Supreme Court No. S231644

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANDRE MERRITT, Defendant and Appellant.	)	4th Criminal No. E062540 San Bernardino County Superior Court Case No. FVI1300082

ON REVIEW FROM
THE FOURTH APPELLATE DISTRICT, DIVISION TWO
AND THE SAN BERNARDINO SUPERIOR COURT
THE HONORABLE DEBRA HARRIS, JUDGE

APPELLANT'S ANSWER BRIEF ON THE MERITS

Hon. Debra Harris, Judge

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ISSUE PRESENTED

Is failure to instruct on the elements of an offense structural error, reversible per se?

INTRODUCTION

In *People v. Cummings* (1993) 4 Cal.4th 1233 (*"Cummings"*) this Court reversed defendant Gay's robbery conviction because the trial court had not instructed on four of the five elements of robbery, explaining "instructional error which withdraws from jury consideration substantially all of the elements of an offense" is structural error. (*Id.* at pp. 1313-1315.)

Six years later in *Neder v. United States* (1999) 527 U.S. 1, 4 [119 S.Ct. 1827, 144 L.Ed.2d 35] (*"Neder"*), the Supreme Court decided "whether, and under what circumstances, the omission of *an element* from the judge's charge to the jury can be harmless error. . ." (*Id.* at p. 7, emphasis added), concluding "the harmless-error rule of *Chapman v. California* applies to this error. . . ." (*Id.* at pp. 4, 9-10.)

The people argue *Neder* and this Court's opinion in *People v. Mil* (2012) 53 Cal.4th 400 (*"Mil"*), are in conflict with *Cummings* and, therefore, per se reversal no longer is required if the jury instructions omit entirely an instruction concerning an offense or

substantially all the elements of that offense. This Court should reject that argument because *Neder* does not undermine *Cummings*, nor do this Court's subsequent rulings, as none of those cases concerns the omission of the entire instruction concerning a particular offense. Whether or not omission of instruction on some "elements" of an offense may be subject to a "harmless error" analysis, complete omission of an instruction concerning the offense and all its elements is structural error. The effect cannot be quantitatively assessed because the definition of the offense the jury used is unknown.

Moreover, to the extent *Neder* would be relevant, its continued validity is questionable in light of more recent United States Supreme Court jurisprudence demonstrating the importance of the Sixth Amendment right to a jury trial. These current cases make it clear applying a harmless error analysis in this context denies a defendant his Sixth Amendment right to have the jury – not a judge – determine guilt in the first instance. For this reason as well, the error is structural, requiring per se reversal.

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STATEMENT OF THE CASE

On May 7, 2013, the San Bernardino County District Attorney filed an information alleging appellant, Andre Merritt, had committed second degree robbery (Pen. Code, § 211) against Kristen Wickum (count one); and second degree robbery (Pen. Code, § 211) against Christian Lopez (count two). (1C.T. 18-19.) The information also alleged both counts constituted a serious felony (Pen. Code, § 1192.7, subd. (c)), and a violent felony (Pen. Code, § 667.5, subd. (c)). (1C.T. 18, 20.) The information also alleged Merritt personally had used a firearm during the commission of counts one and two (Pen. Code, § 12022.53, subd. (b)), and had committed counts one and two for the benefit of a street gang (Pen. Code, § 186.22, subd. (b)(1)(C)). (1C.T. 19-20.)

Jury trial began October 14, 2014 (1C.T. 102; 1R.T. 1), concluding October 20, 2014 (2C.T. 192), the jury finding Merritt guilty as to both counts and finding the firearm enhancement true as to both counts. (2C.T. 183-184, 185, 187, 194; 2R.T. 304-305.) The jury found the gang enhancement not true as to both counts. (2C.T. 186, 188, 194; 2R.T. 304-305.)

On December 12, 2014, the court sentenced Merritt to a total term of 19 years and four months as follows: the upper term of five years for count one, deemed the principal count; the upper term of 10 years for the firearm-use enhancement to count one, to be served consecutively to count one; one-third the mid-term, i.e., one year, for count two, to be served consecutively to count one; and three years and four months for the firearm-use enhancement to count two, to be served consecutively to count one. (2C.T. 210, 211; 2R.T. 311-.)

The court imposed a $300.00 section 1202.4 restitution fine, plus a $300.00 parole revocation fine, suspended unless parole revoked, and a $60.00 court security and conviction fee for each convicted charge, totaling $120.00. (2C.T. 209-210, 212; 2R.T. 310.) Merritt was awarded credits of 708 actual days, plus 106 conduct days, a total of 815 days. (2C.T. 210, 212; 2R.T. 312.)

On December 15, 2014, Merritt timely filed a notice of appeal. (2C.T. 213.) On November 20, 2015, the Court of Appeal filed its opinion, reversing the judgment. The People filed a rehearing petition December 7, 2015, which was denied December 14, 2015. On March 9, 2016, this Court granted review.

STATEMENT OF FACTS

First Incident

Around 5:00 p.m. on December 19, 2012, Kristen Wickum was working at the front counter at Storage Direct, a storage facility located at 15262 Mojave Drive in Victorville. (1R.T. 88-89, 39, 45.) A man wearing a hoodie entered the building, pulled out a gun, and asked for all the money. (1R.T. 89.) Wickum gave the man the money in the drawer, after which he asked if there was more money. Wickum gave him the petty cash box, which was locked. The man asked Wickum to open the box, but she told him she didn't have the key, and to just take the whole box. (1R.T. 89.) The man told Wickum to get down on the ground. He asked Wickum for her cell phone. She said, "Please don't take my phone." (1R.T. 92.) He then took the office phone and broke it, then left. (1R.T. 92.)

Wickum then yelled for Elisha Cordova, the manager, who had been in the back room and had not witnessed the incident. (1R.T. 93, 54, 56.) They immediately called 9-1-1. (1R.T. 57, 94.)

Sheriff's Deputy Travis Buell of the San Bernardino County Sheriff's Department responded to a dispatch call of an armed

robbery, arriving at the scene shortly thereafter. (1R.T. 38-39, 42-43.) He spoke with Wickum, who told him she had been robbed. (1R.T. 42-43.) Wickum appeared visibly upset. (1R.T. 44.) She described the perpetrator as a black male, five feet 11 inches tall, about 20 years old, wearing a blue hooded sweat shirt, gray shorts, white socks, and black Chuck Taylor shoes, and armed with a black, scuffed and scratched, semiautomatic handgun. (1R.T. 46, 51.) The suspect took about $338. (1R.T. 49.)

Deputy Buell also interviewed Cordova, who said she was the manager of the business and had not seen the incident. (1R.T. 44, 46.)

Detective Paul Solorio and Detective Hendrix of the San Bernardino County Sheriff's Department went to the business, met with Wickum, and showed her photographic lineups. (1R.T. 103-104.) Wickum "almost immediately" identified Merritt in a six-pack photo lineup. (1R.T. 105, 96.)

The incident was captured on the building's video surveillance system, and a video of the incident was played for the jury at trial. (1R.T. 91.)

Second Incident

Around 6:22 p.m. that same day–December 19, 2012–Christian Lopez was working as a clerk at La Mexicana, a convenience store located at 15383 Seventh Street in Victorville. (1R.T. 46-48, 51.) As Lopez was counting money at the register, he heard the door sensor ring. (1R.T. 68.) A man wearing a hoodie pointed a gun at Lopez, stating, "Give me the money, muthafucker." (1R.T. 68-69.) Lopez gave the suspect the money from the register, after which the man told Lopez to lay down. (1R.T. 70.) Lopez laid down, face-down, after which the man kicked him in the back, then left the store, after which Lopez called 9-1-1. (1R.T. 70-71.)

Shortly after responding to the robbery dispatch call at the Storage Direct, Deputy Buell responded to another dispatch call of an armed robbery at La Mexicana. (1R.T. 46-48.) Buell spoke with Lopez, who "seemed scared." (1R.T. 47-48.) Lopez told Buell he had been robbed at gunpoint by "a black male in his 20s, about 6 foot with a thin, bulky build wearing a black shirt, khaki shorts, and he was armed with a silver" semiautomatic handgun. (1R.T. 48-49, 51.) The suspect took about $700. (1R.T. 49.)

While being showed a photo lineup. Lopez identified Merritt "right away." (1R.T. 75, 79.)

The incident was captured on the store's video surveillance system, and a video of the incident was played for the jury at trial. (1R.T. 72.)

Search of Residence

On January 4, 2013, Detective Heather Forsythe and Deputy Stoll of the San Bernardino County Sheriff's Department served a search warrant on Merritt at his residence at 15810 Arbolanda Lane in Victorville. (1R.T. 110-111.) The officers announced themselves and knocked, then entered the home. (1R.T. 112.) Inside, they found three individuals, including Merritt. (1R.T. 112.) They detained Merritt, then began searching the home. (1R.T. 112.)

Merritt told the officers which room was his, after which they searched his bedroom. (1R.T. 112.) They found some ammunition, a black bandanna with white symbols on it, and some baseball hats. (1R.T. 112.) They searched the rest of the house, finding some black hooded sweat shirts, some Chuck Taylor Converse shoes, and some cargo shorts. (1R.T. 112, 114, 119-120.)

Defense Case

Charlene Butts, Merritt's mother, testified Merritt had been released from custody at midnight on December 19, 2012, and she had picked him up and drove him home. (1R.T. 181.) Waiting for them at home were Merritt's brother, Derek; Keith Glass; Prince Dean; and Tayveon Cheatum, all there to greet him upon his arrival and to celebrate his release. (1R.T. 181.) They were "smoking weed" and playing video games. (1R.T. 181.) The party lasted "at least two or three days." (1R.T. 182.)

Butts testified that, at 5:00 p.m. on December 19, 2012, Merritt was still at home with brother Derek, his sister, Keith Glass, Prince Dean, and Tayveon Cheatum. (1R.T. 182.) Merritt did not leave the house during the day, and did not leave the house from between 5:00 p.m. to 5:30 or 6:00 p.m. (1R.T. 182.) He did not leave the house "until like four days later." (1R.T. 183.)

Tayveon Cheatum, Merritt's cousin, testified he had arrived at Merritt's house around midnight December 19, 2012. (1R.T. 189.) Cheatum remained at Merritt's house during the day on December 19, leaving some time before 5:00 p.m., and returning around 9:00 p.m.

Cheatum testified that, when he left the house before 5:00 p.m., and when he returned around 9:00 p.m.; Merritt was at the house, wearing the same clothing. (1R.T. 190-191.)

Derek Coleman, Merritt's older brother, testified he was at Merritt's home on December 19, 2012. (1R.T. 198-199.) Merritt was at home between 4:30 p.m. and 6:30 p.m. on December 19, 2012. (1R.T. 199.)

Rebuttal Evidence

The prosecution recalled Detective Solorio, who testified he and Detective Hendrix had interviewed Merritt on January 4, 2013. (1R.T. 227.) When asked where he was on December 19, 2012, Merritt "basically stated that he was at his house earlier in the day, and then he left his house and walked to a friend's house at the Rodeo apartments," spending the night at the Rodeo apartments. (1R.T. 227.)

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DISCUSSION

I. THE FAILURE TO INSTRUCT ON THE CHARGED OFFENSE WAS STRUCTURAL ERROR, REQUIRING REVERSAL PER SE, AND IS NOT CONTROLLED BY *NEDER*.

A. Legal Background.

In *Cummings*, the trial court "did not include an instruction defining robbery when instructing the jury. The court did instruct the jury, however, that ' . . . the crime of attempted robbery . . . requires the specific intent to permanently deprive the owner of its property.'" (*Cummings*, *supra*, 4 Cal.4th at pp. 1311-1312.) This Court held, "[a] finding that property was taken with the intent to permanently deprive the owner does not compel a conclusion that the jury has found the facts necessary to establish the remaining elements of the offense." (*Id.* at p. 1313.)

Cummings explained the error required reversal per se, observing "a distinction between instructional error that entirely precludes jury consideration of an element of an offense and that which affects only an aspect of an element." (*Cummings, supra,* 4 Cal.4th at p. 1315.) This Court also ruled a harmless error analysis cannot be applied "to instructional error which withdraws from jury

consideration substantially all of the elements of an offense and did not require by other instructions that the jury find the existence of the facts necessary to a conclusion that the omitted element had been proved." (*Ibid.*) This Court concluded, "regardless of the merits of the People's argument that" the defendant "did not dispute the existence of the predicate facts and that the evidence overwhelmingly established all of the elements of robbery," the convictions on his robbery counts must be reversed. (*Ibid.*)

Six years later, the United States Supreme Court decided *Neder*, in which the District Court had "erred in refusing to submit the issue of materiality to the jury with respect to those charges involving tax fraud." (*Neder, supra,* 527 U.S. at p. 4.) The District Court, operating under then-existing precedent, has instructed the jury that "materiality" of false statements was not an issue for its consideration, as it was a question of law for the court, which precedent subsequently was overruled. (*Id.* at p. 6.) The Court decided "whether, and under what circumstances, the omission of *an element* from the judge's charge to the jury can be harmless error. . ." (*Id.* at p. 7, emphasis added), concluding "the harmless-error rule of

Chapman v. California applies to this error. . . ." (*Id.* at pp. 4, 9-10.)

In reaching this conclusion, the Supreme Court first noted several types of structural errors, including complete denial of counsel, a biased judge, a denial of self-representation, and a defective reasonable doubt instruction (*Neder, supra,* 527 U.S. at p. 8), then wrote:

> The error at issue here – a jury instruction that omits *an element* of the offense – differs markedly from the constitutional violations we have found to defy harmless-error review. Those cases, we have explained, contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." [Citation.] Such errors "infect the entire trial process," [Citation], and "necessarily render a trial fundamentally unfair." [Citation.] Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guild or innocence . . . and no criminal punishment may be regarded as fundamentally fair."

(*Id.* at pp. 8-9, emphasis added.)

The Court concluded "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder, supra,* 527 U.S. at p. 9, original emphasis.) It relied on prior precedent which had "applied harmless error analysis to cases involving improper instructions on a single element of the offense."

(*Id.* at pp. 9-10.) *Neder* emphasized it only concerned omission of "an", i.e., one, element of an offense, not substantially all the elements, or omission of an instruction concerning a specific offense altogether. (*Id.* at pp. 10-11.) *Neder* did not explain how many "other" elements were included in the various offenses, but it was clear that only the one element of materiality had been removed from the jury's consideration in that case.

B. *Neder* Does Not Control Because the Instant Case Does Not Concern the Mere Omission of One "Element" of an Offense, and This Court's Subsequent Opinions Do Not Undermine *Cummings*.

Neder repeatedly emphasized the issue there was the omission of "an" element or a "single" element (*Neder, supra,* at pp. 8-10), not substantially all the elements of the offense, or the entire instruction explaining the offense to the jury. Because *Neder* only considered the omission of an instruction concerning one element, it is not controlling in cases such as this one in which substantially all the elements, or the instruction concerning the entire offense, are missing. (*People v. Avila* (2006) 38 Cal.4th 491, 567; *Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153 [Cases are not authority for propositions not considered.].)

Neder also distinguished *Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282 [113 S.Ct. 2078, 124 L.Ed.2d 182], which had held instructing the jury with a defective reasonable doubt instruction was structural error because it "vitiates *all* the jury's findings," omitting one element would not vitiate *all* the jury's findings. (*Neder, supra,* at pp. 10-11.) The People assert the error here was not structural because it did not "vitiate all of the jury's findings." (OBM 13.) It does, however, "vitiate" the jury's findings on this one offense. "Vitiate" means: "to impair the quality of, make faulty, spoil, mar. . . ." (Webster's Encyclopedic Unabridged Dict. (Deluxe Ed., 2001), p. 2127, col. 3.) Certainly, the jury's finding is impaired in quality if the jury has not been given the definition of the offense.

The People rely in part on *People v. Flood* (1998) 18 Cal.4th 470 (OBM 8), but *Flood* is distinguishable because, there, the trial court erroneously had removed only one *element* of the offense from the jury's consideration. (*Id.* at pp. 479-482.) This Court specifically explained: "We have no occasion in this case to decide whether there may be some instances in which a trial court's instruction removing an issue from the jury's consideration will be the equivalent of failing

to submit the entire case to the jury – an error that clearly would be a 'structural' rather than a 'trial' error." (*Id.* at p. 503.) Indeed, *Flood* also listed *Harmon v. Marshall* (9th Cir. 1995) 69 F.3d 963, 966 – in which the Court had found structural error because all elements had been removed from the jury's consideration – as distinguishable. (*People v. Flood, supra,* 18 Cal.4th at p. 503, fn. 20.) Moreover, the Ninth Circuit continued to recognize the distinction noted in *Harmon* well after *Neder*. (*United States v. Recio* (9th Cir. 2004) 371 F.3d 1093, 1102-1103.) *Flood* specifically left the question open; it did not undermine *Cummings.*

Thirteen years after *Neder* this Court decided *Mil*, in which it expanded on the "element" discussion, holding omission of two elements of special circumstance allegations may be subject to a harmless error analysis. (*Mill, supra*, 53 Cal.4th at pp. 409-414.) *Mil* did not hold omission of the key instruction concerning the primary offense was subject to a harmless error analysis, nor does any case cited by respondent. Indeed, *Mil* repeats *Cummings'* ruling "omission of 'substantially all of the elements' of a charged offense is reversible per se." (*Id.* at p. 413, citing *Cummings*, *supra,* 4 Cal.4th at p. 1315.)

Omission of the entire instruction certainly is more grievous than omission of "substantially all of the elements."

Mil also specifically rejected the argument the omission of two elements from the charge equated to the omission of substantially all of the elements of an offense, concluding, "We do not find that the omission here was akin to what occurred in *Cummings*." (*Mil, supra,* at pp. 415-416.) In distinguishing the type of the error in *Mil* from that in *Cummings*, this Court impliedly rejected the People's argument in this case. *Mil* also reiterated the issue had not been decided in *Flood*. (*Id.* at p. 413.)

The People devote much of their brief to an argument against the "substantially all" question, claiming *Cummings*' focus on that issue conflicts with the purpose behind per se reversal. (OBM 16-23.) The problem with that line of argument is that is not what happened here because the *entire* instruction was omitted. Therefore, there is no need to consider which "elements" were omitted and no need to either accept or reject the "'substantially all' rule" (OBM 21) in this particular case. Neither *Neder* nor any of this Court's post-*Cummings* opinions support the People's position in this case. All

either are distinguishable or left the question open.

C. Omission of the Entire Instruction Must Be Reversible Per Se.

If the jury is not instructed concerning the offense at all, it is left to colloquial "definitions" of offenses, which may or may not be accurate. Because no instruction was given, a reviewing court cannot determine what, if any, legal parameters the jury applied in finding the defendant guilty. This is truly an instance in which the effect of the error cannot be evaluated, rendering the error structural.

In his majority opinion as to "Part II" of *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246, 113 L.Ed.2d 302], Chief Justice Rehnquist explained the harmless error analysis applied when analyzing cases involving "'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.) Chief Justice Rhenquist went on to explain the types of errors which had been held to be "structural:"

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> The admission of an involuntary confession -- a classic "trial error" -- is markedly different from the other two constitutional violations referred to in the *Chapman* footnote as not being subject to harmless-error analysis. One of those violations, involved in *Gideon v. Wainwright*, 372 U.S. 335 (1963), was the total deprivation of the right to counsel at trial. The other violation, involved in *Tumey v. Ohio*, 273 U.S. 510 (1927), was a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless-error" standards. The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial. Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are not subject to harmless error the following: unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); the right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984); and the right to public trial, *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984). Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.

(*Arizona v. Fulminate, supra*, 499 U.S. at pp. 309-310.)

The Supreme Court revisited this question in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140 [126 S.Ct. 2557, 165 L.Ed.2d 409], concerning the erroneous deprivation of a defendant's right to retained counsel of his own choosing. (*Id.* at pp. 142-143.) Justice Scalia explained *Fulminante* and the "structural" error question:

> Although it is hard to read that case as doing anything other than dividing constitutional error into two comprehensive categories, our ensuing analysis in fact relies neither upon such

> comprehensiveness nor upon trial error as the touchstone for the availability of harmless-error review. Rather, here, as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.

(*Id.* at p. 148, fn. 4.)

That passage also went on to reject the limiting, "fundamental unfairness" test advanced by the People here (OBM pp. 14, 22-23), explaining: "But this has not been the only criterion we have used. In addition to the above cases using difficulty of assessment as the test, we have also relied on the irrelevance of harmlessness . . . ." (*Gonzalez-Lopez, supra,* 548 U.S. at p. 148, fn. 4.)

In the instant case, there are two separate, independent reasons for per se reversal, the first being the difficulty of determining what standard the jury applied. Although a lay person's view of what a "robbery" is may be reasonably accurate, certainly the same cannot be said of a multitude of other offenses, many of which the average juror probably never has even heard of, much less considered the required "elements." "Burglary" can be committed in any number of ways, chiefly depending on the intent of the defendant, with no actual "theft" required, as the average juror may suppose. (Pen. Code, § 459; *People v. Ceballos* (1974) 12 Cal.3d 470, 479, fn. 2; *People v.*

Brownlee (1977) 74 Cal.App.3d 921, 930.) This Court has noted a "reasonable lay juror" would not know the technical definition for "rape." (*People v. Hughes* (2002) 27 Cal.4th 287, 349-350.) Moreover, if no instruction is given, each juror could apply an individualized definition of the offense, which may be completely inconsistent with the definitions employed by other jurors. Because it is difficult, if not impossible, to determine what definition a jury employed if no instruction concerning the offense is given, the error is not subject to harmless error review.

Moreover, the second criterion concerns the irrelevance of harmlessness to the analysis. (*Gonzalez-Lopez, supra,* 548 U.S. at p. 148, fn. 4.) The absence of the instruction denied the defendant the right to have the jury determine his guilt as to the particular offense, as discussed further in the following issue. If the defendant was denied his Sixth Amendment right, harmlessness is "irrelevant." (See *Sullivan v. Louisiana, supra*, 508 U.S. at p. 281 [denial of right to jury determination may not be quantitatively assessed because "the jury guarantee being a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve

its function. . . ."; see also *Waller v. Georgia* (1984) 467 U.S. 39, 49-50 [104 S.Ct. 2210, 81 L.Ed.2d 31] [per se reversal of a suppression hearing for violation of public trial guarantee]; *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 543 [denial of right to jury trial reversible per se]; *United States v. Monger* (6th Cir. 1999) 185 F.3d 574, 578 [*Neder* inapplicable if entire instruction omitted].) Because harmlessness is irrelevant to the inquiry, it similarly is irrelevant that bits and pieces of the robbery instruction may have been presented to the jury in other instructions, or that counsel did not argue there was no robbery, key components of the People's argument in this Court. (OBM 14-15.)

"A jury of laypersons forced to guess at the law is not ordered liberty, it is chaos. Part of the core concept of a jury trial is that the jurors find the facts and apply to them the law described by the judge in order to reach a verdict." (*Reynolds v. Cambra* (C.D. Cal. 2001) 136 F.Supp.2d 1071, 1095; reversed on other grounds in *Reynolds v. Cambra* (9th Cir. 2002) 290 F.3d 1029.) *Neder* cannot apply if an instruction is completely omitted. For all these reasons *Neder* is not controlling. This error requires per se reversal.

II. OMISSION OF THE ENTIRE INSTRUCTION CONCERNING AN OFFENSE MUST BE VIEWED AS STRUCTURAL ERROR BECAUSE IT DENIES THE DEFENDANT HIS RIGHT TO JURY TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. ADDITIONALLY, *NEDER'S* CONCLUSION IS NO LONGER VALID AFTER *APPRENDI*.

The People's position that omission of the entire instruction concerning an offense can not be "structural" error also is flawed because it permits the defendant's guilt to be evaluated in the first instance by the reviewing court, rather than the jury. As noted above, if the jury is not instructed concerning the offense at all, there is no way of determining which standard an individual juror – or the jury as a whole – applied. The reviewing court, finally applying the relevant law, is given the task of reviewing the record to determine if, given the state of that record, whether or not the jury most probably would have found the defendant guilty had it been instructed properly. This places the determination of the defendant's guilt or innocence in the first instance in the hands of judges, not the jury, thereby denying a defendant his right to a jury trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

In *Jones v. United States* (1999) 526 U.S. 227 [119 S.Ct. 1215, 143 L.Ed.2d 311], the Supreme Court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury under the Sixth Amendment) or merely a sentencing factor which could be decided by a judge. In making this assessment, the Court emphasized the Sixth Amendment implications based on the historical role of juries. The Court explained that, historically, there had been "competition" between judge and jury over their respective roles. (*Id.*, at p. 245.) Juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid.*, quoting 4 Blackstone, Commentaries 238-239.)

One year after *Jones*, the Court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

Apprendi involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate crime statute. But in analyzing the question presented, the Court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . ." (*Ibid.*, quoting 2 Joseph Story, Commentaries on the Constitution of the United States, pp. 540-541 (4th ed. 1873).)

Two years later, the Court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (*See Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556].) *Ring* involved the question of whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the Court reversed its earlier holding in *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511] and recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,] . . . [o]ur precedents are not sacrosanct." (*Ring v. Arizona*, *supra*, 536 U.S. at p.

608.) *Ring* continued the Court's focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law – just as Justice Stevens had done in his *Walton* dissent. (*See Walton v. Arizona*, *supra*, 497 U.S. at p. 711.)

Two years after *Ring*, the Court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], the Court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts* (1980) 448 U.S. 56 [100 S.Ct. 2531, 65 L.Ed.2d 597]. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 60.) In *Roberts* the Court had held the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the government's interest in effective law enforcement. (*Ohio v. Roberts*, *supra*, 448 U.S. at pp. 64, 77.) In *Crawford*, however, the Court took a very different approach, one that was consistent with the approach it had taken in *Jones*, *Apprendi*

and *Ring*. The Court examined the "historical record" and concluded that, under the common law in 1791, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) The Court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." (*Id.* at p. 63.)

Finally, only three months after *Crawford*, the Court applied its historical record model yet again in the Sixth Amendment context. In *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403], the Court held that it violated the Sixth Amendment for a judge to impose a longer sentence based on fact-finding not made by the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id.* at p. 301.) Once again focusing on the Framers' intent, the Court stressed that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark

out the role of the jury." (*Id.* at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed., 1981) [describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"]; John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed., 1850) ["[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature]; Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ["Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative"]; *Jones*, *supra*, 526 U.S. at pp. 244-248.)

Justice Scalia, joined by Justices Souter and Ginsburg, dissented in *Neder*, succinctly writing: "I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged – which necessarily means his commission of *every element* of the crime charged – can never be harmless." (*Neder*,

supra, 527 U.S. at p. 30, dis. opn. of Scalia, J.) As Justice Scalia further explained:

> The right to be tried by a jury in criminal cases obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged. And since all crimes require proof of more than one element to establish guilt (involuntary manslaughter, for example, requires (1) the killing (2) of a human being (3) negligently), it follows that trial by jury means determination by a jury that *all elements* were proved. The Court does not contest this. It acknowledges that the right to trial by jury was denied in the present case, since one of the elements was not -- despite the defendant's protestation -- submitted to be passed upon by the jury. But even so, the Court lets the defendant's sentence stand, *because we judges can tell that he is unquestionably guilty.*

(*Id.* at p. 32, original emphasis.)

The clear and consistent line of cases from *Jones* to *Apprendi* to *Ring*, *Crawford*, and *Blakely* leaves no doubt that the Supreme Court has reinforced Sixth Amendment jurisprudence and the historical role of juries, emphasizing the intent of the Framers in adopting the Sixth Amendment. Applying a "harmless error" test is inconsistent with the requirement the *jury*, not the justices of the reviewing court, make the initial determination of the defendant's guilt. To that end defendant Merritt contends *Neder* is no longer valid, given the Supreme Court's steadfast strengthening of Sixth Amendment jurisprudence since 1999.

Neder also has been the subject of scholarly criticism. One commentator has referred to *Neder* as "the Court's most troubling moment." (Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States* (2001) 28 Am. J. Crim. L. 229, 239.) Professor Carter writes: "In cases like *Neder*, the failure to require a finding of guilt beyond a reasonable doubt on all elements of the crime is an error that strikes at the hear of procedural fairness." (*Id.* at p. 242.) She summarizes:

> The Neder decision, and the Court's overall approach to harmless error analysis, fail to appreciate the underlying concepts. The catch phrase "no harm, no foul" is apt in a literal sense to the Court's decisions, as well as in exemplifying a lack of analysis. The decision in Neder is probably a "no harm, no foul" situation in terms of Neder's actual guilt. It is hard to argue that a $ 5 million error is not material on a tax return. The problem is that the "harm" is not the guilt or innocence of Neder. The harm is whether or not Neder received a fundamentally fair trial. A fundamentally fair trial includes the right to a jury verdict on all elements of the crime. Neder did not have such a verdict. The harmless error doctrine should ask if the error contributed to the verdict. In Neder's case, the answer is that there is no verdict on the element. Therefore, the question is pointless because the predicate of a verdict is missing.

(*Id.* at p. 245.)

Another commentator has explained how permitting an

appellate court to make a factual determination in the first instance "works a different and more profound constitutional injury to the jury and to the very structure of the Constitution itself," offending "constitutional structure by undermining the institutional interests of the jury." (Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury* (2008) 76 Fordham L. Rev. 2027, 2030-2031.)

However, Merritt recognizes this Court will follow *Neder* to the extent it has "direct application" here (*Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 484 [109 S.Ct. 1917, 104 L.Ed.2d 526]), and the question of the validity of *Neder* as a whole valid must be left to the United States Supreme Court. However, as set forth above, *Neder* does *not* have "direct application" here because it did not concern the omission of the *entire* instruction concerning the offense. Therefore, in this particular context this Court need not be follow *Neder*, but instead should apply the High Court's more recent Sixth Amendment jurisprudence in this particular case in which the entire instruction was omitted, ruling the error structural and requiring per se reversal because Merritt was denied his

Sixth Amendment right to have the jury determine his guilt.

III. THE PEOPLE's RELIANCE ON AUTHORITY FROM OTHER JURISDICTIONS IS FLAWED.

The People cite a variety of decisions from other jurisdictions purporting to bolster their position. That reliance is misplaced.

Parker v. Secretary for the Dept. of Corrections (11th Cir. 2003) 331 F.3d 764, did not concern the "complete omission" of the only instruction concerning the offense, as the People intimate. (OBM 24.) It concerned the omission of "an oral instruction defining the elements of first-degree felony murder," in a case in which the jury also was instructed concerning premeditated murder and returned a general verdict. (*Id.* at pp. 776-777.) Because there as an independent basis for the jury's verdict, the court applied the harmless error test to the analysis of the effect of the omitted instruction. (*Id.* at p. 778.) Here, there was no instruction concerning an "alternate theory" of robbery.

Reliance on *Martin v. State* (2005) 165 M.D.App. 189 [885 A.2d 339] (OBM 24) is interesting because, in rejecting the structural error conclusion, that case lists several other opinions from other jurisdictions in which a structural error, per se reversal standard was

applied in cases of "the total lack of an instruction." (*Id.* at pp. 201-202.) In one post-*Neder* case, the Michigan Supreme Court wrote: "We issue this opinion to iterate a bright line rule: It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." (*People v. Duncan* (2000) 462 Mich. 47, 48 [610 N.W.2d 551].) That court discussed *Neder*, finding the error structural because the defendant had been "deprived of a 'basic protection,'" elaborating:

> The trial court's failure to instruct regarding *any* of the elements of felony-firearm, while allowing the jury to render a verdict on felony-firearm, sent the jury to its deliberative duties deprived of its essential tool: the law that was to be applied to the facts. Such a defect improperly left the jury to speculate, i.e., the absence of any instructions regarding the elements of felony-firearm left the jury to guess what the prosecuting attorney might be required to prove. . . . Incontrovertibly, when a jury is allowed to speculate, the subsequent verdict is not a reliable indicator of the defendant's guilt or lack thereof.

(*Id.* at pp. 52-53, original emphasis.)

The court distinguished *Neder* in cases in which the definition of all the elements of the offense were absent as that denied the defendant of the Sixth Amendment right to have the jury, not a judge,

render the verdict. (*People v. Duncan, supra,* 462 Mich. at pp. 54-55.) Although the People argue *Duncan* "is unpersuasive because it relies on a pre-*Neder* case," *Harmon* (OBM 25), that is inaccurate. *Duncan* did not merely rely on *Harmon*, it included a discussion of *Neder*, and the *Duncan* court arrived at its own, independent conclusion. The People also rely on the *Duncan* dissent's reference to the "fundamentally fair trial" standard (OBM 25), which, as discussed above, is not the only test. (*Gonzalez-Lopez, supra,* 548 U.S. at p. 148, fn. 4.)

State v. Bunch (2010) 363 N.C. 841 [689 S.E.2d 866] concerned the omission of a portion of the instruction, not the entire instruction, so *Neder* applied. (*Id.* at pp. 845-846.) The Mississippi Supreme Court did not only rely on its own constitution in finding the error structural; it also looked to pre-*Neder* precedent, which had not permitted a court to "hold that a jury would have found something it did not find." (*Harrell v. State* (Miss. 2014) 134 So.3d 266, 270-271.) In view of the strong dissent in *Neder* and the trend toward strengthening a defendant's Sixth Amendment rights, it is doubtful the United States Supreme Court would apply *Neder*, rather than its

prior precedent, in a case such as the instant one in which the entire instruction was omitted. This Court should not do so either.

IV. IF THIS COURT DOES REVERSE THE COURT OF APPEAL'S JUDGMENT, THE CASE MUST BE REMANDED FOR DECISION ON THE REMAINING ISSUE UNADDRESSED IN THE OPINION.

Merritt also argued the trial court had erred in giving CALCRIM 207 because he had raised an alibi defense. (AOB 14.) However, the Court of Appeal declined to address the issue, finding it moot. (Typed Opn. pp. 9-10.) Therefore, if this Court does reverse the Court of Appeal's judgment, it should remand the matter to the Court of Appeal with direction to decide the remaining issue. (Cal. Rules of Court, rule 8.528(c).)

CONCLUSION

In order to preserve the integrity of the trial process and Merritt's Sixth Amendment right to have the jury, not a reviewing court, determine his guilt in the first instance, the judgment of the Court of Appeal reversing the conviction should be affirmed.

Dated: August 15, 2016

Respectfully submitted,

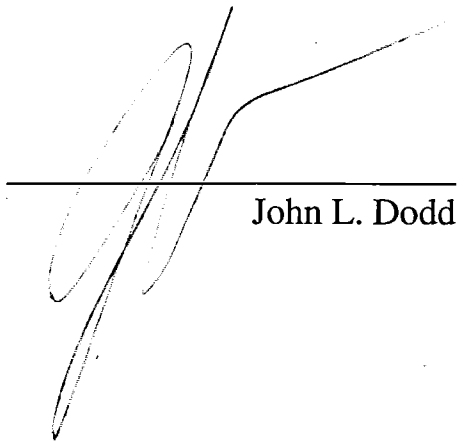
John L. Dodd, attorney for
Appellant Andre Merritt

CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c).)

I, John L. Dodd, counsel for Appellant, certify pursuant to the California Rules of Court, that the word count for this document is 7,086 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 15, 2016



John L. Dodd

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 17621 Irvine Blvd., Ste. 200, Tustin, CA 92780.

On August 15, 2016, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action.

(x) by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

(x) BY MAIL

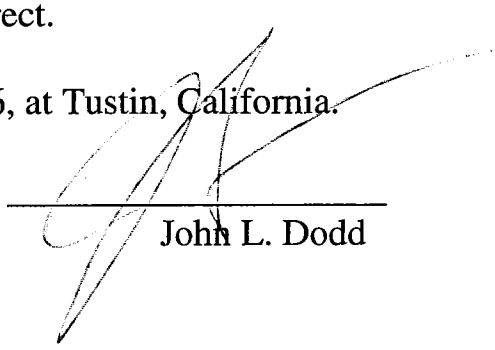
(x) I deposited such envelope in the mail at Tustin, California. The envelope was mailed with postage thereon fully prepaid.

I additionally declare that I electronically submitted a copy of this document to the Supreme Court on its website at http://www.courts.ca.gov/24590.htm, in compliance with the court's Terms of Use.

Furthermore, I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document from John L. Dodd & Associates' electronic service address jdodd@appellate-law.com on August 15, 2016, to the Attorney General's electronic service address ADIEService@doj.ca.gov and to Appellate Defenders, Inc.'s electronic service address eservice-courts@adi-sandiego.com by the close of the business day at 5:00 p.m.

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

Executed this 15th day of August 2016, at Tustin, California.



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