IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S188204
	)	
v.	)	
	)	
ANTHONY ARANDA, JR.,	)	
	)	
Defendant and Appellant.	)	
	)	

On Appeal from a Judgment of
the Superior Court of the State of California
in and for the County of Riverside

The Honorable Albert J. Wojcik
Judge Presiding

APPELLANT'S REPLY BRIEF ON MERITS

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PEOPLE OF THE STATE OF CALIFORNIA,)
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ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO GIVE A STANDARD REASONABLE DOUBT INSTRUCTION (CALJIC NO. 2.90) WAS A STRUCTURAL DEFECT REQUIRING AUTOMATIC REVERSAL OF BOTH THE MANSLAUGHTER CONVICTION AND THE STREET TERRORISM CONVICTION.

With respect to appellant's street terrorism conviction, respondent acknowledges that the trial court's instructions did not adequately convey the concept of reasonable doubt to the jury. (RABM[1] 4.) Therefore, respondent presumably agrees the conviction was properly reversed by the Court of Appeal. However, with respect to appellant's manslaughter conviction, respondent argues the omission of CALJIC No. 2.90 only

[1] RABM refers to Respondent's Answering Brief on the Merits.

violated state law, and that the error was not prejudicial under the *Watson*[2] standard. (RABM 7, 37-40.) According to respondent, in the context of the manslaughter conviction, the failure to deliver CALJIC No. 2.90 was not a federal constitutional error because the trial court's instructions, including pretrial instructions, "viewed as a whole, correctly conveyed the concept of reasonable doubt and the presumption of innocence to the jury." (RABM 7.)

Before explaining why this Court should reject respondent's analysis, it is important to note respondent says very little about the first question presented by this case, namely, whether the trial court's failure to give a standard reasonable doubt instruction is reversible per se or is subject to harmless error review. Referring to the manslaughter conviction, respondent in his argument that the error was not a federal one, simply notes he "has not found any cases decided by this Court in which a violation of state law only has been deemed structural error," and maintains it would be "anomalous if this Court were to hold that the omission of CALJIC No. 2.90 here was structural error." (RABM 37.) This is an oversight. At a minimum, this Court should address the prejudice question (reversal per se or harmless error review) in deciding the outcome of the street terrorism

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[2] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

conviction. As noted, respondent essentially concedes the error here violated federal standards as to that conviction. As this Court is aware, the Courts of Appeal have divided on whether the failure to give a standard reasonable doubt instruction is structural error demanding reversal per se, or whether it is subject to harmless error review under the standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (*Chapman*).[3] Only one case, *People v. Mayo* (2006) 140 Cal.App.4th 535 (*Mayo*), has applied the state law standard of prejudice articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), and there the court emphasized the limited nature of its holding. (*Mayo*, *supra*, at pp. 548-549 ["We hold only that under the specific facts of this case, the omission of the definition of reasonable doubt contained in *CALJIC No. 2.90* does not constitute federal constitutional error."].) Appellant urges this Court to settle the question here.

Appellant thoroughly covered this issue in Argument I of his opening brief. In short, when a jury is not properly instructed that the prosecution bears the burden of proving beyond a reasonable doubt all

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[3] Compare, for example, *People v. Crawford* (1997) 58 Cal.App.4th 815, 817 ["the failure to instruct on these fundamental principles is constitutional error that requires per se reversal of the judgment"] with *People v. Flores* (2007) 147 Cal.App.4th 199, 210 ["we believe the correct standard to apply in this case is the *Chapman* standard"].

elements of a criminal offense and the facts necessary to establish each of those elements – whether because of a deficient instruction (as in *Sullivan*[4]), or no instruction at all (as in this case) – "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made," and the reviewing court can only speculate as to "what a reasonable jury would have done." (*Sullivan, supra*, at p. 281.) In either situation, there is "no jury verdict of guilty-beyond-a-reasonable-doubt" and thus "no object . . . upon which harmless error scrutiny can operate." (*Id.* at p. 280.) The error is "structural" in the sense that its consequences are "necessarily unquantifiable and indeterminate." (*Id.* at p. 282.) "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 150 [126 S.Ct. 2557, 165 L.Ed.2d 409].) Accordingly, at least in the context of the street terrorism conviction, the trial court's failure to deliver CALJIC No. 2.90, is per se reversible error. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 320, fn. 14 [99 S.Ct. 2781, 61 L.Ed.2d 560] ["Our cases have indicated that failure to instruct a jury on

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[4] *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] (*Sullivan*).

the necessity of proof of guilt beyond a reasonable doubt can never be harmless error."].)

Turning to the manslaughter conviction, respondent contends that changes in the law have undermined the decision in *People v. Vann* (1974) 12 Cal.3d 220 (*Vann*). (RABM 7, 31.) In *Vann*, this Court found that the trial court's inadvertent failure to give a general reasonable doubt instruction, a prior version of CALJIC No. 2.90, violated the federal constitution. (*Vann*, *supra*, at pp. 227-228.) Respondent points to the fact that, since *Vann*, the United States Supreme Court has clarified the standard for instructing on reasonable doubt, and that both that court and this one have promulgated new standards for reviewing claims of instructional error. (RABM 7.)

Vann's holding, that the failure to deliver CALJIC No. 2.90 was an error of federal constitutional magnitude, is as good today as it was in 1974. *Vann*'s statement that the reasonable doubt standard is "recognized as rooted in the federal Constitution," is hardly controversial. Quoting *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368], *Vann* noted "'the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" (*Vann*, *supra*, 12 Cal.3d at

p. 227.) *Winship* of course remains good law. It also cannot be seriously contended that the instructional omission in *Vann* was not a federal error under the particular circumstances of that case. The "isolated" references to reasonable doubt in the circumstantial evidence and good character instructions given in that case did not adequately apprise the jury of its constitutional duty to find the elements of the crimes beyond a reasonable doubt. (*Id.* at pp. 226-227.) Furthermore, the fact that the jurors had been alerted to this requirement before they were empaneled, did not fill the hole left by CALJIC No. 2.90's omission at trial. As *Vann* explained:

> The failure to instruct is likewise not cured by other directions given to the jury. Thus the jury panel was instructed prior to the selection of jurors that it would be "incumbent . . . upon the People to prove the allegations as to each defendant, and to prove them beyond a reasonable doubt, to a moral certainty, before you would be entitled to return a guilty verdict." However, the court immediately thereafter instructed that "At the conclusion of the evidence in the case the court will give you instructions on the law as it relates to the evidence." Final instructions were not given to the jury until 16 days later. At that time the court did not refer back to its preliminary remarks made before the selection of the jurors, and stated, "it is my duty to instruct you on the law that applies to this case, and *you must follow the law as I state it to you.*" (Italics added.) Toward the end of the charge the court concluded, "You have been instructed on all the rules of law that may be necessary for you to reach a verdict." In net effect the jurors were given to understand that they had received a self-contained, complete statement of the law they were to follow.

(*Id.* at p. 227, fn. 6 [original emphasis].) This reasoning remains solid.

Respondent offers two cases which he contends represent significant changes in the law since *Vann* was decided. The first is *Boyde v. California* (1990) 494 U.S. 370 [108 S.Ct. 316, 110 L.Ed.2d 1190] (*Boyde*). (RABM 16-17, 34.) There, the United States Supreme Court held that when there is an *ambiguous* jury instruction, the court must determine if there is a reasonable likelihood that the jury interpreted it so as to render an unconstitutional verdict. (*Boyde*, *supra*, at p. 380.) This case, however, does not involve an ambiguous instruction that was delivered, but rather an instruction the trial court failed to give. Accordingly, *Boyde*'s "reasonable likelihood" standard does not apply here. (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385] ["[I]n reviewing an ambiguous instruction such as the one at issue here, [under *Boyde*] we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."] [citation omitted];; *Gilmore v. Taylor* (1993) 508 U.S. 333, 341-342 [113 S.Ct. 2112, 124 L.Ed.2d 306] [*Boyde* "clarified the standard for reviewing on federal habeas a claim that ambiguous jury instructions impermissibly restricted the jury's consideration of 'constitutionally relevant evidence.'"] [citation omitted]; *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 967 ["In *Boyde v. California* . . . the Court established a standard of review

for reversible error where the jury instruction given was ambiguous."].)

This is essentially what the court in *People v. Elguera* (1992) 8 Cal.App.4th 1214 (*Elguera*) found when confronted with a nearly identical argument:

> The Attorney General, for his part, maintains the appropriate question is whether the instructions created a "reasonable likelihood" the jury would misunderstand the law. The suggested standard, however, and the cases cited to support it do not concern the standard of prejudice for omission of a required instruction from the final charge; rather, "reasonable likelihood" is the standard for determining whether an instruction is impermissibly ambiguous or subject to misinterpretation. [Citation.] No such question is presented here.

(*Id.* at p. 1220.)

Respondent also relies on *Victor v. Nebraska* (1994) 511 U.S. 1 [114 S.Ct. 1239, 127 L.Ed.2d 583] (*Victor*). (RABM 20, 34, 36-37.) There, the United States Supreme Court considered two different jury instructions defining reasonable doubt. The Supreme Court explained that "trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." (*Victor*, *supra*, 511 U.S. at p. 22.) The Supreme Court further observed:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citations.] Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, "taken as a whole,

> the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." [Citation.]

(*Victor*, *supra*, at p. 5.)[5]

Under *Victor*, respondent contends that here the instructions as a whole correctly conveyed the concept of reasonable doubt to the jury, and therefore there was no federal constitutional violation. (RABM 19-20.) There are significant flaws in respondent's argument. For one thing, respondent claims that the *Victor* standard was satisfied because "there is no reasonable likelihood the jury misunderstood the instructions as appellant contends." (RABM 25, citing *Boyde*, *supra*, 494 U.S. at pp. 383-386.) However, as appellant just explained, this is not the appropriate test. *Boyde* was an ambiguous instruction case; this is a no instruction case.

Respondent also spends considerable time arguing that events prior to trial contributed heavily to the jury's understanding of the correct burden of proof. For instance, respondent contends that "the trial court repeatedly explained – and indeed strongly emphasized – the principles related to the prosecution's burden of proof and the presumption of innocence during jury

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[5] As Justice Ginsburg observed in her concurrence in *Victor*, this statement from the majority opinion could be considered dictum because in both consolidated cases the trial courts defined reasonable doubt. The question of whether a definition of reasonable doubt was constitutionally required, therefore, was not squarely before the Court. (See *Id.* at p. 26 [Ginsburg, J., concurring in part and concurring with the judgment].)

selection." (RABM 20.) In addition, respondent notes that "the correct reasonable doubt standard was discussed forcefully . . . and at length during those proceedings," and that the "court and parties drove these points home in a very powerful way." (*Id.* at p. 21.)

However, what jurors were told prior to being impaneled has no bearing on whether the omission of CALJIC No. 2.90 at trial violated the federal constitution. This Court and others have repeatedly held that the omission of a predeliberation reasonable doubt instruction cannot be cured by information imparted to prospective jurors prior to trial, even when that information includes the missing instruction. (*Vann*, *supra*,12 Cal.3d at p. 227, fn. 6; *Elguera*, *supra*, 8 Cal.App.4th at pp. 1222-1223; *People v. Flores*, *supra*, 147 Cal.App.4th at p. 215; *People v. Crawford*, *supra*, 58 Cal.App.4th at p. 824; cf. *People v. Loy* (2011) 52 Cal.4th 46, 59 [holding that court's comments to prospective jurors did not mislead the jury or diminish its sense of responsibility because "[t]hey were made during jury selection to explain the basic process to prospective jurors, not during the penalty phase itself when the jury's sentencing responsibility was the main focus"].)

Moreover, in this case, as in *Vann*, the jurors were directed to follow only the trial court's final instructions and nothing else. The trial court told the jurors it was "now" instructing them "on the law that applies to *this*

case," and that they "*must* accept and follow the law as I state it to you." (3 RT 670 [italics added].) In these circumstances, the jurors would not be expected to consider information they may have picked up during jury selection to decide the case. (See *People v. Frank* (1990) 51 Cal.3d 718, 728 [jurors are presumed to follow jury instructions and obey the law]; see also *Vann*, *supra*, at p. 227, fn. 6 ["In net effect the jurors were given to understand that they had received a self-contained, complete statement of the law they were to follow."]; *People v. Flores*, *supra*, 147 Cal.App.4th at p. 215 ["the jurors presumably (and reasonably) inferred that all of the instructions on the law that they were to apply to the facts in this case were given them during the court's predeliberation instructions"].)

With respect to the jury instructions given at trial, respondent contends that "the trial court repeatedly reiterated the burden of proof" with respect to the murder charge, and "repeated these core principles" in describing the elements of the gang and firearm enhancement allegations. (RABM 22.) Appellant discussed these instructions at length in the opening brief, and little would be added by repeating that analysis here. (AOBM[6] 49-56.) In short, the case law makes clear that isolated references to reasonable doubt appearing within jury instructions on specific matters –

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[6] AOBM refers to Appellant's Opening Brief on the Merits.

the situation here – is not sufficient to apprise jurors that the defendant is entitled to acquittal unless the prosecution proves each element of the crimes charged "to the jurors' satisfaction beyond a reasonable doubt." (*Vann*, *supra*, 12 Cal.3d at p. 227; see also *People v. Flores*, *supra*, 147 Cal.App.4th at p. 216 ["We cannot presume that a reasonable doubt instruction given in a *specific* context . . . will necessarily be understood by all of the jurors to apply *generally* to their determination of a defendant's guilt on the charged offenses."] [original emphasis].) Respondent appears to acknowledge this statement describes the instructions in this case:

> Apparently through inadvertence, the court did not include in its instructions CALJIC No. 2.90 – the general instruction on the prosecution's burden of proof and the presumption of innocence. . . . [¶] The court's instructions did, however, address the prosecution's burden of proof in various specific contexts.

(RABM 13-14.)

Respondent also highlights the court's circumstantial evidence instruction[7], CALJIC No. 2.01, but fails to explain how the use of the phrase "reasonable doubt" in that instruction helped cure the trial court's failure to instruct with CALJIC No. 2.90; why this case is different from *Vann* and the other cases which suggest such an instruction adds little to

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[7] RABM 22.

juror understanding of the reasonable doubt concept[8]; or why, as appellant argued in the opening brief, the instruction did not actually mislead jurors into convicting on a lesser showing than due process requires. (AOBM 49; *Vann*, *supra*, at pp. 226-227.)

Respondent relies heavily on *People v. Mayo* (2006) 140 Cal.App.4th 535 (*Mayo*), which held that the failure to give a standard reasonable doubt instruction only amounts to federal constitutional error if the jury instructions as a whole fail to adequately convey the concept of reasonable doubt. (RABM 23-25.) In other words, *Mayo* analyzed the error under the standard described in *Victor*. (*Mayo*, *supra*, at pp. 542, 548.) *Mayo* found that the failure to give CALJIC No. 2.90 in that case did not assume constitutional magnitude largely because the final instructions advised the jury that the defendant was entitled to acquittal unless each element of the charged offense (murder) was proved beyond a reasonable doubt. (*Id.* at p. 546.)

Here, as in *Mayo*, the jury was instructed that the elements of murder had to be proved beyond a reasonable doubt. (See 4 CT 823 ["the burden is on the People to prove beyond a reasonable doubt each of the elements of

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[8] See *Vann*, *supra*, 12 Cal.3d at pp. 226-227; *Elguera*, *supra*, 8 Cal.App.4th at p. 1221; *People v. Flores*, *supra*, 147 Cal.App.4th at pp. 215-216; and *People v. Crawford*, *supra*, 58 Cal.App.4th at p. 824.

murder"].) However, unlike in *Mayo*, appellant was acquitted of murder and convicted of a different offense, voluntary manslaughter, and the jury was never told that the People had to prove each element of *that* offense beyond a reasonable doubt. Respondent claims "this distinction does not inure to appellant's benefit," because other instructions (CALJIC Nos. 5.15, 8.72, and 8.75) "fully instructed the jury with regard to the prosecution's burden of proof and reasonable doubt with regard to appellant's manslaughter conviction." (RABM 25.) However, none of those instructions advised the jury that the prosecution's burden of proof was beyond a reasonable doubt *and* applied to each element of voluntary manslaughter. CALJIC No. 5.15 and CALJIC No. 8.72 were limited to the prosecution's burden of proving that the homicide was unlawful, but did not explain the burden extended to proving each element of voluntary manslaughter. (4 CT 814, 830.) In addition, the *Stone*[9] instruction, CALJIC No. 8.75, indicated that the standard to convict on a lesser offense was beyond a reasonable doubt, but did not explain that the prosecution bore that burden of proof, or that the burden applied to each element of voluntary manslaughter.

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[9] *Stone v. Superior Court* (1982) 31 Cal.3d 503.

Respondent seems to treat the absence of CALJIC No. 2.90's presumption of innocence language[10] as a entirely separate issue. (RABM 25-28.) This same approach was used in *Mayo*. (*Mayo*, *supra*, 140 Cal.App.4th at pp. 549-550.) The approach should be rejected. While a failure to specifically instruct "'on the presumption of innocence does not in and of itself violate the Constitution'" (*People v. Friend* (2009) 47 Cal.4th 1, 7, quoting *Kentucky v. Whorton* (1979) 441 U.S. 786, 789 [99 S.Ct. 2088, 60 L.Ed.2d 640]), it is recognized that the presumption of innocence is "logically similar" to the reasonable doubt standard (*Taylor v. Kentucky* (1978) 436 U.S. 478, 484 [98 S.Ct. 1930, 56 L.Ed.2d 468]), and is an "elementary principle whose enforcement lies at the foundation of the administration of our criminal law." (*In re Winship*, *supra*, 397 U.S. at p. 363.) Therefore, while the United States Supreme Court did not specify what "the concept of reasonable doubt" means (*Victor*, *supra*, 511 U.S. at p. 5), it seems reasonable to assume the presumption of innocence represents an important part of that concept. Accordingly, the omission of CALJIC No. 2.90's presumption of innocence language in this case should be

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[10] "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty." (CALJIC No. 2.90.)

regarded as a strong indication that the instructions as a whole did not satisfy the standard described in *Victor*.

"What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, [citations], and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements, [citations]." (*Sullivan*, *supra*, 508 U.S. at pp. 277-278.) Here, the jury instructions, considered individually and as a whole, did not adequately inform the jury that the prosecution bore the burden of proving, beyond a reasonable doubt, each element of the offenses of which appellant was convicted. In other words, the instructions did not properly convey the concept of reasonable doubt to the jury. (*Victor*, *supra*, 511 U.S. at p. 5.) "The reasonable doubt instruction more than any other is central in preventing the conviction of the innocent." (*People v. Elguera*, *supra*, 8 Cal.App.4th at p. 1222, quoting *People v. Brigham* (1979) 25 Cal.3d 283, 290.) The absence of such an instruction in this case violated the federal constitution and requires per se reversal of both the manslaughter and street terrorism convictions.

CONCLUSION

For all the foregoing reasons, appellant respectfully requests this Court find that the omission of CALJIC No. 2.90 from appellant's trial requires reversal of his convictions.

Respectfully submitted,

William J. Capriola
Counsel for Appellant

WORD COUNT COMPLIANCE

Pursuant to rule 8.520(c) of the California Rule of Court, I hereby certify that this document contains 4,127 words.

William J. Capriola

DECLARATION OF SERVICE

Re: *People v. Aranda*, S188204

I, William J. Capriola, declare that I am over eighteen years of age, and not a party to the within cause; my employment address is Post Office Box 1536, Sebastopol, California 95473-1536. I served a true copy of the attached:

APPELLANT'S REPLY BRIEF ON THE MERITS

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

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Each envelope was then, on January 19, 2012, sealed and deposited in the United States Postal Service at Sebastopol, California, in the county in which I am employed, with the first class postage thereon fully prepaid.

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

Executed at Sebastopol, California, this 19th day of January, 2012.

William J. Capriola