In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **ANDRE MERRITT,** **Defendant and Appellant.**	Case No. S231644

SUPREME COURT
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Fourth Appellate District, Division Two, Case No. E062540
San Bernardino County Superior Court, Case No. FVI1300082
The Honorable Debra Harris, Judge

REPLY BRIEF ON THE MERITS

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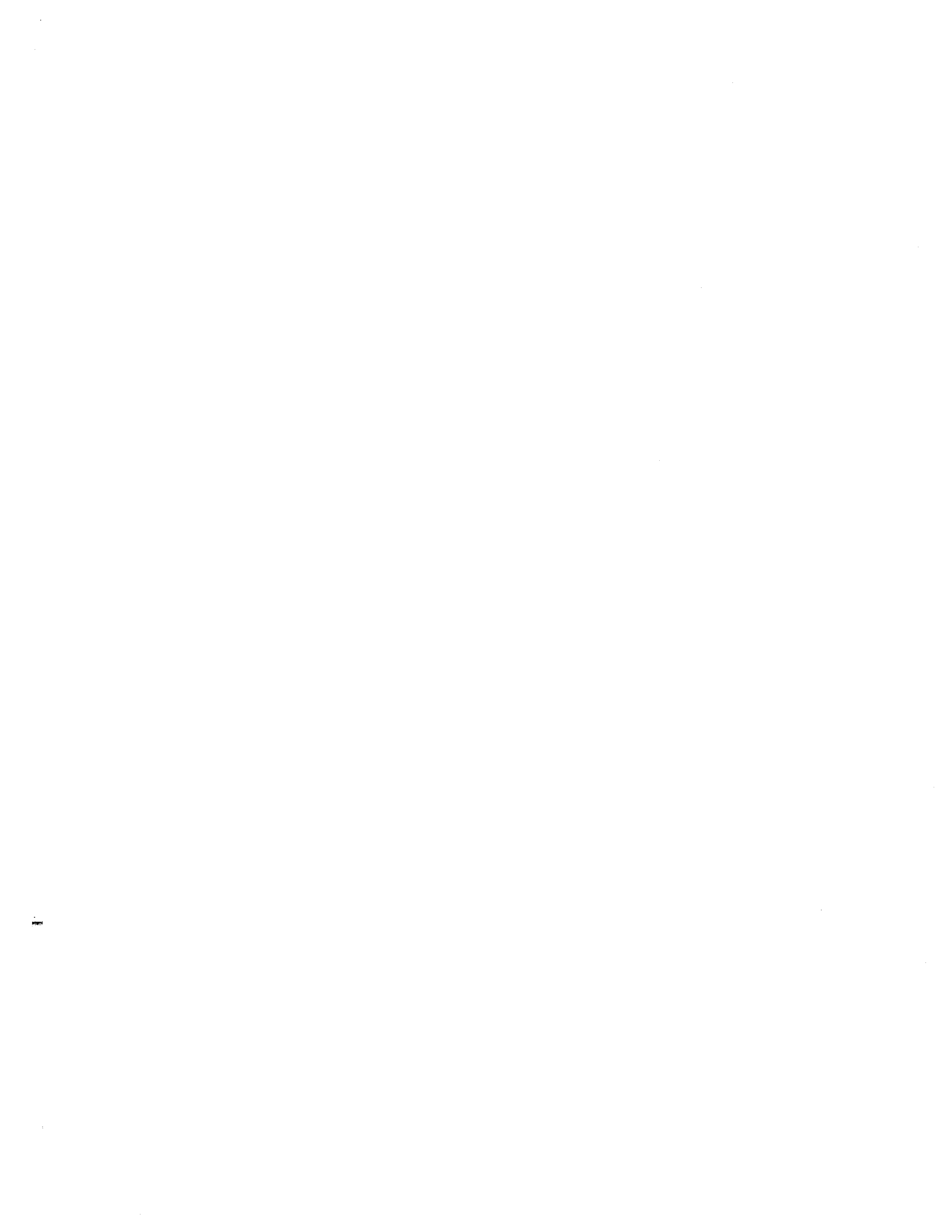

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INTRODUCTION

There is no dispute that the failure to instruct on all elements of a charged crime is error. The issue presented in this case is whether that error is subject to harmless error review. In *People v. Cummings* (1993) 4 Cal.4th 1233 (*Cummings*), this court held that the failure to instruct the jury on substantially all the elements of robbery was structural error not amenable to harmless error review. But after *Cummings*, the United States Supreme Court in *Neder v. United States* (1999) 527 U.S. 1 (*Neder*) clarified the law concerning whether harmless error analysis applies to such instructional errors of constitutional dimension and held that it does. Appellant maintains that the mere existence of an instructional error of constitutional dimension is reversible per se, but *Neder* expressly holds otherwise. Appellant also argues that *Neder* is not controlling because its holding applied solely to instructional error in omitting *one* element of the charged offense. But *Neder*'s holding did not turn on the number of elements omitted, and in *People v. Mil* (2012) 53 Cal.4th 400 (*Mil*), this court followed *Neder* and held that harmless error review applied to error in failing to instruct on two out of three elements. While the facts of *Mil* did not require the court to overrule *Cummings*, the reasoning of *Mil*, *Neder*, and other post-*Cummings* cases do not support retaining the *Cummings* rule. Appellant finally argues that *Neder* was wrongly decided, though he correctly concedes that this court is bound by United States Supreme Court decisions on federal constitutional issues.

Furthermore, both *Neder*'s and *Mil*'s reasoning promotes good public policy, because application of the rule in *Neder* and *Mil* preserves judgments obtained from fundamentally fair trials where the People prove the error was harmless beyond a reasonable doubt. Conversely, application of the rule in *Cummings* leads to arbitrary results. Appellant claims error in failing to instruct on the elements of a charged offense is structural error

because it is difficult to determine the standard that the jury applied. But *Neder* rejected this argument, and as this court reasoned in *Mil*, while establishing harmlessness may prove more difficult in the context of multiple omissions, "that is not a justification for a categorical rule forbidding an inquiry into prejudice." (*Mil, supra,* 53 Cal.4th at p. 412.) This case illustrates this point: appellant received a fundamentally fair trial and the record affirmatively shows that any error was harmless. Appellant fails to respond to respondent's argument that the error was harmless here, and he fails to dispute respondent's claim that reversal would serve no valid interest in this case.

Accordingly, this court should expressly overrule *Cummings* and hold that error in failing to instruct on any number of the elements of the charged offense is subject to harmless error review.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO INSTRUCT ON SUBSTANTIALLY ALL OF THE ELEMENTS OF THE CHARGED OFFENSE IS SUBJECT TO HARMLESS ERROR REVIEW

The Court of Appeal, in reversing appellant's two robbery convictions for failure to give CALCRIM number 1600 (setting forth the elements for robbery), relied on this court's decision in *People v. Cummings, supra,* 4 Cal.4th 1233 and held that the error was structural and not amenable to harmless error review. (*People v. Merritt* (2015) E062540, slip op. at p. 9.) But, as explained in respondent's opening brief (OBM 7-10), the United States Supreme Court in *Neder* clarified that harmless error analysis applies to instructional errors concerning the omission of an element of the offense. And subsequently, in *People v. Mil*, this court relied on *Neder* and held the failure to instruct on more than one element was subject to harmless error review. The rule in *Cummings* is no longer viable in light of these more recent opinions. The *Cummings* rule also contravenes public policy as it

requires the reversal of fundamentally fair trials where error is proven harmless beyond a reasonable doubt.

A. Contrary to Appellant's Contention, The Decision in *Neder* Controls Because Its Reasoning Shows That Error in Failing to Instruct on Any Number of Elements of the Charged Offense is Not Structural Error Requiring Automatic Reversal

Only certain very rare instructional errors are structural and reversible per se. These errors to which harmless error review does not apply "are the exception and not the rule." (*Mil*, *supra*, 53 Cal.4th at p. 410, quoting *Rose v. Clark* (1986) 478 U.S. 570, 578.) As discussed at length in respondent's opening brief (OBM 10-16), error in failing to instruct on elements of the charged offense is not structural error because it does not vitiate all of the jury's findings. The court in *Neder* held that "a jury instruction that omits an element of the offense [] differs markedly from the constitutional violations [the Supreme Court has] found to defy harmless-error review" because such error, "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder*, *supra*, 527 U.S. at pp. 8-9.) Error in failing to instruct on an element of the offense does not require *automatic* reversal because it is *possible* to determine whether the error is harmless from the record. (*Id.* at p. 12.)

Appellant argues that *Neder* is not controlling because its holding applied solely to instructional error in omitting *one* element of the charged offense. (ABOM 14-15.) But the court's holding in *Neder* is not limited to error in failing to instruct on *one* element because the holding did not turn on the number of elements omitted but rather on the nature of the error. (See *Neder*, *supra*, 527 U.S. at p. 12.) In fact, in *Mil*, this court relied on *Neder* in holding that error in omitting two out of three elements of the charged felony murder special-circumstance instruction was not structural

error.[1] (*Mil*, *supra*, 53 Cal.4th at p. 413.) This court affirmed that, "[t]he critical inquiry, in our view, is not the number of omitted elements but the nature of the issues removed from the jury's consideration." (*Ibid.*) *Neder* held that instructional error is not reversible per se because it is *possible* to determine the error's effect on the verdict. (*Neder*, *supra*, 527 U.S. at p. 12.) It is possible to determine whether error in failing to instruct on all elements of the offense is harmless, for example, by looking to the entire record and examining overlapping instructions, overlapping facts found in other verdicts, overwhelming evidence of guilt, whether the defendant conceded certain elements, whether counsel explained the elements of the offense to the jury, and whether it was impossible for the defendant to contest certain elements. (See, e.g., *id.* at p. 19 [overwhelming evidence of guilt shows harmlessness]; see also *Mil, supra,* 53 Cal.4th at p. 411 [harmless error review applies where elements were uncontested and supported by overwhelming evidence]; see also *People v. Gonzalez* (2012) 54 Cal.4th 643, 663 [overwhelming and uncontroverted evidence established the jury would have found defendant guilty absent instructional error].) Thus, such error is *subject* to harmless error review even if courts often find such error is harmful.

The error here is subject to harmless error review because it did not vitiate all the jury's findings and it is possible to determine the effect of the error on the verdict. Contrary to appellant's claim that the term "vitiate" simply means to impair the quality of the jury verdict (ABOM 15), case law

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[1] Appellant briefly argues that *Mil* is distinguishable because it addressed the omission of elements of a special circumstance allegation, not the primary charged offense. (ABOM 16.) But as this court is well aware, a defendant is entitled to the same jury finding on the elements of a special-circumstance allegation that increases his sentence as he is on the elements of the primary charged offense. (*Apprendi v. New Jersey* (2000) 530 U.S. 466.)

demonstrates that "vitiate" in this context means that the jury finding is rendered meaningless, because the nature of the error renders the error un-assessable. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; also *Neder*, *supra*, 527 U.S. at p. 12.) And here, the record demonstrates that the instructional error did not vitiate the jury's findings because appellant contested only identity at trial, and the arguments of counsel, jury instructions, jury questions, and verdicts overwhelmingly established that the jury properly considered identity and found against appellant. (OBM 14-15.)

Appellant claims the effect of the error here cannot be evaluated because it is difficult to determine whether the jury applied the correct legal definition of robbery when it was not instructed with CALCRIM number 1600. (ABOM 20.) Appellant understandably points to no authority that supports his contention, because it is well-established that harmless error review applies even where the record affirmatively established that a jury applied the *wrong* legal standard because the instruction misdescribed elements of the offense. (E.g. *People v. Wilkins* (2013) 56 Cal.4th 333, 350.) Whether the jury applied the correct legal standard in reaching its verdict is a question of whether there was error at all—not whether the error is amenable to harmless error review. And while establishing harmlessness may prove more difficult in the context of multiple elemental omissions, "that is not a justification for a categorical rule forbidding an inquiry into prejudice." (*Mil, supra,* 53 Cal.4th at p. 412.)

Appellant also contends that harmless error review is "irrelevant" if a defendant is denied his Sixth Amendment right to a jury trial. (ABOM 21-22.) This contention was wholly denied in *Neder*. The United States Supreme Court explained that harmless error review applies in cases where the jury did not render a "complete verdict" on every element of the offense, which is undeniably error in violation of the Sixth Amendment. (*Neder*, *supra*, 527 U.S. at pp. 12-13.) Even before the decision in *Neder*, it

was well-established that error in violation of the Sixth Amendment right to a jury trial does not render an error reversible per se. (E.g. *Rose v. Clark*, *supra*, 478 U.S. 570; also *Carella v. California*, *supra*, 491 U.S. 263.) Accordingly, appellant fails to show that this court should retain the *Cummings* rule simply because his Sixth Amendment right was violated. Respondent does not contest that appellant's Sixth Amendment right was violated by the instructional error. The issue here is whether in light of that violation, the error can be reviewed to assess whether it is harmless.

Finally, appellant fails to explain why the supreme court of Mississippi, in holding that failure to instruct on all elements of the charged offense is structural error, *had* to distinguish the Mississippi Constitution from the United States Constitution to avoid applying harmless error review under *Neder*. (*Harrell v. State* (2014) 134 So.3d 266, 271 ["However, [contrary to *Neder*'s application,] Mississippi has its own constitution, wherein the right to a trial by jury also is protected, and via language stronger than that found in its federal counterpart."].) This court has already specifically rejected the argument that the California Constitution affords greater protection regarding instructional errors of constitutional dimension (*Flood*, *supra*, 18 Cal.4th at p. 487), thus the reasoning in *Neder* requires this court to revisit its decision in *Cummings*.

B. Appellant's Faulty Assumption that All Elements Were Omitted Because the Trial Court Failed to Instruct the Jury with the Standard CALCRIM Illustrates Why *Cummings* Erred in Focusing on the Number of Elements Omitted

As discussed is respondent's opening brief (OBM 16-24), more recent authority has eclipsed *Cummings*'s rule that failure to instruct on "substantially all" elements of the charged offense is structural error. Appellant provides no response to respondent's assertion that *Cummings*'s approach of first looking to overlapping instructions to determine whether

an instructional error is reversible per se was specifically rejected in *Neder*. Appellant also fails to address respondent's argument that the *Cummings* rule erroneously allows harmless error review only where there is no error in the first place, since United States and California Supreme Court authority holds that the existence of constitutional error does not mandate reversal. (*Neder*, *supra*, 527 U.S. at pp. 12-13.)

Additionally, respondent's opening brief explains in detail how the "substantially all" test is unworkable and leads to arbitrary and unpredictable results. (OBM 21-24.) Appellant does not seriously grapple with this claim. Rather, he asserts that this case does not require this court to accept or reject *Cummings*'s "substantially all" rule because "the *entire* instruction was omitted" here. (ABOM 17.) However, the trial court's failure to instruct the jury with CALCRIM number 1600, the standard jury instruction, does not establish the nature of the error here. Rather, it is well established that the correctness of jury instructions is to be determined from the entire charge of the court. (E.g. *People v. Burgener* (1986) 41 Cal.3d 505, 538, disapproved of on another ground by *People v. Reyes* (1998) 19 Cal.4th 743; also *Boyd v. United States* (1926) 271 U.S. 104, 107.) As explained in respondent's opening brief, while the trial court omitted CALCRIM number 1600, four of six elements were covered by other instructions. Appellant's assumption that the jury was not instructed on any element of the charged offense simply because CALCRIM number 1600 was not read to the jury illustrates the inherent problem with the *Cummings* rule, which allows for harmless error review only where a certain vague number of elements were omitted. As discussed in respondent's opening brief (OBM 21-22), and as stated by this court in *Mil* (*Mil*, *supra*, 53 Cal.4th at pp. 412-413), determining the number of elements omitted from the instructions is difficult and subject to varying interpretation—it is not as simple as looking to whether or not the standard instruction was given.

The rule articulated in *Cummings* leads to unpredictable and irrational results. Regardless of the number of elements omitted from the instructions, error in failing to instruct on the elements of an offense should be subject to harmless error review under *Neder*'s and *Mil*'s reasoning. Though error in failing to instruct on all or "substantially all" elements of the charged offense may often be prejudicial, it is *subject* to harmless error analysis because it is possible to determine whether the error is harmless or not from the record. (See *Neder*, *supra*, at p. 12.) Further, as respondent has conceded, because the error is of constitutional dimension, it is the People's burden to establish under *Chapman v. California* (1967) 386 U.S. 18 that the error did not impact the verdict. A finding of harmlessness under these circumstances will undoubtedly be rare, but as respondent argues in great detail in the opening brief, the error in this case was harmless beyond a reasonable doubt. (OBM 26-31.) In sum, the error was harmless because (1) the jury was familiar with the elements of robbery, since both the prosecutor and defense counsel listed the elements in their closing statements; (2) appellant conceded every element of robbery at trial; (3) other instructions required the jury to find four out of six elements of robbery; (4) the jury was properly instructed on identity and found against appellant; and (5) overwhelming evidence supports the robbery convictions. Appellant fails to respond to respondent's argument that the error is harmless in this case, and he fails to refute respondent's assertion that reversal would serve no valid interest here. Appellant's failure to suggest any reason that the error was harmful in this case exemplifies the arbitrariness of *Cummings*'s "substantially all" standard for determining whether an instructional error is structural or subject to harmless error review.

C. Contrary to Appellant's Assertion, The United States Supreme Court's Reasoning in *Neder* Applies Because *Neder* is Still Good Law

Seemingly tracking Justice Scalia's dissent in *Neder*, appellant challenges the correctness of *Neder* itself. (ABOM 23-32.) He contests the public policy behind harmless error review of error involving elemental omissions, arguing that "it permits the defendant's guilt to be evaluated in the first instance by the reviewing court, rather than the jury." (ABOM 23.) But the majority in *Neder* rejected this claim and expressly held that harmless error review is proper even in the absence of a "complete verdict" on every element of the offense. (*Neder*, *supra*, 527 U.S. at pp. 12-13.) And the United States Supreme Court has continued to approve of its holding in *Neder* in subsequent cases. (E.g. *Washington v. Recuenco* (2006) 548 U.S. 212, 126 [discussing its holding in *Neder* with approval].) As appellant appropriately concedes, this court is bound by United States Supreme Court decisions on federal constitutional questions. (*Chesapeake & O. Ry. Co. v. Martin* (1931) 283 U.S. 209, 221; also *Moon v. Martin* (1921) 185 Cal. 361, 366.)

Appellant also suggests that *Neder*'s holding is no longer valid after the United States Supreme Court decided *Apprendi*. This claim also fails. The issue in *Apprendi* was whether a defendant's sentence could be enhanced beyond the statutory maximum based on a fact found by the sentencing judge, rather than the jury which determined the verdict. (*Apprendi*, *supra*, 530 U.S. at p. 469.) The Supreme Court stated that sentencing factors, like elements to a crime, implicate a defendant's due process rights because liberty is at stake. (*Id.* at pp.476–78.) The court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.)

The standard of review applicable to *Apprendi* error was not addressed until 2006 in the decision of *Washington v. Recuenco*, *supra*, 548 U.S. at page 126. The error in *Recuenco* was that the trial court imposed a firearm enhancement at sentencing based only on the jury's finding that he was armed with a "deadly weapon," which the People conceded was an error under *Blakely v. Washington* (2004) 542 U.S. 296. (*Recuenco*, *supra*, 548 U.S. at p. 215.) Like *Apprendi* error, *Blakely* error occurs when the judge enhances a sentence beyond the statutory maximum based on aggravating facts not found by a jury or admitted by the defendant. (*Blakely*, *supra*, 542 U.S. at pp. 303–304.) The People argued the *Blakely* error was harmless, but the Washington Supreme Court held this type of error was structural and reversible per se. (*Recuenco*, *supra*, 548 U.S. at p. 216.) The United States Supreme Court reversed, relying on *Neder*'s holding. (*Id.* at pp. 219-221.) The Supreme Court reiterated its holding in *Neder*, then it noted its recognition in *Apprendi* "that elements and sentencing factors must be treated the same for Sixth Amendment purposes," and thus, it held that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." (*Id.* at pp. 220-221.) The court remanded the case for a harmless error analysis. (*Id.* at pp. 221-222.)

Neder's harmless error analysis has been applied to *Apprendi* errors in every single federal appellate circuit. (See *U.S. v. Bailey* (1st Cir. 2001) 270 F.3d 83; *U.S. v. Joyner* (2nd Cir. 2002) 313 F.3d 40; *U.S. v. Vazquez* (3d Cir. 2001) 271 F.3d 93; *U.S. v. Stewart* (4th Cir. 2001) 256 F.3d 231; *U.S. v. Matthews* (5th Cir. 2002) 312 F.3d 652; *U.S. v. Zidell* (6th Cir. 2003) 323 F.3d 412; *U.S. v. Nance* (7th Cir. 2000) 236 F.3d 820; *U.S. v. Wheat* (8th Cir.2001) 278 F.3d 722; *U.S. v. Sanchez–Cervantes* (9th Cir. 2002) 282 F.3d 664; *U.S. v. Prentiss* (10th Cir. 2001) 273 F.3d 1277; *U.S.*

v. Candelario (11th Cir. 2001) 240 F.3d 1300; *U.S. v. Samuel* (D.C. Cir. 2002) 296 F.3d 1169.)

Many state appellate courts have also applied *Neder* to *Apprendi* errors. (See *Campos v. State* (Ala. Crim. App., Dec. 18, 2015, No. CR-13-1782) 2015 WL 9264157; *State v. Ring* (2003) 204 Ariz. 534; *People v. Scott* (2001) 91 Cal.App.4th 1197; *State v. Davis* (2001) 255 Conn. 782; *Galindez v. State* (Fla. 2007) 955 So.2d 517, 522; *People v. Thurow* (2003) 203 Ill.2d 352; *State v. Daniels* (2004) 278 Kan. 53, 64; *State v. Johnson* (La. Ct. App. 2013) 109 So.3d 994, 1003; *State v. Burdick* (Me. 2001) 782 A.2d 319, 328; *Adams v. State* (2007) 336 Mont. 63, 79; *State v. McDonald* (2004) 136 N.M. 417, 419; *State v. Blackwell* (2006) 361 N.C. 41, 49; *State v. Walters* (Tenn. Crim. App., Nov. 30, 2004, No. M2003-03019-CCA-R3CD) 2004 WL 2726034; *State v. Pleasant* (Wash. Ct. App. 2007) 139 Wash.App. 1091; *State v. Gordon* (2003) 262 Wis.2d 380, 401.)

Contrary to appellant's argument that *Neder*'s conclusion is no longer valid after *Apprendi*, acceptance of *Neder*—even after *Apprendi*—appears to be practically universal. Appellant's argument to the contrary fails to appreciate the distinction between identifying an error and identifying the appropriate standard of review applicable to that error. *Neder* is still good law, and as explained in respondent's opening brief, *Neder*'s reasoning is inconsistent with the rule established in *Cummings*. Accordingly, this court should expressly overrule *Cummings* and hold that error in failing to instruct on any number of the elements of the charged offense is subject to harmless error review.

CONCLUSION

The People respectfully request that this court reverse the judgment of the Court of Appeal and hold that error in failing to instruct on the elements of the charged offense is subject to harmless error review and that the error here was harmless beyond a reasonable doubt. The People also request this

court remand this matter to the Court of Appeal to address appellant's second claim that he raised in that court (OBM 5), which the Court of Appeal declined to address after it held appellant was entitled to relief based on his instructional error claim.

Dated: September 1, 2016

Respectfully submitted,

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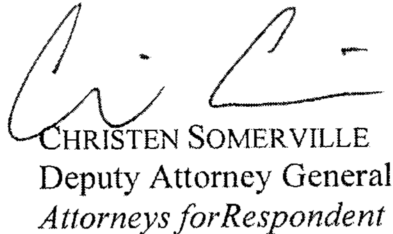

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 3,583 words.

Dated: September 1, 2016

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Merritt** No.: **S231644**

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 that same day in the ordinary course of business.

On September 2, 2016, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **September 2, 2016** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to John L. Dodd, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at jdodd@Appellate-Law.com.

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 September 2, 2016, at San Diego, California.

D. Wallace
Declarant

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