac as he left the party. (12 RT 1268-1269.) Presumably this was count 4 in the original information charging Osuna with felony assault and a great bodily injury enhancement. (1 CT 108.)

the incident, thinks he was hit a total of five times, and despite Hlavac's assertion he covered his face when he was on the ground "so I didn't get stomped on. . . . ¶ Because I know what happens with them," he admitted no one tried kicking him in the head when he was on the ground, and agreed it was "a run-of-the-mill fistfight." (12 RT 1281, 1287, 1295.) The entire event lasted around a minute. (12 RT 1297.)

Hlavac did not intend to file a police report but his parents, observing his bleeding hand (from where he hit Osuna) and swollen eye, insisted he do so. (12 RT 1290, 1292.) He subsequently told police the fight was mutual combat and he did not wish to pursue charges. (12 RT 1293.) Because of Hlavac's dislike of appellant, however, he called Detective Oplinger when her phone number appeared in the newspaper. (12 RT 1293-1294.)

Count 11

This felony assault was far more violent than the single punch thrown at Kauanui. It also had by far the most serious consequences other than Kauanui's death, and was the *only* count involving great bodily injury. (§ 12022.7.) Yet even here the victim's injuries were nothing close to life-threatening, and it simply defies logic to assert appellant consciously disregarded the risk to Kauanui's life with a single punch with his non-

dominant hand when he could land several hard blows with his dominant hand on someone who at worst may have sustained a broken nose. At no time did Johnson lose consciousness despite being hit several times with what Johnson's friend Christopher Horning[19] termed as "as much force as you can possibly give a person," or "hit . . . as hard as you can." (13 RT 1369, 1373, 1375.)

Respondent's recitation of the events following the assault is potentially misleading: "Johnson was transported to the hospital and Horning rode with him in the ambulance. Horning remained with Johnson the rest of the night. At Scripps Hospital in La Jolla, doctors examined Johnson and determined that he had possible facial fractures including a broken nose with bleeding." (ROBM p. 15.) This may be read to suggest Johnson was in the hospital the entire night, but he was not. Following the trip to the hospital, Johnson and Horning returned to Johnson's home in the "early hours of the morning." (13 RT 1380.) The emergency room physician's notes indicated Johnson had a "probable broken nose" and "possible facial fractures." The physician recommended a CAT scan, but Johnson left the emergency room before one could be performed. (13 RT

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[19]A police officer said both Johnson and Horning appeared intoxicated. (13 RT 1396.)

1401, 1408.)

Johnson's injuries were no doubt extremely unpleasant. Nevertheless, while it is true Johnson stated he "had recurrent pain in his ear when he slept on his left side," pain he "associated . . . with drainage from his nose and deviated septum" (ROBM p. 16), Johnson also testified he had previously broken his nose "once or twice" in sports injuries, and said those injuries might have caused the deviated septum. (13 RT 1416.)

ARGUMENTS ON REVIEW

I.

THE COURT OF APPEAL CORRECTLY FOUND INSUFFICIENT EVIDENCE OF IMPLIED MALICE

Respondent complains that the Court of Appeal "ran roughshod over principles of appellate review . . . . because it substituted [its] own evaluation of the evidence for that of the jury." (ROBM p. 37.) But substituting its own evaluation of the evidence for that of the jury is exactly what happens every time a trial or appellate court exercises its statutory authority and finds insufficient evidence to support a verdict under Penal Code sections 1181, subdivision (6) or section 1260. Respondent conspicuously fails to adduce *any* evidence the Court of Appeal should have considered but did not, or considered in an improper manner. Respondent additionally asks this court to "[establish] that the implied malice element of second-degree murder can be satisfied by a single punch to the head if there is evidence that a defendant appreciated the deadly potential of his blow and went ahead and threw it anyway." (ROBM p. 41.) But such a holding would be entirely obvious and beside the point. For good reason, the Court of Appeal concluded there was *no* evidence appellant "appreciated the deadly potential of his blow and went ahead and threw it anyway."

The due process clause of the United States Constitution requires the prosecution to prove every element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; U.S. Const., 5th and 14th Amends.) "After *Winship* the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt," a requirement of due process. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

A. *People v. Knoller* (2007) 41 Cal.4th 139 and Implied Malice

Murder is the unlawful killing of a human being with malice aforethought, and malice is either express (during an intentional killing) or implied. Malice "is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§§ 187, 188.) In *People v. Knoller, supra,* 41 Cal.4th 139, this court, noting there had been two previous lines of decisions[20] regarding the "abandoned and malignant heart" formulation, clarified the

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[20]Those of *People v. Thomas* (1953) 41 Cal.2d 470, and *People v. Phillips* (1966) 64 Cal.2d 574.

meaning of this potentially confusing statutory formulation.

Knoller was the infamous San Francisco case where two huge, vicious Presa Canario dogs mauled to death a neighbor attempting to enter her own apartment with a bag of groceries. The dogs' owners, repeatedly warned of the dangers the dogs posed, were involved in a twisted personal and business relationship with two Aryan Brotherhood prison inmates who managed to run a Presa Canario breeding operation from Pelican Bay State Prison. (*People v. Knoller, supra,* 41 Cal.4th at pp. 144-148.) The major issue this court addressed in *Knoller* was "whether the mental state required for implied malice includes only conscious disregard for human life or can it be satisfied by an awareness that the act is likely to result in great bodily injury." (*Id.* at p. 143.)

There are both subjective and objective components to implied malice. The subjective component requires proof a defendant acted "with conscious disregard for life." (*People v. Knoller, supra,* 41 Cal.4th at p. 143.) The objective component was phrased in *People v. Phillips, supra*, 64 Cal.2d at p. 587, as "an act, the natural consequences of which are dangerous to life," and in *People v. Thomas, supra*, 41 Cal.2d at p. 480, as an "act that involves a high degree of probability that it will result in

death."[21] (*Id.* at pp. 143, 157.) Although in its opinion the Court of Appeal employed the "high degree of probability" language of *Thomas* (Opn., pp. 29-32), this court has previously indicated the *objective* tests of *Phillips* and *Thomas* are the same: "[T]he two linguistic formulations--'an act, the natural consequences of which are dangerous to life and 'an act [committed] with a high probability that it will result in death'--are equivalent and are intended to embody the same standard." (*People v. Nieto-Benitez* (1992) 4 Cal.4th 91, 111.)

Respondent acknowledges case law holding that absent aggravating circumstances, an assault with fists resulting in death is manslaughter. (*People v. Munn* (1884) 65 Cal. 211, 213; *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205; *People v. Teixeira* (1955) 136 Cal.App.2d 136, 150.) The assault with fists and feet cases respondent cites are easily distinguished from the present case because in each the decedent's body left abundant physical evidence a brutal assault had actually taken place. (*People v. Beyea* (1974) 38 Cal.App.3d 176, 186, 188 [two Hell's Angels beat victim for 15-20 minutes, leaving a lacerated spleen, three internal

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[21] *Knoller* disapproved of the trial court's employing *Thomas* as a *subjective* test in granting Knoller a new trial in the belief implied malice required her *subjective awareness* her conduct "had a *high probability* of resulting in death." (*People v. Knoller, supra,* 41 Cal.4th at p. 157, italics in original.)

areas of hemorrhage, and evidence of "15 to 20 applications of blunt force"]; *People v. Mears* (1956) 142 Cal.App.2d 198, 201-202 [lacerations on scalp and chin, apparently "made by a blunt instrument and not by a fist"; swollen and bruised face, including a "badly bruised and broken nose"; bruises on collar bone and abdomen]; *People v. Ogg* (1958) 159 Cal.App.2d 38, 51-52 [defendant, a professional boxer, inflicted "numerous injuries on various parts of [his wife's] body, many of which were unrelated to the fatal skull fracture," reflecting "a severe beating".) The single-punch case respondent cites, *People v. Efstathiou* (1941) 47 Cal.App.2d 441, consists of a mere 660 words and 36 sentences, with its entire legal analysis contained in a single paragraph. More to the point, that brief legal analysis concerns a *proximate cause* issue; the court addressed the defendant's contention on appeal that if the victim died from falling on the sidewalk, the defendant's acts were not "the direct and proximate cause of the death of deceased." (*Id.* at p. 443.) Nowhere does the case even mention *implied* malice, and the court's statement that "malice is indicated by the pursuit of the deceased by appellant" (*ibid.)* suggests the court was considering express rather than implied malice.

In facts somewhat similar to the present case, in *People v. Cox* (2000) 23 Cal.4th 665, the defendant punched the victim during an

argument with a "solid blow," whereupon "the victim fell to the pavement and appeared to have been knocked unconscious." He regained consciousness but later died. (*Id.* at p. 668.) The issue this court considered was whether the trial court had correctly instructed the jury battery was an inherently dangerous misdemeanor and thus a predicate for involuntary manslaughter (*id.* at pp. 669-670), though for present purposes, the significance of *Cox* is that this court took as a given a blow sufficient to knock someone down, lose consciousness, and die was a misdemeanor battery supporting an involuntary manslaughter conviction.

B. The Subjective Component of *Knoller*: Of What Was Seth Cravens Consciously Aware When He Threw a Single Punch at a Professional Athlete With his Non-dominant Hand?

"[I]mplied malice requires a defendant's awareness of engaging in conduct that endangers the life of another--no more, and no less." (*People v. Knoller, supra,* 41 Cal.4th at p. 143.) The "no less" portion of this statement includes a defendant's conscious awareness his conduct risked causing serious bodily injury. (*Ibid.*) In other words, *Knoller* requires that when Seth Cravens struck Emery Kaunaui, he had to know--"know" as in be consciously aware of the fact--Kauanui's death might reasonably follow. An awareness he might get injured, even seriously, is insufficient.

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1) What, Exactly, Do the Other Assaults Prove?

The People have consistently relied on the other assaults as their primary "proof" appellant appreciated and consciously disregarded the threat his single punch posed to Kauanui's life.[22] This position is forwarded as if merely stating it makes it true, whereas logic dictates the opposite conclusion. Appellant had struck numerous other people on numerous other occasions, sometimes several times, resulting in nothing approaching life-threatening injury. The worst injury he had previously inflicted was an apparently broken nose on the stockbroker Michael Johnson. Contrary to the only rational conclusion to be drawn from this--i.e., that when appellant threw a punch at Emery Kauanui, he had absolutely no reason to think a radically different result might obtain--the People assert appellant's commission of these other offenses mysteriously reflects, as respondent puts it, "Cravens's subjective knowledge that his habit of suddenly attacking people endangered their lives . . . ." (ROBM. p. 4.) The Court of Appeal acknowledged the prosecution's argument was unreasonable: "The evidence that Cravens had previously punched multiple people in the face *without inflicting any life-threatening injury* tends to

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[22]Appellant unsuccessfully asked this court, if it were to grant respondent's petition for review, to also consider whether these counts were legitimately joined with the murder count.

negate an inference of subjective knowledge of life endangerment; it does not support a reasonable inference that when Cravens punched Kauanui in the face, he subjectively knew he was endangering Kauanui's life." (Opn., p. 34, italics in original.) The Court of Appeal got it right.

2) What, Exactly, Does the Pavement Prove?

Respondent makes much of the fact the punch was thrown over a paved surface.[23] (E.g., ROBM pp. 29-30, 35, 38, 40-41.) Given the inebriation of virtually all parties and pandemonium that evening, the notion that appellant gave much thought to what kind of surface they were on when he took a swing at Kauanui strains belief. In any event, the fact that several of the other assaults took place on a paved surface without any further injury resulting from contact with the pavement (counts 7, 10, 11) only underscores that appellant was not even consciously disregarding the possibility the victim might suffer great bodily injury, much less death, from an impact with the pavement when he hit him.

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[23]Appellant will use the term "pavement" rather than "concrete" (which would imply the sidewalk and curb) or "asphalt" (as in the street), because the record is not entirely clear whether Kauanui's head struck the curb or the street. (Respondent's assertions Kauanui hit his head "on a cement curb" [ROBM p. 29] and "on the curb of a concrete sidewalk" [ROBM p. 38] are unaccompanied by record citation.) It probably stands to reason that if it is true appellant stepped off the curb when he hit Kauanui (8 RT 631), Kauanui's head struck the street, though where his head hit is of no apparent consequence to the issue here.

Respondent misstates the Court of Appeal's position as "that Cravens's realization that Kauanui *would* fall and hit his head on the cement curb, evidenced a mere awareness of a risk of seriously bodily injury . . . ." (ROBM p. 29, italics added.) This misstatement is repeated on the next page. (ROBM p. 30.) What the court actually said was this: "A single fist blow to the head does not involve a high probability of death simply because it occurs on pavement, and awareness that the recipient of such a blow *might* fall and hit his or her head on the pavement is merely awareness of a risk of serious bodily injury, not conscious disregard for life." (Opn., p. 33, italics added.) There is a big difference between "would" and "might," and the Court of Appeal was addressing its own speculation as to what the jury was thinking. (Opn., pp. 32-33.)

As the preceding quote from the opinion reflects, the pavement issue is also relevant to the objective component of implied malice. The vast majority of the thousands of punches thrown every day in this country necessarily occur over hard surfaces--streets, asphalt school playgrounds, recreation centers, etc.--and while the impact with the pavement obviously caused Kauanui's death, the fact appellant hit him when they were on a paved surface proves exactly nothing regarding implied malice.

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3. What, Exactly, Do Appellant's Statements Prove?

And, as did the People during trial and on appeal, respondent here parades appellant's statements before and after several of the assaults, including the fatal one, with the insinuation they constitute evidence of implied malice. (E.g., ROBM pp. 1-2, 4-5, 11, 15, 26-27.) They do no such thing. For better or worse, the hyperbolic use of terms like "kill" or "murder" is part of everyday language for a great many people, and appellant was one of them.[24] And, in any event, the actual statements appellant made and the circumstances under which they were made belie any sinister interpretation:

a) Other Offenses

i) Erik Wright--not appellant--threatened to "fucking kill" Eric Sorensen in count 1. (10 RT 915.) Appellant was convicted of aiding and abetting a criminal threat, and did not touch Sorensen or anyone else during the incident.

ii) During the party crashing attempt on New Year's Eve in count 7, Logan Henry said appellant ""looked me in the face and told me that he was going to F'ing kill me, F'ing kill me." Henry told appellant to "Do it,

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[24]As the Court of Appeal put it, "Cravens's . . . use of terms like 'kill' and 'murder' . . . show, at most, an evil disposition or despicable character, which is not equivalent to implied malice." (Opn., p. 33.)

you know. Bring it." Appellant did nothing. (11 RT 1141, 1149.)

iii) Two days after the assault on Michael Johnson in count 11, appellant sent a MySpace message reading: "What the fuck. When are we going to chill. I can't go to the Shack for a while because I murdered someone. Ha, ha, ha, ha, No biggie. Call me up and let's get krunk [sic][25]." (13 RT 1419.) Appellant obviously had not murdered Johnson; the worst he had done is possibly broken his nose.

b) After Appellant Hit Kauanui

i) Kauanui's friend Nur Kitmitto arrived at Kauanui's house after Kauanui had fallen and struck his head, and followed the ambulance to the hospital. (14 RT 1668-1669.) He called appellant at 2:50 a.m. to find out what had happened and why, told him the police were there, and said, "There's nothing you can get away from this time, and it's a big deal." Appellant "said he was willing to come back at [Kauanui] if he had to." (14 RT 1671.) Kitmitto relayed to appellant Kauanui would be in the hospital at least one night. (14 RT 1672.)

"Come back at him if he had to" indicates appellant believed he had hit Kauanui out of some kind of necessity, probably as a misguided

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[25]"Krunk" likely means "crazy drunk." (‹http://www.urbandictionary.com/define.php?term=krunk› [as of Aug. 26, 2009].)

response to Kauanui's challenge.

ii) Nicole Sparks had dated Kauanui and was friends with both appellant and Hank Hendricks. (9 RT 680, 688.) At school on the 24th, Sparks heard about the fight and called Hendricks "[s]ometime between 11:00 and 11:30," and actually saw Hendricks and appellant drive by the school while she was talking to Hendricks. (9 RT 691, 698.) She asked Hendricks if there had been a fight and heard appellant say in the background either "I put him to sleep" or "We put him to sleep," followed by laughter. (9 RT 693-694, 699.) At the time Sparks did not know Kauanui was in the hospital, nor was the hospital otherwise mentioned during the phone call. (9 RT 698.)

"Sleep" was not a euphemism for death. Appellant obviously knew he had rendered Kauanui unconscious, hence he "put him to sleep." He had also been told by Nur Kitmitto that Kaunaui would be in the hospital for at least one night (meaning the previous night)--which would hardly convey the gravity of the injury Kauanui had sustained.[26]

iii) Kristin Link was friends with both appellant and Kauanui. (9 RT 673.) Living in Los Angeles, Link received a call from her mother on May

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[26]Kauanui's condition deteriorated after two days in the hospital. (12 RT 1336-1337.)

24 telling her Kauanui was in the hospital, and Link called appellant. (9 RT 674.) Confused because she thought they were friends, she asked whether appellant and Kauanui had been in a fight, to which appellant replied in what sounded like bragging, "I would hardly call it a fight. I punched him out." (9 RT 674-675.) At the end of the conversation, however, around 11:00 a.m., Linke told appellant Kauanui was in the hospital, and appellant began crying. (9 RT 675-676, 678.)

Two things stand out here. First, appellant's statement--"I would hardly call it a fight. I punched him out."--is an accurate description of what happened between him and the victim. Second, Nur Kitmitto had probably led appellant to believe Kauanui would be in the hospital for a single night only, which would explain why appellant began crying when he realized Kauanui had not already been released.

C. The Objective Component of *Knoller*: Is Death a Natural Consequence of Throwing a Single Punch at a Professional Athlete?

Nor does respondent fare any better with the objective component of implied malice. The natural consequence of pointing a loaded gun at someone and pulling the trigger is inherently dangerous to life. The natural consequence of stabbing someone in the chest with a hunting knife is inherently dangerous to life. The natural consequence of landing a punch on the jaw of a young healthy male is a sore jaw. Statistically, this was a

freak result; it could not have been anything else. A young and healthy male hit another young and healthy male, something that happens thousands of times a day in this country without further complication.[27]

Despite the fact the prosecution's main witness Jennifer Grosso stated there was a one-on-one fight between Kauanui and House before appellant hit him, and despite the fact the prosecutor vouched for Grosso's testimony as "100 percent corroborated for every aspect of it," and despite the fact there was not a shred of physical evidence Kaunaui had sustained any kind of beating, respondent doggedly asserts there was a group assault on Kauanui. (E.g., ROBM pp. 29, 31, 35, 37-38, 40.) Although Grosso did present the only coherent version of the events on the street that evening, whether anyone other than House hit Kauanui before appellant did is ultimately immaterial.[28] *What respondent omits is that even if there was*

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[27]While it is impossible to know just how many thousands of punches are thrown each day in this country, because the overwhelming majority of them are doubtless never reported to authorities, there is a staggering number of reported assaults. According to the United States Bureau of Justice Statistics, in 2007, the year of the current offense, there were 13.9 simple assaults per 1,000 persons age 12 or older, and 3.4 aggravated assaults per 1,000 persons age 12 or older. (‹http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm› [as of Jan. 27, 2011].)

[28]Since the People continue to insist Kauanui was the subject of a group beating, in the interest of truth it is worth considering the detailed factual recitals contained in the codefendants' change of plea forms, which are part of this appellate record. When the time came for the People to have the others present that evening acknowledge under penalty of perjury

some kind of group assault on Kauanui that preceded appellant's throwing the punch, it was so inconsequential it left absolutely no physical evidence. Other than the fatal wound resulting from the impact of his skull on the sidewalk, the victim's other injuries consisted only of minor scrapes and

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what it was they had done, only one--Eric House--admitted so much as touching Emery Kauanui before he fell. Matthew Yanke, Orlando Osuna, and House pled guilty to involuntary manslaughter in connection with Kauanui's death.

Matthew Yanke: "I did aid and abet Seth Cravens in an assault on Emery Kauanaui, which resulted in Mr. Kauanui's death, *by accompanying and providing transportation* to Seth Cravens, Eric House, Orlando Osuna and Hank Hendricks *so that Mr. House could personally assault Mr. Kauanaui* and with knowledge of Mr. Cravens['] past acts/reputation for violence and with knowledge that such a fight was likely to provoke Mr. Cravens to assault Mr. Kauanui." (2 CT 320.)

Orlando Osuna: "I aided and abetted Seth Cravens in an assault on Emery Kauanui which resulted in Mr. Kauanui's death by agreeing with Seth Cravens, Eric House, Matthew Yanke and Henri Hendricks to go to Mr. Kauanui's house for the purpose of assaulting Mr. Kauanui with knowledge of Seth Craven's reputation for violence, *by driving the group to Mr. Kauanui's* house." (2 CT 324.)

Eric House: "I aided and abetted Seth Cravens in an assault on Emery Kauanui, which led to Emery Kauanui's death, by accompanying Mr. Cravens, Matthew Yanke, Orlando Osuna, and Hank Hendricks to Mr. Kauanui's house *and personally assaulting Mr. Kauanui* with knowledge of Mr. Cravens' past acts and reputation for violence and that such was likely to provoke Mr. Cravens to assault Mr. Kauanui." (2 CT 330.)

Henri Hendricks pled guilty to accessory: "After personally observing Seth Cravens commit a felony assault which caused great bodily injury to Emery Kauanui, I assisted in concealing Mr. Cravens in order to avoid arrest on the night the crime was committed." (2 CT 327.)

abrasions (13 RT 1433-1437)--the result of rolling around in the street, shirtless and in shorts, during the fight with House--that were described by the pathologist as "medically trivial" or "medically insignificant" (13 RT 1439, 1474). Common sense dictates any kind of "group beating" worthy of the term, especially by young men, all of them former football players, would leave evidence along the lines of cracked ribs or internal bleeding, or at the very least severe bruising. (See, e.g., *People v. Beyea, supra,* 38 Cal.App.3d at pp. 186, 188.) Respondent would no doubt prefer this court believe the Court of Appeal ignored evidence appellant administered the coup de grace to a virtually helpless victim, but it did not, and the reality is the victim had just triumphed in the fight with Eric House and felt emboldened enough to approach and swear at appellant, who then hit him a single time. The Court of Appeal reviewed the conflicting evidence of a group assault, and correctly concluded even if it did happen, it was not "substantial evidence that Cravens knew the blow he was about to deliver to Kauanui was life-endangering." (Opn., p. 36.)

Here, however, respondent ups the ante by asserting appellant "organized a group-attack on an alcohol impaired Kauanui, and then decided to deliver a surprise punch to Kauanui's head" (ROBM p. 38), as if appellant coolly and methodically calculated the demise of a helpless

Kauanui. Nothing could be further from the truth; virtually everyone there that evening was in the same boat. Kauanui was drunk and had been smoking marijuana. (13 RT 1450.) Appellant, House, Yanke, and Hendricks had smoked marijuana. (14 RT 1577-1578.) Appellant was drunk. (14 RT 1583.) Eric House was "very drunk." (14 RT 1582.) Matt Yanke was "a little bit too intoxicated to drive."[29] (13 RT 1497.)

Which brings us to more factual omissions in respondent's brief, important because they belie respondent's insistence on the alleged overwhelming force with which appellant hit Kauanui. (E.g., ROBM pp. 2, 34 35-36, 38.) It has been uncontroverted during these proceedings that appellant, who is right-handed, delivered the punch with his non-dominant left hand. (6 RT 290; 14 RT 1657.) It has also been uncontroverted that the pathologist could not even tell on which side of the face the victim had been punched, a significant and incontrovertible fact placing into perspective the testimony of witnesses describing the force of the blow.[30]

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[29]Jennifer Grosso, on the other hand, did not enjoy drinking and had less than one drink the entire night. (6 RT 233.)

[30]Jennifer Grosso: "one extremely hard punch" (6 RT 257); Dylan Eckardt: "one of the hardest punches I've ever seen thrown" (8 RT 631). The language is similar to that employed by Christopher Horning in describing the punches thrown at Michael Johnson in count 11: The first punch was thrown with "as much force as you can possibly give a person" (13 RT 1369), the second "[j]ust full out hit him as hard as you can" (13 RT 1373), and the third "[e]very bit" as forceful as the first two (13 RT

(13 RT 1475.) These facts--and they are facts, not opinions--mean Kauanui's death was a freak result of the punch appellant threw at him, and not a natural consequence. And, while appellant obviously set into motion the physical forces that ultimately resulted in Kauanui's death, it was not the impact of appellant's fist that killed Emery Kauanui, but the impact with the pavement when Kauanui fell.[31]

The Court of Appeal correctly found insufficient evidence of implied malice. There was no evidence appellant recognized and consciously disregarded the possibility Kauanui might die when he hit him, and no evidence death is a natural consequence of a healthy young male throwing a single punch at another healthy young male.

1375). Unlike Kauanui, however, the punches left physical evidence on Johnson. (13 RT 1412.)

[31]During argument, the prosecutor misrepresented the facts and the expert testimony by conflating the impact of appellant's fist with the impact of the pavement: "The velocity of the punch completely controlled by Mr. Cravens. And you get that velocity from the medical examiner, who finds the fracture consistent with the things we've described previously." (15 RT 1840-1841); "The science also tells us that when the defendant hit Kauanui, he did it with the kind of force that Dr. Stanley [the medical examiner] has seen when people are hit with hammers, bats, or in vehicle collisions. That's what the science tells us." (16 RT 1888).

II.

HAVING FOUND INSUFFICIENT EVIDENCE TO SUPPORT A MURDER CONVICTION, THE COURT OF APPEAL WAS WITHIN ITS GENERAL AUTHORITY TO REDUCE THE CONVICTION TO THE LESSER INCLUDED OFFENSE OF VOLUNTARY MANSLAUGHTER, ALTHOUGH IT ERRED WHEN IT EXPANDED A NON-STATUTORY THEORY OF VOLUNTARY MANSLAUGHTER TO DO SO

A. Introduction

According to respondent, "The Court of Appeal's betrayal of its duty to view the evidence in the light most favorable to the verdict is further evidenced by its overreach in expanding the law of voluntary manslaughter in order to reach a level of conviction the appellate court thought proper." (ROBM p. 39.) This is a non sequitur. Whether there was sufficient evidence of implied malice is a question entirely separate from whether the Court of Appeal correctly reduced the conviction to voluntary manslaughter. If there was insufficient evidence of implied malice and *no* "level of conviction" to which the offense might properly be reduced, the result is that the case must be reversed without remand.[32] (*People v. Adams* (1990) 220 Cal.App.3d 680, 691.)

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[32]In the "Statement of Additional Issues Should Review Be Granted" section of his "Answer to Petition for Review," appellant asked this court to consider whether the Court of Appeal should have reduced his conviction to involuntary manslaughter. The court declined to review the question, so appellant will not argue the matter here.

Other than vaguely assert the Court of Appeal erred in expanding *People v. Garcia* (2008) 162 Cal.App.4th 18, respondent continues to rail against the Court of Appeal's finding insufficient evidence of implied malice rather than attempt to answer the second of the two questions *respondent* asked this court to review. We do not even know, for example, whether respondent considers *Garcia* sound legal doctrine, only that respondent believes

> the Court of Appeal . . . ignored the conclusions of the finder of fact and then . . . found a situation for the *Garcia* specie of voluntary manslaughter that fixes liability based on an objective assessment that the criminal conduct could be dangerous to human life, as contrasted with implied malice murder, which differs only in requiring a subjective appreciation of danger to human life. The difference between these two theories of criminal liability is so razor [thin], and is based on little more than inferences to be drawn from the self same circumstances, which is precisely what the jury did here, that for the Court of Appeal to say there was "no evidence" of implied malice, but enough for an objective determination of danger to human life, is intellectually disingenuous and legally erroneous. (ROBM pp. 39-40.)

Respondent appears to be confusing the mens rea and actus reus components of a crime with "two theories of criminal liability." In any event, the "two theories of criminal liability" that are in fact far more closely related are implied malice murder, which employs a subjective standard requiring an actual awareness of a risk to life, and involuntary manslaughter, which employs an objective test asking only if a reasonable

person would have been aware of the potentially fatal consequences of a given act. (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.) Otherwise, respondent sheds more heat than light on the second question respondent asked this court to review.

B. Considered in the Abstract, the Court of Appeal Was Within its Statutory Authority to Reduce Appellant's Conviction to a Lesser Included Offense; in Addition, the Court of Appeal Reduced the Offense to One Specifically Charged by the People in the Amended Information

"[A]n appellate court's power to modify a judgment is purely statutory." (*People v. Navarro* (2007) 40 Cal.4th 668, 678.) This statutory authority resides in Penal Code sections 1181, subdivision 6[33] and section 1260.[34] "This court has long recognized that under Penal Code sections

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[33]Section 1181 provides in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: ¶ 6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial, and this power shall extend to any court to which the cause may be appealed."

[34]Section 1260 provides: "The court may reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense or the punishment imposed, and may set aside, affirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial and may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances."

1181, subdivision 6, and 1260, an appellate court finding insufficient evidence supporting the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense." (*Id.* at p. 671.) "From the beginning, section 1181, subdivision 6, and later section 1260, have been understood to provide courts a mechanism for correcting the jury's error in 'fix[ing] the degree of the crime."[35] (*Id.* at p. 679.)

In *People v. Adams, supra,* 220 Cal.App.3d 680, the court discussed the scope of a reviewing court's authority to reduce given insufficient evidence of a greater offense. Although "Penal Code section 1260 appears to confer plenary power of modification on a reviewing court," the court stated it "must be read in connection with Penal Code section 1181, subdivision 6." (*Id.* at p. 688.) A reviewing court's power to modify a conviction is limited "to only those circumstances where the evidence would support a conviction of a lesser necessarily included offense, a lesser degree offense or an offense that was charged by the plaintiff." (*Ibid.*)

Two out of three of those circumstances are applicable here. First,

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[35]The existence of these statutory provisions ipso facto refutes respondent's repeated claim the Court of Appeal somehow abused its authority in disagreeing with the jury's verdict. (ROBM pp. 1, 3, 30-31, 37-41.)

voluntary manslaughter is a lesser included offense of murder. (*People v. Barton* (1995) 12 Cal.4th 186, 190.) "It has long been the law that a 'charge of murder includes by implication a charge of the lesser degree of murder as well as voluntary and involuntary manslaughter.'" (*People v. Thomas* (1987) 43 Cal.3d 818, 824.) Second, here the charge of murder did not include voluntary manslaughter just by implication, but by virtue of the prosecution's separately charging Kauanui's death as voluntary manslaughter in an amended information.[36] (2 CT 540.)

At least in the abstract, then, the Court of Appeal was within its statutory authority to reduce the murder conviction to voluntary manslaughter, both because voluntary manslaughter is a lesser included offense of murder, and because the People elected to separately charge voluntary manslaughter.

C. The Unique Case of Voluntary Manslaughter

A complicating factor here, however, is that voluntary manslaughter is a different kind of lesser included offense in that, "as a functional matter, the elemental facts proving the crime with the greater punishment--murder --are a subset of the elemental facts of the crime with the lesser punishment

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[36]The People likewise separately charged involuntary manslaughter. (2 CT 540.)

--voluntary manslaughter." (*People v. Breverman* (1998) 19 Cal.4th 142, 188-189.) There is language in this court's cases indicating voluntary manslaughter is limited to sudden quarrel or heat of passion[37] and imperfect self-defense, but there is contrary language in at least one case suggesting that voluntary manslaughter may result simply from a lack of malice.

"Manslaughter is 'the unlawful killing of a human being without malice.' (§ 192.) A defendant lacks malice and is guilty of voluntary manslaughter in "limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'--the unreasonable but good faith belief in having to act in self-defense." (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) A killing either in a sudden quarrel or heat of passion or in imperfect self-defense may be intentional or unintentional, "when a person [acts] with a conscious disregard for life." (*Id.* at p. 108; *People v. Blakeley* (2000) 23 Cal.4th 82, 88-89.)

The "conscious disregard for life" language is the same as this court's formulation of implied malice in *Knoller*. The lessons of *Lasko* and *Blakeley*, in other words, are that the "limited, explicitly defined

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[37]Appellant will refer to sudden quarrel or heat of passion as "provocation" manslaughter.

circumstances" of killing because of provocation or in imperfect-self defense negate both express (in an intentional killing) and implied (acting with conscious disregard for life) malice.

The question is whether voluntary manslaughter is limited to provocation and imperfect self-defense. It was not always so limited, at least before the diminished capacity defense was abolished. In *People v. Mosher* (1969) 1 Cal.3d 379, the defendant raised a diminished capacity defense. (*Id.* at p. 389.) The trial court gave a voluntary manslaughter instruction using only the "sudden quarrel or heat of passion" theory, prompting this court to observe:

> In so limiting the instruction the court erred, for, as we have previously noted, the statutory requirement is "the unlawful killing of a human bring *without malice*." (Italics added.) (Pen. Code, § 192.) Thus, in order to give effect to the statute when evidence of diminished capacity has been introduced, the jury must be instructed that if it finds the defendant could not harbor malice aforethought because of a mental disease, defect, or intoxication the homicide cannot be an offense higher than manslaughter. (*Id.* at p. 385.)

This court rejected the argument it had created a nonstatutory crime, noting that section 192 (defining manslaughter) "had been adopted before the concept of diminished capacity had developed," and that diminished capacity "gave effect to the *statutory* definition of manslaughter by recognizing that factors other than sudden quarrel or heat of passion may render a person incapable of harboring malice." (*People v. Anderson*

(2002) 28 Cal.4th 767, 783, italics in original, citing *People v. Mosher, supra,* 1 Cal.3d at p. 385, fn. 1.)

Following the abnegation of diminished capacity, it would appear that voluntary manslaughter is limited to cases involving an intent to kill or conscious disregard for life where malice is negated by provocation or imperfect self-defense. That was not, however, the conclusion of this court in *People v. Rios* (2000) 23 Cal.4th 450. In *Rios*, the defendant shot the victim in the face at close range during an argument. (*Id.* at pp. 455-456.) He was acquitted of murder, then was retried and convicted of voluntary manslaughter. (*Id.* at p. 453.) The jury was instructed that "every person who unlawfully kills . . . without malice but with an intent to kill, is guilty of voluntary manslaughter," but not on the provocation or imperfect self-defense components of voluntary manslaughter. (*Id.* at pp. 458-459.)

This court concluded as follows:

> [P]rovocation and imperfect self-defense are not elements of voluntary manslaughter when, as here, the defendant faces only that charge. Heat of passion or imperfect self-defense *precludes* a finding of malice *where malice is an element of the charge*, but *malice is not at issue* upon a charge of manslaughter. The charge of voluntary manslaughter absolves the People of proving that malice was present. It does not require the prosecution to establish, beyond reasonable doubt, that *malice was absent*. The possibility that the defendant killed with malice, and thus committed the greater offense of murder, does not prevent a conviction of voluntary manslaughter, a lesser included offense which does not require proof of malice. (*People v. Rios, supra*, 23 Cal.4th at pp. 462-463, italics in original.)

This court did, however, note that cases stating provocation was an element of voluntary manslaughter arose "in murder cases and are solely concerned with how issues of provocation or imperfect self-defense might *reduce* an intentional homicide from the charged offense of murder to the lesser included offense of voluntary manslaughter. Most simply consider whether there was sufficient evidence of provocation, or of imperfect self-defense, to *entitle* a *murder* defendant to voluntary manslaughter instructions." (*Id.* at p. 468, italics in original.)

The holding in *Rios* appears limited to those cases in which voluntary manslaughter is charged alone rather than as a lesser included offense of murder. In light of *Rios*, however, the answer to the question of whether voluntary manslaughter is necessarily limited to provocation or imperfect self-defense is, "Yes, but . . . ."

D. *People v. Garcia* (2008) 162 Cal.App.4th 18

In *People v. Garcia,* on the other hand, and illustrating the adage that bad facts make bad law, the court invented a new theory of voluntary manslaughter out of whole cloth.[38]

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[38]In appellant's opening brief, counsel uncritically argued the trial court should have instructed the jury with the novel voluntary manslaughter theory of *Garcia* as a lesser included offense. Following closer examination of the question occasioned by the Court of Appeal's request for supplemental briefing, however, counsel realized and argued two of the

The facts of *Garcia* are indeed egregious. Following an argument with his girlfriend, the defendant Garcia, who had drunk "a quantity of beer and inexpensive fortified wine," walked to a market to buy more wine. On the way he encountered one Juan Avila, whom Garcia struck in the head with a handgun, knocking him down. Garcia then returned to the girlfriend's house, argued with her again, procured a shotgun, and headed back to the market. He entered the market with the shotgun but walked out, where he was confronted by Aristeo Gonzalez, who told him to put the gun away. Garcia struck Gonzalez with the butt of the shotgun, causing him to fall to the sidewalk and hit his head. When someone tried to help Gonzalez, Garcia pointed the shotgun at him and asked if he "wanted to be dead as the person who was lying there," and pointed the shotgun at yet another person who slowed down his car to see if he could provide assistance to Gonzalez. Gonzalez died from blunt force head trauma; his skull was fractured on the left side, and he had a "rather large" laceration on the lip, apparently where the shotgun struck him. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 23.)

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predicates required by *Garcia*--i.e., that appellant committed a felony rather than misdemeanor assault when he took a single swing with his non-dominant hand, and that assuming he did commit a felony, it was inherently dangerous--were absent, and urged *Garcia* should not be applied.

The defendant was found guilty of voluntary manslaughter and two counts of assault with a firearm. On appeal, he contended the trial court prejudicially erred in failing to instruct the jury on involuntary manslaughter. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 24.) Deciding the issue actually before it, the *Garcia* court held there was insufficient evidence to support a jury instruction on involuntary manslaughter, but enunciated along the way a new theory of voluntary manslaughter that might be termed "felony manslaughter," according to which an unintentional killing during the commission of an inherently dangerous assaultive felony is voluntary manslaughter.[39] (*Id.* at pp. 31-33.)

For purposes of the second degree felony-murder rule, the term "inherently dangerous felony" has been defined as one which "by its very

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[39]The entire "felony manslaughter" discussion in *Garcia* appears to consist of dicta. There are two actual holdings in *Garcia,* one that there was insufficient evidence to support an involuntary manslaughter instruction (*id.* at p. 24), the other that the court's imposition of the upper term for voluntary manslaughter did not violate his right to a jury trial (*id.* at p. 33). *The defendant did not challenge the sufficiency of the evidence to support his conviction for voluntary manslaughter* (*id.* at p. 26), meaning it was unnecessary for the court to invent the "felony-manslaughter" theory. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered. [Citations.] An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [Citation.]" (*People v. Knoller, supra,* 41 Cal.4th at p. 154-155.)

nature . . . cannot be committed without creating a substantial risk that someone will be killed." (*People v. Howard* (2005) 34 Cal.4th 1129, 1135.) *Garcia* adopts this definition for purposes of its "felony-manslaughter" rule, finding that assault with a deadly weapon is an inherently dangerous felony considered in the abstract, presumably because the offense of assault with a *deadly weapon* by definition creates "a substantial risk that someone will be killed. . . . In determining whether a felony is inherently dangerous to human life, the court considers the elements of the offense in the abstract, not the defendant's specific conduct." (*People v. Garcia, supra*, 162 Cal.App.4th at p. 28, fn. 4.)

E. Here, the Court of Appeal Takes *Garcia* One Step Further

The Court of Appeal requested supplemental briefing on the question of, assuming the court concluded there was insufficient evidence supporting appellant's second degree murder conviction, to what lesser offense the conviction would properly be reduced, and asked the parties to address the applicability of *Garcia* to the issue. In his supplemental brief, appellant noted assault by means of force likely to produce great bodily injury is not an inherently dangerous felony in the abstract, given the legal definition of such in the second-degree felony murder rule adopted by

Garcia.[40] If an inherently dangerous felony is one that creates "a substantial risk that someone will be killed," the most that can be said for assault by means of force likely to produce great bodily injury is that it creates a substantial risk that someone will suffer great bodily injury. As this court noted in *Knoller* in a different context, however, the risk of death and the risk of serious bodily injury are not the same thing. (*People v. Knoller, supra*, 41 Cal.4th at pp. 143, 156.)

The employment of a deadly weapon in an assault by definition creates an objective possibility of death lacking in a felony assault without a deadly weapon, which may explain why *Garcia* employed the inherently dangerous felony test it did. This court has pronounced "sound" the inference that the Legislature intended "a meaningful difference" between the "assault with a deadly weapon or instrument" and "assault by means of force likely to produce great bodily injury" clauses of section 245, subdivision (a)(1). (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1030.) "[A] 'deadly weapon' within the meaning of section 245 must be an object extrinsic to the human body. Bare hands or feet, therefore, cannot be

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[40]Assault and battery are not considered inherently dangerous misdemeanors, though they may serve as predicates for a conviction of involuntary manslaughter under section 192, subdivision (b). (*People v. Wells* (1996) 12 Cal.4th 979, 988.)

deadly weapons . . . ." (*Id.* at p. 1034.) This "meaningful difference" is underscored by the fact that a conviction of section 245, subdivision (a)(1) is a serious felony pursuant to sections 667 and 1192.7 when a defendant personally uses a deadly weapon during an assault, but a conviction based only on "force likely to produce great bodily injury" is not. (*People v. Davis* (1996) 42 Cal.App.4th 806, 814.)

In order to affix voluntary manslaughter liability to appellant, the Court of Appeal accordingly found it necessary to "expand the holding in *Garcia* by concluding that an unintentional killing, without malice, resulting from the commission of a felony assault or battery constitutes voluntary manslaughter, regardless whether it satisfies the test for an inherently dangerous felony used in applying the second degree felony murder rule." (Opn., p. 42.) The court concluded "assault by means of force likely to cause great bodily harm is properly considered an inherently dangerous felony *for purposes of determining whether an unintentional killing during the commission of that felony is voluntary or involuntary manslaughter*." (Opn., p. 44, italics in original.) The court found it necessary to create this exception in recognition that "the California Supreme Court has held that an unintentional homicide committed in the course of a *noninherently dangerous* felony may properly support a

conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (Opn., p. 45, italics in original.)

To put the difference between a risk of death and risk of great bodily injury in perspective, in the present case the loss of Eric House's tooth in the fight with Emery Kauanui arguably constituted great bodily injury. (*People v. Belton* (2008) 168 Cal.App.4th 432, 439-440.) Examples of felonies held inherently dangerous to human life, on the other hand, include shooting at an inhabited dwelling, poisoning with intent to injure, arson of a motor vehicle, grossly negligent discharge of a firearm, manufacturing methamphetamine, kidnaping, and reckless or malicious possession of a destructive device. (*People v. Howard, supra,* 34 Cal.4th at p. 1136.) The Court of Appeal erred when it added throwing a single punch at a professional athlete to this list.

Finally, the "felony-manslaughter" theory of *Garcia,* a theory greatly expanded by the Court of Appeal here, functions much like the second degree felony-murder rule. Under the second degree felony-murder rule, once a defendant has been found guilty of committing an inherently dangerous but non-assaultive felony resulting in death, the inquiry ends and the defendant is guilty of second degree murder. The second degree felony-murder doctrine has been criticized by legal scholars as "an artificial

concept of strict criminal liability that 'erodes the relationship between criminal liability and moral culpability.'" (*People v. Howard, supra*, 34 Cal.4th at p. 1135.) Because of this erosion, this court has "repeatedly stressed that the rule 'deserves no extension beyond its required application.'" (*Ibid.*) "Felony manslaughter," and especially the Court of Appeal version whereby *any* felony assault or battery resulting in death is voluntary manslaughter, is a similar "artificial concept of strict criminal liability."

F. "Felony Manslaughter" Is a Prohibited Non-Statutory Crime Created by *Garcia* and Adopted by the Court of Appeal in Appellant's Case

Perhaps dispositive of the question whether the court erred in applying an expanded version of the "felony-manslaughter" theory of *Garcia* is that the theory is a judicially-created doctrine with no statutory basis. Citing Penal Code section 6,[41] this court has stated, "Some statutory or regulatory provision must describe conduct as criminal in order for the

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[41]Section 6 provides in relevant part: "No act or omission . . . is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes, which it specifies as continuing in force and as not affected by its provisions, or by some ordinance, municipal, county, or township regulation, passed or adopted, under such statutes and in force when this Code takes effect."

courts to treat that conduct as criminal." (*People v. Chun* (2009) 45 Cal.4th 1172, 1183.) In *Chun,* the court considered the defendant's claim the second degree felony-murder rule was "unconstitutional on separation of power grounds as a judicially created doctrine with no statutory basis." (*Id.* at pp. 1180.) Noting "there are no nonstatutory crimes in this state," the court held "the second degree felony-murder rule, although derived from the common law, is based on statute; it is simply another interpretation of section 188's abandoned and malignant heart language." (*Id.* at p. 1183.)

Similarly, and closer to the point here, in *People v. Anderson, supra,* 28 Cal.4th 767, this court, after reaffirming the common law doctrine that duress is not a defense to murder, considered the defendant's contention that even if not a complete defense, duress could reduce a crime to manslaughter by negating malice. (*Id.* at pp. 777-778, 781.) Although the court recognized policy arguments could be made that killing under duress "should be a crime less than the same killing without such fear," the court declined to recognize this theory of manslaughter because it had not been authorized by the Legislature. (*Id.* at p. 784.) The court noted provocation manslaughter is explicitly based on section 192 and added, "although less obviously, the imperfect self-defense form of manslaughter is also based on statute." (*Id.* at p. 782.) "The problem with making a killing under duress

a form of manslaughter is that no statute so provides. . . . Both forms of voluntary manslaughter currently recognized--provocation and imperfect self-defense--are grounded in statutory language." (*Ibid.*) "Recognizing killing under duress as manslaughter would create a new form of manslaughter, which is for the Legislature, not courts, to do." (*Id.* at p. 783.)

"A new form of manslaughter" is precisely what *Garcia* created and what the Court of Appeal here expanded.

CONCLUSION

After dispassionately reviewing the facts presented at trial, the Court of Appeal correctly found insufficient evidence that when appellant struck Emery Kauanui, he did so consciously aware of the fact Kauanui's death might result. All respondent can do is continue to parade the other non-life threatening assaults appellant committed or aided and abetted, all of which at best show, as the Court of Appeal put it, that appellant has "an evil disposition or despicable character."

Considered in the abstract, the Court of Appeal was within its authority to reduce the conviction to voluntary manslaughter, and there is authority from this court to the effect that under certain circumstances voluntary manslaughter need not involve provocation or imperfect self-defense. It does, however, appear that the Court of Appeal erred in extending a theory of voluntary manslaughter not recognized by statute.

Dated: 03/07/11

Respectfully submitted,

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SETH CRAVENS

CERTIFICATION OF WORD COUNT

I, Randall B. Bookout, hereby certify that, according to the computer program used to prepare this document, Appellant's Answer Brief on the Merits, contains 13,926 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 7th day of March 2011, at Coronado, California.

Randall Bookout

Randall Bookout
Attorney at Law

DECLARATION OF SERVICE

Case Name: *People v. Seth Cravens* Supreme Court No. S186661

I declare: I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is Post Office Box 181050, Coronado, California, 92178.

On March 7, 2011, I served the attached

APPELLANT'S ANSWER BRIEF ON THE MERITS

of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Coronado, California on March 7, 2011.

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at Coronado, California, on March 7, 2011.

RANDALL BOOKOUT
(Typed Name)

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(Signature)