In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

MARVIN TRAVON HICKS,

Defendant and Appellant.

Second Appellate District, Division Five, Case No. B259665
Los Angeles County Superior Court, Case No. MA058121
The Honorable Kathleen Blanchard, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Whether the trial court erred when it refused to inform the jury during a retrial of a murder charge that the defendant had been convicted of gross vehicular manslaughter in the first trial.

INTRODUCTION

After driving under the influence of PCP and killing a two-year-old girl, Hicks was convicted of gross vehicular manslaughter and other related charges, but the jury deadlocked 11 to 1 on the murder charge. During the retrial of the murder charge, Hicks argued that under *People v. Batchelor* (2014) 220 Cal.App.4th 1102 (*Batchelor*), he was entitled to an instruction that the prior jury had convicted him of gross vehicular manslaughter. The trial court found that *Batchelor* was wrongly decided and refused to instruct the jury on the prior verdict, a determination that was upheld by the Court of Appeal.

The Court of Appeal was correct. An instruction on the prior jury's verdict would convey information irrelevant to the sole issue of the retrial: whether the prosecutor proved the elements of second degree murder beyond a reasonable doubt. Such an instruction also would also inject the issue of punishment into the jury's deliberations and lead the jury to speculate about issues that are not before it and that are inappropriate for it to consider.

STATEMENT OF THE CASE

Hicks smoked PCP and drove erratically and at high speeds in Lancaster. Despite being pursued by officers in a marked patrol vehicle, Hicks continued to drive. He eventually plowed into another vehicle at approximately 70 miles an hour, killing two-year-old Madeline Ruano, who was functionally decapitated.

Hicks was arrested and charged with murder (Pen. Code, § 187, subd. (a)), evading an officer causing injury (Veh. Code, § 2800.3, subd. (a)), evading an officer causing death (Veh. Code, § 2800.3, subd. (b)), gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)), and driving under the influence causing injury (Veh. Code § 23153, subd. (a)). (1CT 9-11.)

At his first trial, the jury deadlocked on the charge of second degree murder and convicted Hicks of the remaining counts. (1CT 127-132, 152-156.)

Prior to a retrial on the murder, defense counsel argued the jury should be informed of Hicks's convictions in the first trial, and provided the trial court with the decision in *Batchelor*. (4RT 2710, 2722-2723, 3002.)

The court stated that it was "mystified" by the *Batchelor* decision, found that it was "out of line with all of the case law," and believed that prior verdicts were "absolutely not relevant." (4RT 2717, 2719-2721, 2723, 3004-3005.) The court found that *Batchelor* required a "circular" instruction that advises the jury of an "irrelevant fact" and then tells the jurors not to let it influence their decision. (4RT 2719-2720.) The court was concerned that if it instructed the jury that Hicks had previously been convicted of certain charges and Hicks was then convicted of the murder, a compelling argument could be made that the court told the jury Hicks was guilty. The court found that the possibility of prejudice to Hicks was greater than if it excluded any mention of the manslaughter conviction. (4RT 2724.) When Hicks renewed his motion during a discussion on the instructions, the court denied the motion for the same reasons previously stated. (6RT 4502.)

The jury convicted Hicks of second degree murder. (1CT 217, 231-232.)

The Court of Appeal affirmed. In the published portion of the opinion, it found that the trial court did not err in refusing to instruct the jury that Hicks had been convicted of gross vehicular manslaughter in the first trial. (Opn. 23-26.) The Court of Appeal found that *Batchelor* was distinguishable, but also disagreed with *Batchelor*'s conclusion that an instruction on the prior jury's verdict was required. (Opn. 24.) The court found that such an instruction would have conveyed irrelevant information that could confuse the second jury or prevent it from focusing on the only relevant issue, which is whether the prosecutor had proved Hicks committed second degree murder beyond a reasonable doubt. (Opn. 25-26.) And the court explained that, to the extent that the instruction was intended to convey that Hicks would be punished if acquitted of murder, it would have improperly advised the jury to consider penalty or punishment. The instruction, if given, also would have violated this Court's precedent on instructions regarding lesser related offenses. (Opn. 25.) Finally, the Court of Appeal found that any error was harmless under the state or federal standards of harmless error. (Opn. 26.)

This Court granted Hicks's petition for review.

ARGUMENT

THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY WITH THE IRRELEVANT FACT THAT HICKS HAD BEEN CONVICTED OF GROSS VEHICULAR MANSLAUGHTER IN A PRIOR TRIAL

Hicks contends that the trial court erred when it declined to instruct, pursuant to *Batchelor*, that he had been convicted in a prior trial of gross vehicular manslaughter and that the jury's only task was to decide whether the elements of murder had been proven. Hicks insists that without a *Batchelor*-type instruction, a jury will wrongly assume that an acquittal will

set a defendant free, and that such speculation will "inevitably influence their verdict." (AOB 21-47.)

The trial court properly refused to give the instruction because the verdict in the prior trial was irrelevant to whether the elements of second degree murder had been proved. And the use of such an instruction would contradict the longstanding rule that juries are not to consider punishment in reaching their verdicts, as well as this Court's precedent on instructions regarding lesser related offenses. Even if such an instruction is required, it should be given only in situations similar to *Batchelor*, and this case is unlike that case.

A. The Prior Verdict Was Irrelevant to Whether Hicks Committed a Second Degree Murder

A trial court must instruct on general principles of law that are relevant to the issues raised. (*People v. Alexander* (2010) 49 Cal.4th 846, 920; see *People v. Bivert* (2011) 52 Cal.4th 96, 120.) "These general principles of law are those 'vital to the jury's consideration of the evidence' before it." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1223; see *People v. Smith* (2013) 57 Cal.4th 232, 239.) At the same time, a trial court must refrain from instructing on legal principles that are irrelevant to the issues raised by the evidence, would confuse the jury, or would relieve the jury from making findings on issues. (*People v. Alexander, supra*, 49 Cal.4th at p. 920; see *People v. Bivert, supra*, 52 Cal.4th at p. 120.) Thus, "a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing." (*People v. Moon* (2005) 37 Cal.4th 1, 30.) The decision whether to give an instruction is reviewed de novo. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581; see *People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Here, the trial court was correct to disagree with *Batchelor* and to refuse to give an instruction that a prior jury had convicted Hicks of gross vehicular manslaughter. As the Court of Appeal below held (Opn. at 25-26), such an instruction would convey irrelevant information to the jury. Hicks' conviction for gross vehicular manslaughter is unrelated to the only issue of the retrial, namely, whether the prosecutor proved the elements of second degree murder beyond a reasonable doubt (Opn. at 26), a determination that the prior jury failed to render. (See *People v. Gonzales* (2011) 52 Cal.4th 254, 317.) Hicks's second jury was instructed on the elements of second degree murder and, thus, had all the instructions it needed to determine if Hicks was guilty or not guilty. (1CT 226-227; 6RT 4891-4893.)

B. An Instruction on the Previous Jury's Verdict Would Contradict the Settled Rule That Juries Should Not Consider Punishment

A *Batchelor* instruction would also ran afoul of the well-settled principle that in criminal cases, the trier of fact is not to be concerned with the question of penalty or punishment in reaching a verdict as to guilt or innocence. (*People v. Engelman* (2002) 28 Cal.4th 436, 442; see also *Shannon v. United States* (1994) 512 U.S. 573, 579 [114 S.Ct. 2419, 129 L.Ed.2d 459].) This principle reflects the "basic division of labor" between the judge and the jury. (*Shannon v. United States, supra*, 512 U.S. at p. 579.) While the judge has the responsibility of sentencing the defendant if guilt is found, the jury's "function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged." (*Ibid.*)

In line with this long-standing precedent, the jury in this case was instructed to "consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences." (1CT 219 [CALJIC 1.00]; 6RT 4877.) The court also instructed the jury, "In your deliberations do not

discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict." (1CT 228 [CALJIC 17.42]; 6RT 4895.) A *Batchelor* instruction would contradict these instructions. (See *People v. Farley* (2009) 46 Cal.4th 1053, 1131 [requested instruction might have been understood as a contradiction of the instruction properly given].)

An instruction on the verdict in the prior trial would also improperly distract the jury from the issue of whether guilt of second degree murder had been proved beyond a reasonable doubt. Instead of focusing the jury on whether implied malice had been shown, such an instruction would invite the jurors "to ponder matters that are not within their province, distract[] them from their factfinding responsibilities, and create[] a strong possibility of confusion." (*Shannon v. United States, supra*, 512 U.S. at p. 579.)

Rather than clarifying the jury's decision, such an instruction would cause the jury to engage in the mental gymnastics of trying to consider the prior verdict, while also trying to ignore the possible punishment the defendant could receive. A jury cannot be expected to undertake such a contradictory task, nor would such an instruction remove the question of punishment, as Hicks insists. (AOB 23.) Instead, an instruction about the prior trial would focus the jury on penalties and cause them to speculate about the range of possible punishments for manslaughter and murder. (See *People v. Ray* (1996) 13 Cal.4th 313, 353 [instructions not to consider punishment prevent jury from reaching verdict based on "irrelevant and speculative 'consequences,'" such as "the punishment the defendant might receive"]; *People v. Ruiloba* (2005) 131 Cal.App.4th 674, 692-693 [jury consideration of punishment "has the potential to deflect the jury by inviting discussion and speculation about the results of whatever findings it makes"].) Hicks's concern—that he was deprived of possible reluctance by jurors to convict him of murder if they had known about his manslaughter

conviction—is "not legitimate" in light of the rule "precluding jury consideration of possible punishment." (*People v. Hoover* (1986) 187 Cal.App.3d 1074, 1084 [rejecting assertion of prejudice stemming from court's instruction that the case did not involve the death penalty].)

Hicks argues that his proposed instruction was necessary because jurors "naturally speculate about the consequences of their verdict by wrongly assuming that an acquittal will absolve him of all criminal responsibility." (AOB 21.) He further asserts that speculation about punishment is "an acknowledged reality" by this Court. (AOB 23-26.) This observation about jury speculation does not help Hicks's claim because all of the examples cited by him occurred in the penalty phase of death penalty cases (AOB 24-26), where the jury's task is to assess the appropriate *sentence* for the defendant. (See, e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 806-812 [jurors discussed whether those who receive a death sentence are actually executed and whether those who receive life without parole are released from prison]; *People v. Schmeck* (2005) 37 Cal.4th 240, 305-307 [jurors discussed whether life without the possibility of parole meant that the defendant would spend his life in prison]; *People v. Riel* (2000) 22 Cal.4th 1153, 1218-1219 [jurors discussed the possibility that a death sentence could be commuted to life in prison]; *People v. Pride* (1992) 3 Cal.4th 195, 267 [jurors discussed that those sentenced to life in prison had a greater opportunity to escape]; *People v. Cox* (1991) 53 Cal.3d 618, 696 [juror comment that it did not matter whether jury voted for death because death penalty had not been carried out since the 1960s].)

Hicks has not shown that jurors inevitably consider punishment when deciding whether a defendant is guilty of the charged offenses, nor has he shown that the jurors in this case did so. Instead, jurors are presumed to follow the instructions that they are not to consider penalty or punishment

in reaching their verdicts on guilt. (*People v. Foster* (2010) 50 Cal.4th 1301, 1353.)

As the Court of Appeal also correctly noted, an instruction that Hicks had been convicted of manslaughter in the prior trial could result in confusion and unforeseeable and unpredictable prejudice to both sides. (Opn. at 26.) For example, a defendant could be prejudiced by such an instruction because it signals to the jury that he "was culpable or that it should determine certain facts adverse" to the defendant. (Opn. at 26.) And an advisement to the jury about the result of a first trial: (1) "might induce the jury to speculate on its ramifications," (2) convey that the first jury could not reach a verdict on the murder charge, and (3) cause the jury to "draw an inference from that assumption." (Opn at 26.) Rather than focus the jury's attention on the evidence or place the parties in the same position as if no trial had been held previously, such an instruction could open a Pandora's box of possible ramifications and speculative inferences by the jury that could adversely affect both sides in ways that are difficult to calculate. Even if the defense is willing to risk such prejudice by requesting such an instruction, the prosecution should not be forced to do the same. The trial court did not err in refusing Hicks's requested instruction. (*People v. Zaragoza* (2016) 1 Cal.5th 21, 53 [trial court may reject an instruction if it is "potentially confusing"]; *People v. Hall* (2011) 200 Cal.App.4th 778, 782 [trial court can refuse to give instructions that would be "'confusing and not helpful to the deliberative process'"].)

Hicks further argues that the lack of any instruction on the gross vehicular manslaughter conviction gave the prosecutor an unfair tactical advantage because the jury is unaware that the defendant was convicted by another jury of a lesser related offense. (AOB 30-31, 37.) Regardless of any previous conviction for gross vehicular manslaughter, a prosecutor still has to prove beyond a reasonable doubt that the defendant committed the

charged offense. Hence, a conviction by a prior jury of gross vehicular manslaughter does not lessen the prosecutor's burden of proof for murder, or result in fewer elements for the prosecutor to prove. In such a situation, the prosecution may even feel compelled to present additional evidence to prove guilt on the murder count. And the defense is free to argue that the evidence did not show implied malice, but instead showed a crime less than murder. (4RT 2720-2721.) None of these tasks were altered by the lack of an instruction on the outcome of the prior trial.

C. The Trial Court's Decision Not to Instruct on the Outcome of the Prior Trial Is Consistent with This Court's Precedent on Lesser-Related-Offense Instructions

Relying on *People v. Geiger* (1984) 35 Cal.3d 510, which this Court overruled as wrongly decided (*People v. Birks* (1998) 19 Cal.4th 108, 113, 123, 130, 136 [overruling *Geiger*]), Hicks contends that the lack of an instruction on his conviction for manslaughter presented the jury with an all-or-nothing choice that forced it to convict him so that he would not escape punishment for his acts. (AOB 28-31.) However, as the Court of Appeal correctly found (Opn. at 25), the trial court's refusal to instruct on manslaughter was consistent with this Court's precedent on instructions for lesser related offenses.

Gross vehicular manslaughter is a lesser related offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 991, overruled on other grounds in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229.) This Court has held that instructions on lesser related offenses are only required when both parties agree to such instructions. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1230; *People v. Jennings* (2010) 50 Cal.4th 616, 668; *People v. Hall* (2011) 200 Cal.App.4th 778, 781.) In this case, the prosecutor did not agree to the requested instruction on the gross vehicular manslaughter

conviction (4RT 2714-2715) and, thus, the trial court properly refused to give it.

The decision in *People v. Valentine* (2006) 143 Cal.App.4th 1383 further demonstrates why Hicks's requested instruction is inconsistent with this Court's precedent. In *Valentine*, the defendant was charged with robbery, but asked the trial court to instruct on the uncharged lesser related offense of receiving stolen property; by doing so, he hoped to argue that he committed the uncharged offense and, therefore, should be acquitted of the charged offense of robbery. (*People v. Valentine, supra*, 143 Cal.App.4th at p. 1385.) In deciding that the defendant was not entitled to such an instruction, the Court of Appeal stated that the defendant wanted to turn this Court's precedent "on its head" by requesting the instruction "so that he can argue for an outright acquittal!" (*Id.* at pp. 1387-1388.) The Court of Appeal concluded that the lesser related offense was "not a *defense* to robbery; rather it is a theory of criminal liability based on a different offense." (*Ibid*, italics in original.) Thus, the failure to give the instruction did not infringe on the defendant's right to present a defense. (*Ibid.*)

Similarly, here, Hicks was not entitled to an instruction regarding his conviction for the lesser related offense of gross vehicular manslaughter merely so he could use it as a defense to the murder charge. Nothing prevented Hicks from presenting evidence or arguing that the elements of murder had not been proved and that he should be acquitted. Nor does the lack of such an instruction detract from the jury's job because it must still decide whether the appropriate mens rea for murder has been shown.

Hicks's reliance on *People v. Geiger* is untenable. In *People v. Geiger, supra*, 35 Cal.3d at pp. 526, 530-532, this Court held that, upon defense request, a defendant was entitled to instructions on a lesser related offense (1) when there is sufficient evidence to support such an instruction, (2) the offense was "closely related to that charged and shown by the

evidence," and (3) the defense relied on a theory that was consistent with a conviction for a lesser related offense. (*People v. Geiger, supra*, 35 Cal.3d at pp. 526, 530-532.) In reaching this conclusion, this Court noted that the prosecution did not have a legitimate interest in obtaining a conviction of the charged offense where the jury has a reasonable doubt of guilt, but returns a guilty verdict to avoid an unwarranted acquittal that would leave the defendant unpunished for actions that could constitute a lesser offense. (*Id.* at p. 519.)

However, *Geiger* was overruled by *People v. Birks* (1998) 19 Cal.4th 108, 113, 123, 130, 136, which determined that *Geiger* was "wrongly decided" and "incorrect." In *Birks*, the defendant proceeded on the theory that he had committed the lesser related offense of trespass, but not the charged offense of burglary. (*People v. Birks, supra*, 19 Cal.4th at pp. 114-115.) Despite the fact that the lesser related offense embodied the primary defense, this Court in *Birks* nonetheless held that that, "contrary to *Geiger*, a criminal defendant should not have a unilateral right to insist that the jury consider lesser related offense without the prosecutor's consent." (*People v. Birks, supra*, 19 Cal.4th at p. 136.)

Hicks argues that *Geiger* was overruled only for reasons "irrelevant to its recognition of the risks attendant on presenting the jury with an all-or-nothing choice between conviction and acquittal upon evidence that he committed some crime while not necessarily the one charged or technically included within it." (AOB 29.) This is simply not the case. *Birks* set forth a bright line rule that clearly and explicitly overrules *Geiger*. (See *People v. Foster, supra*, 50 Cal.4th at p. 1344 [*Birks* overruled *Geiger* and, therefore, court did not err in failing to instruct on lesser related offense of trespass despite "defendant's legal and factual theories concerning how his conduct may have constituted trespass"].)

D. Cases Involving the Defense of Not Guilty by Reason of Insanity Do Not Support the Requested Instruction in This Case

Contrary to Hicks' claim, precedent involving the defense of not guilty by reason of insanity does not help his argument. Hicks notes that in those cases, the jury—at a sanity phase trial—is told that the defendant will not go free if it finds that the defendant was insane when he committed his offenses. (AOB 31-35.) Such cases do not support the defense instruction; instead, the situation is more akin to a new trial.

"[T]he plea of not guilty by reason of insanity is a statutory defense that does not implicate guilt or innocence but, instead, determines 'whether the accused shall be *punished* for the *guilt* which has already been established.'" (*People v. Hernandez* (2000) 22 Cal.4th 512, 522.) When a defendant pleads both not guilty and not guilty by reason of insanity, the trial is bifurcated, with the issue of guilt tried first. (Pen. Code, § 1026, subd. (a); *People v. Elmore* (2014) 59 Cal.4th 121, 140-141.) If the defendant is found guilty, the trial proceeds to the sanity phase, where the jury determines whether the defendant was sane or insane at the time he committed the offense.[1] (Pen. Code, § 1026, subd. (a); *People v. Elmore, supra*, 59 Cal.4th at pp. 141, 144.) During the sanity phase of the trial, an instruction on the consequences of a verdict of not guilty by reason of insanity must be given if requested by the jury or the defense. (*People v. Dennis* (1985) 169 Cal.App.3d 1135, 1139-1141.) This is because a jury may not be aware that a person found not guilty by reason of insanity will

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[1] A person who enters only a plea of insanity concedes that he has committed the criminal act, and the only issue is whether he was insane at the time. (Pen. Code, § 1026, subd. (a); *People v. Elmore, supra*, 59 Cal.4th at p. 141, fn. 12.)

not immediately be freed, but will instead be confined until his sanity is restored. (*Ibid.*)

Hicks argues that these same considerations should apply to his retrial for murder. (AOB 31-35.) But, as shown, a jury considering the sanity of a defendant has already found the defendant guilty of the charged offense. (*People v. Elmore, supra*, 59 Cal.4th at p. 141.) The bifurcated nature of the sanity proceeding makes it necessary to inform the jury about the consequences of an insanity finding because it might otherwise be hesitant to make such a finding. A bifurcated sanity phase thus has little resemblance to a jury determining guilt or innocence of a charged offense.

Rather, as the Court of Appeal reasonably found (Opn. at 24-25), this case is more akin to what happens when a new trial has been granted. In that situation, the parties are placed "in the same position as if no trial had been had" and any "former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction." (Pen. Code, § 1180; see also *People v. Gonzales, supra*, 52 Cal.4th at p. 317 [noting that this Court has rejected claims that a trial court is required to inform the jury of prior proceedings in the case]; *People v. Edwards* (1991) 54 Cal.3d at 787, 845 [this Court has "never suggested that the trial court is required to inform the jury of the history of the prior proceedings, and certainly not a partial history"].) Because "the granting of a new trial has the same effect as a mistrial" (*Veitch v. Superior Court* (1979) 89 Cal.App.3d 722, 727), the same rules should apply to this case, in which a mistrial was granted after the original jury deadlocked on the murder charge. (1CT 156.)

E. If a *Batchelor*-Type Instruction Is Appropriate, It Would Only Be in Situations That Are Similar to *Batchelor*

Even if a *Batchelor*-type instruction were appropriate, it would be required in situations that mirror the one in *Batchelor*. Because the case at bar is unlike those cases, no such instruction was necessary here.

The *Batchelor* decision was based, in part, on the prosecutor's closing argument, in which he stated, "And now is the time that you have to hold this person accountable. Now is the time that you have to send the message that you drink and drive and kill someone, you're going to be held accountable. There is only one count in this case that you have to decide on. This is it. Hold him accountable for killing someone." (*People v. Batchelor, supra*, 229 Cal.App.4th at p. 1117.) Thus, the prosecutor in *Batchelor* conveyed that the defendant would go free if the jury failed to convict him of murder, and the Court of Appeal determined that an instruction were required to counter that suggestion.

The prosecutor in Hicks's case made "no such argument" and was specifically ordered by the trial court to avoid making any such argument. (Opn. at 24; see 4RT 2721, 3004.) The prosecutor's closing argument focused on the evidence showing that Hicks had committed a second degree murder. (6RT 5101-5129.) Hicks does not point to anything during the prosecutor's closing argument that conveyed the jury should convict him to hold him accountable.

After defense counsel argued that Hicks's actions and state of mind might constitute other crimes "that don't rise to the level of murder" because Hicks did not have a conscious disregard for life (6RT 5131-5154), the prosecutor noted in rebuttal argument that Hicks had testified that "he's responsible" for the death of Madeline Ruano. (6RT 5251.) The prosecutor then argued that the case involved "a second degree murder" and

responded to defense counsel's arguments on conscious disregard for life. (6RT 5252-5255.) In doing so, the prosecutor stated that Hicks made many "poor choices" and decisions the day of the accident and added, "Sometimes what needs to happen is people need to hold them personally accountable for they've done. You have the opportunity to do that in this case." (6RT 5255.) The prosecutor's statements were part of an argument that Hicks "had no regard whatsoever for the safety of any other human being on December 6, 2012," and that he "absolutely knew that it was dangerous and he did it anyway." (6RT 5256.) The prosecutor concluded that Hicks "committed second degree murder." (6RT 5258.)

The prosecutor's argument in this case is different from the one in *Batchelor*, where the prosecutor argued that there was a single charge and that the defendant needed to be held accountable for the victim's death, thereby implying the defendant would go free if the jury did not convict him. Here, it was clear that the prosecutor was merely arguing for the unremarkable proposition that in light of Hicks's own testimony, he should be held accountable for second degree murder.

Hicks contends that, during Hicks's cross-examination, the prosecutor emphasized that Hicks should be held accountable for Ruano's death. (AOB 43-44.) But, the prosecutor's two questions regarding personal accountability were part of a series of queries regarding whether Hicks had decided to drive his car while impaired by PCP, thereby making him guilty of second degree murder. (6RT 4867-4869.) Unlike *Batchelor*, the prosecutor in Hicks's case did not convey that Hicks would go free or unpunished if the jury failed to convict him of second degree murder. In light of these distinguishing factors, the Court of Appeal rightly concluded that *Batchelor* was inapplicable to Hicks's case.

Recently, the court that decided *Batchelor* reiterated the principles it announced in *Batchelor*. (*People v. Johnson* (2016) __ Cal.Rptr.3d __,

2016 WL 6135337, *2 (E063172).) In *Johnson*, a jury convicted the defendant of hit and run and gross vehicular manslaughter, but could not reach a verdict on second degree murder. (*Ibid.*) The trial court informed the jury that the defendant had previously been convicted of "'two of the three charges brought by the district attorney,'" but did not advise the second jury that the defendant had been convicted of gross vehicular manslaughter while intoxicated. (*Ibid.*) Although the prosecutor in *Johnson* never suggested the defendant would go free if he was not convicted of second degree murder, the court reversed the conviction because defense counsel was precluded in the second trial from arguing that the defendant's actions only rose to the level of negligence and not implied malice. (*Id.* at p. *4.)

Here, in contrast, the trial court told defense counsel, "And to the extent that acts may constitute other things short of implied murder, I think you are free to argue that." (4RT 2720-2721; see 6RT 4874-4875 [trial court finds that defense can argue "there may be other charges that they might have proven, but they are not charged here"].) During opening statement, defense counsel said that he would be asking the jury to decide whether the prosecution "select[ed] the right charge" "by electing to charge murder." (6RT 4809.) Defense counsel reiterated that theme during closing argument, stating, "There are probably 30 other charges I could think of and I would have nothing to say. I would stand here and say he is absolutely guilty of it. I could stand here and think of charges involving killing that don't rise to the level of murder and I would stand here and say he is absolutely guilty of it." (6RT 5133.) Thus, a *Johnson* situation did not occur here because Hicks's defense counsel was allowed to argue that

his actions fell short of second degree murder but might have constituted other crimes.[2]

F. Any Error Was Harmless Because a Different Result Is Not Reasonably Probable

Even if the trial court erred by failing to inform the jury about the gross vehicular manslaughter conviction, the error was harmless. As Hicks states (AOB 42), an error in this context is harmless if it is not reasonably probable that he would have obtained a more favorable result had the instruction been given. (*People v. Williams* (2013) 58 Cal.4th 197, 271.)

Although the prior trial ended in a hung jury on the murder charge, the jurors deadlocked 11 to 1 in favor of guilt (4RT 2424), thereby demonstrating that even when the jury was presented with both murder and gross vehicular manslaughter, the evidence supporting the murder charge was compelling. As the Court of Appeal below also concluded, the evidence of Hicks' guilt of murder in the second trial, including the evidence of implied malice, was "overwhelming." (Opn. at 26.)

Second degree murder is the unlawful killing of a human with malice aforethought. (*People v. Jimenez* (2015) 242 Cal.App.4th 1337, 1358; see *People v. Chiu* (2014) 59 Cal.4th 155, 166.) Malice can be either express or implied. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1220; *People v. Jiminez, supra*, 242 Cal.App.4th at p. 1358.) It is express when there is a deliberate intention to unlawfully take the life of another; it is implied when the death results from an intentional act, the natural consequences of that act are dangerous to human life, and the act was deliberately performed by a person who knows his conduct endangers life and acts with conscious

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[2] The *Johnson* court also compared the closing arguments of the first and second trials. (*People v. Johnson, supra*, 2016 WL 6135337 at p. *4.) In this case, the closing arguments made during the first trial were not transcribed. (4RT 2119, 2121.)

disregard for life. (*People v. Rangel, supra*, 62 Cal.4th at p. 1220; *People v. Jiminez, supra*, 242 Cal.App.4th at p. 1358; *People v. Sanchez* (2001) 86 Cal.App.4th 970, 975.) "'Implied malice is determined by examining the defendant's subjective mental state to see if he or she actually appreciate the risk of his or her actions.'" (*People v. Jiminez, supra*, 242 Cal.App.4th at p. 1358.)

There was overwhelming evidence presented at the second trial that Hicks appreciated the risk of driving under the influence. Hicks knew that PCP affected him within a minute of taking the drug and that its effects could last hours. (5RT 4296; 6RT 4847.) When he got behind the wheel to drive, he knew what could happen when a person drove while under the influence, including the possibility that someone could be killed. (5RT 4310-4312, 4819, 4827.)

The jury at the second trial also heard evidence that Hicks' prior convictions required him to attend classes that stressed the dangers of driving under the influence (5RT 4248-4256), and that Hicks signed a DMV form saying it was dangerous to human life to drive while under the influence (5RT 4262-4265). The danger of driving under the influence was made clear during one of Hicks's prior convictions for driving under the influence (5RT 4305-4306; 6RT 4864), which involved him rear-ending another car on the freeway.

The events preceding the crash further supported a finding of implied malice. Despite being pursued by deputies who had the lights and sirens of their vehicles activated, Hicks drove recklessly, dangerously, and erratically for a considerable distance, causing other drivers to take evasive actions to avoid a collision with him. (4RT 3628, 3639-3640, 3644-3645, 3647, 3657-3658, 3660-3661, 3675, 3680, 3687, 3689, 3694-3695; 5RT 4016, 4507-4508; 6RT 4510-4513.) Hicks's subjective awareness of the risk was clearly shown when he yelled, "Get out of my way" at either a nearby

motorcyclist or the deputies before he turned, which caused one deputy to leap into his vehicle to avoid being hit. (4RT 3667, 3679.) After the fatal collision, Hicks was alert and oriented, had a normal level of consciousness, and was aware of the collision. (5RT 3958-3961, 3965, 3971.) Moreover, Officer Joshua Wupperfeld testified that a person under the influence of PCP was capable of making decisions, albeit bad ones. (6RT 4541-4542, 4559-4561, 4565-4566, 4577.)

Although Hicks argues that there was evidence to show that he acted without malice, including that he was acting irrationally and could not process his knowledge of the dangers of driving under the influence (AOB 43), Hicks was alert and oriented and had a normal level of consciousness after the crash. (5RT 3958-3961, 3971.) Moreover, Wupperfeld was given a series of hypotheticals based on the evidence in the case and opined that such a person would still be capable of making decisions. (6RT 4558-4561.) Hicks also testified that he made a conscious decision to drive the car that day, even though he realized that people could be killed by someone driving under the influence of drugs or alcohol. (5RT 4304-4306, 4309-4312.) Although Hicks also claimed that he was having a bad reaction to the PCP and was merely trying to get to his son's house for help, his story was contradicted by the fact that he made no effort to call 911 or stop at any of the hospitals that were closer than his son's house. (6RT 4818-4819, 4821, 4826-4829, 4844-4846.)

Thus, there was overwhelming evidence that Hicks had a subjective awareness of the risk that he posed when he drove under the influence. (See, e.g., *People v. Jiminez, supra*, 242 Cal.App.4th at pp. 1358-1360 [ample evidence of implied malice based on stints in substance abuse treatment programs, his acknowledgment of the risks of driving under the influence, prior "brushes with the law," and a "straightforward judicial admonition" pursuant to Vehicle Code section 23593, subdivision (a)];

People v. David (1991) 230 Cal.App.3d 1109, 1114-1116 [ample evidence of implied malice because evidence showed defendant felt effects of PCP immediately, took deliberate steps of obtaining car keys, had prior convictions involving actual collisions, and drove recklessly prior to deadly crash].)

Although the evidence in the second trial was similar to the evidence in the first trial, there were seven witnesses who testified only at the second trial. These witnesses included Dr. Walid Arnaut, who testified about Hicks's level of alertness and consciousness when he was at the hospital (5RT 4216-4219); the motorcyclist who testified that Hicks yelled at him or the police, "'You guys are stupid. You guys are stupid. Get out of my way" (4RT 3667); and Officer Joshua Wupperfeld, who provided expert testimony that people under the influence of PCP were capable of making decisions. (6RT 4515-4532).

As noted previously, Hicks' case does not involve the type of prosecution closing argument found harmful in *Batchelor*, nor was there the kind of defense restriction that was evident in *Johnson*.

Finally, Hicks has not demonstrated or established that the jury in his murder retrial considered or assumed that he would be released if it failed to find him guilty of second degree murder. Therefore, Hicks's assertion of prejudice is merely speculative. (See *People v. Boyce* (2014) 59 Cal.4th 672, 716 ["'In the absence of some specific indication of prejudice arising from the record, defendant "does no more than speculate" [citation] that the absence of the instructions prejudiced him."].)

In light of the foregoing, any error in failing to instruct on the manslaughter conviction was harmless.

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's judgment be affirmed.

Dated: October 28, 2016

Respectfully submitted,

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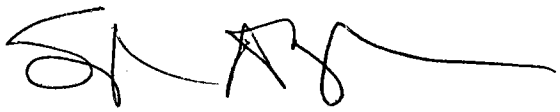
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 6,142 words.

Dated: October 28, 2016

KAMALA D. HARRIS
Attorney General of California



STEPHANIE A. MIYOSHI
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DECLARATION OF SERVICE

Case Name: ***People v. Marvin Travon Hicks***

No.: **S232218**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 28, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Nancy Gaynor
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Sherri R. Carter
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Los Angeles County Superior Court
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Los Angeles, CA 90012
For delivery to:
Hon. Kathleen Blanchard, Judge

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On October 28, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by transmitting a true copy via electronic mail as follows:

Thomas R. Trainor
Deputy District Attorney
(Courtesy Copy by Email)

Craig Edward Kleffman
Deputy District Attorney
(Courtesy Copy by Email)

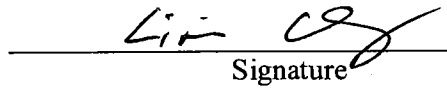
On October 28, 2016, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On October 28, 2016, I caused original and eight copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **Fexdex Tracking # 8033-9707-4596.**

On October 28, 2016, I hand-delivered a copy of the **ANSWER BRIEF ON MERITS** to the California Court of Appeal, Division Five.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 28, 2016, at Los Angeles, California.

Limin Chang
Declarant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