SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	**CAPITAL CASE** **S112691**
vs.	
DAVID A. WESTERFIELD,	
Defendant and Appellant.	

San Diego County Superior Court No. SCD 165805

The Hon. William D. Mudd, Judge

APPELLANT'S SUPPLEMENTAL BRIEF (MODIFYING ARGUMENT XIV)

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DEATH PENALTY

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

INTRODUCTION

As set forth in the motion requesting permission to file this supplemental opening brief, this brief contains modification of the contention presented in argument **XIV** of the opening brief.

XIV (SUPPLEMENTAL)

THE TRIAL COUR WAS OBLIGATED TO INSTRUCT IN THIS CASE ON SECOND-DEGREE MALICE MURDER AND INVOLUNTARY MANSLAUGHTER BASED ON THE ACCUSATORY-PLEADING TEST FOR LESSER-INCLUDED OFFENSES

In argument **XIV** of the opening brief, appellant argued that he was entitled to instruction on the lesser-included offenses of second-degree malice murder and involuntary manslaughter. He addressed the question, left open by this Court in *People* v. *Valdez* (2004) 32 Cal.4th 73, 114, fn. 17 as to whether first-degree felony murder had any lesser-included offenses. It was argued in detail that, ever since this Court clarified the law of murder in *People* v. *Chun* (2009) 45 Cal.4th 1172, it was now clear that all forms of murder were malice murder, and that second-degree murder and involuntary manslaughter were, under the statutory-elements test, offenses included within first-degree murder, whether felony-murder or premeditated murder. (AOB, pp. 359 *et seq.*)

But, at the time the opening brief was filed, there was available and alternative argument that did not require the elaboration needed to answer the question left open by *Valdez*. In 2006, the Court of Appeal in *People* v. *Anderson* (2006) 141 Cal.App.4th 430 held that even when a case is presented by the prosecution solely on a theory of first degree felony murder, a defendant may still be entitled to instruction on second-degree malice murder under the accusatory pleading test for lesser-included offenses if the accusatory pleading alleges that the killing had been done "with malice aforethought." (*Id.*, at pp. 444-445, accord, *People* v. *Campbell* (2015) 233 Cal.App.4th 148, 162.)

In the instant case, the information alleged that Mr. Westerfield "did unlawfully murder Danielle Van Dam, a human being, in violation of PENAL CODE SECTION 187(a)." (1 CT 174.) Although the specification of "malice aforethought" is not express in this pleading formulation, Penal Code section

187(a) provides: "Murder is the unlawful killing of a human being, or a fetus, *with malice aforethought.*" (Emphasis added.) There is no difference between a pleading that refers to the language of the statute and a pleading that simply tracks the language of the statute, as occurred in *Anderson* and *Campbell.*

Thus, it seems, the legal basis for instruction on the lesser-included offenses is the accusatory pleading test, which, per *Anderson* and *Campbell*, applies here. The evidentiary basis for the instructions at issue is the same as that set forth in the opening brief in the original argument (AOB, pp. 361-362), and nothing further need be said. Further, if the accusatory pleading test does apply here, there is no need to resort to the *Chun* analysis and the question left open in *Valdez* may remain open. There is, however, one possible problem with applicability of the accusatory pleading test that must be addressed, and which arises from the decision in *People* v. *Huynh* (2012) 212 Cal.App.4th 285.

In *Huynh*, as in *Anderson*, the prosecution sought a first-degree felony murder conviction, while defendants, in both cases, contended that instruction on second-degree malice murder as a lesser included offense was required. As seen already, the Court in *Anderson* agreed, based on the accusatory pleading test for lesser-included offenses. The Court in *Huynh* distinguished *Anderson*, but did so by characterizing the issue as a "notice" issue:

> On the notice issue, we find *Anderson* clearly distinguishable from this case. In Anderson, the prosecution tried the case on both a felony-murder theory and a theory of malice aforethought; here, the prosecution's case was based solely on the felony-murder rule. Although both the first amended information in *Anderson* and the information in Huynh's case referenced section 187, subdivision (a), only the accusatory pleading in Anderson included "malice aforethought" language. The accusatory pleading in this case did not have "malice aforethought" language. Also in *Anderson*, the defendant was not charged at any point with the predicate felony to support the felony-murder theory while Huynh was charged with the predicate felonies of oral copulation and sodomy. Additionally, the

> special circumstances attached to Huynh's murder count provided him with at least implicit notice that the prosecution was proceeding under a felony-murder theory. Finally, Huynh knew from the get-go that his case was being prosecuted only on a felony-murder theory because the prosecution made the theory of the case clear well in advance of the trial. In *Anderson*, the felony-murder theory did not become apparent until after the trial began." (*Huynh*, *id.*, at pp. 313-134.

But an examination of *Anderson* reveals that the only factor deemed important on the question of instruction on the lesser-included offense was the allegation in the accusatory pleading that the killing was done "with malice aforethought." Notice played the same role it does whenever the question of lesser-included offenses arise: because of the statutory definition of the charge, or because of the language of the accusatory pleading, lack of notice is *not* a reason *against* giving instructions on lesser-included offenses. (See *People* v. *Anderson*, *supra*, 141 Cal.App.4th at p. 445.) "California law has long provided that *even absent a request*, and over *any* party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed." (*People* v. *Birks* (1998) 19 Cal.4th 108, 112, emphasis added.) This principle of course would allow for only one *valid* objection from the parties, and that would be notice – a problem that theoretically should not arise since the lesser offenses, whether under the elements test or the pleading test, are *necessarily* included in the charged offense. In short, notice is *not* the reason *for* giving instructions on lesser-included offenses.

Huynh thus distorts the problem and ignores the actual, affirmative reasons for instruction on lesser included offenses: to safeguard the defendant's state constitutional right to have a jury determine every material issue presented by the evidence; and to safeguard the jury's function of ascertaining the truth. (*People* v *Cole* (2004) 33 Cal.4th 1158, 1215; *People* v. *Birks*, *supra*, 19 Cal.4th 108, 118-

119; *People* v. *Anderson*, *supra*, 141 Cal.App.4th 430, 442.) Thus, when *Anderson* states that a lesser-included offense can be determined by the language of the accusatory pleading "because the accusatory pleading is to provide notice to the defendant of the charges that he or she can anticipate being proved at trial" (*id.* at p. 445), the Court is merely noting the necessary parameter that limits the type of lesser offense that requires instruction. The Court is not giving the reason why instruction on this type of offense, so limited, is necessary and desirable. Again, *Huynh* fails to perceive this and its attempt to distinguish *Anderson* and turn it into a notice case is misconceived and incorrect.

One thus returns to appellant's prior assertion: there is no *substantive* difference between an accusatory pleading formulated in the verbatim language of Penal Code section 187(a) and an accusatory pleading that expressly references Penal Code section 187(a). Where, as here, the evidence allows for a theory of felony-murder or of malice-murder or of involuntary manslaughter, then instruction on these lesser crimes were required in this case to discharge Mr. Westerfield's state law right to have a jury determine every issue of material fact (*People* v. *Flood* (1998) 18 Cal.4th 470, 480-481; *People* v. *Modesto* (1963) 59 Cal.2nd 722, 730), and his Eighth Amendment right to have a lesser-included offense submitted as a non-capital option to the jury. (*Beck* v. *Alabama* (1980) 447 U.S. 625, 638.) If, however, this Court finds *Huynh* persuasive, or if this Court disagrees with *Anderson* and *Campbell*, there is, again, the argument based on *Chun* and the statutory elements test.

CONCLUSION

For the reasons stated in this brief and in argument **XIV** of the opening brief, the trial court erred in failing to instruct on second-degree murder and involuntary manslaughter, and reversal of appellant's conviction for special circumstance murder is warranted for these reasons.

Dated: December 15, 2015

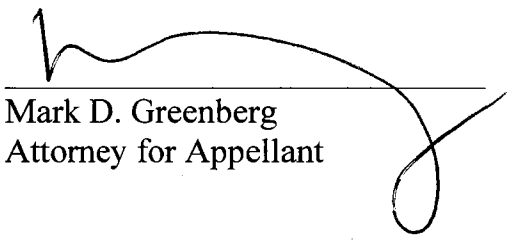
Respectfully submitted,

Mark D. Greenberg
Attorney for David Westerfield

CERTIFICATION OF WORD-COUNT

I am attorney for appellant in the above-titled action. This document has been produced by computer, and in reliance on the word-count function of the computer program used to produce this document, I hereby certify that, exclusive of the table of contents, the proof of service, and this certificate, this document contains 1414 words.

Dated: December 15, 2015



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[CCP Sec. 1013A(2)]
The undersigned certifies that he is an active member of the State Bar of California, not a party to the within action, and his business address is 484 Lake Park Avenue, No. 429, Oakland, California; that he served a copy of the following documents:

APPELLANT'S SUPPELMENTAL BRIEF (MODIFYNG ARG XIV)

by placing same in a sealed envelope, fully prepaying the postage thereon, and depositing said envelope in the United States mail at Oakland, California on December 16, 2015, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 16, 2015 at Oakland, California.

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