SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

DAVID A. WESTERFIELD, Defendant and Appellant.

CAPITAL CASE
S112691

SUPREME COURT
FILED
FEB 25 2016
Frank A. McGuire Clerk
Deputy

San Diego County Superior Court No. SCD 165805

The Hon. William D. Mudd, Judge

APPELLANT'S SUPPLEMENTAL REPLY BRIEF (MODIFYING ARGUMENT XIV)

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DEATH PENALTY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	**S112691**
vs.	
DAVID A. WESTERFIELD,	**San Diego No. SCD165805**
Defendant and Appellant.	

APPELLANT'S SUPPLEMENTAL REPLY BRIEF (ISSUE XIV)

XIV. (SUPPLEMENTAL)

THE "ACCUSATORY PLEADING" TEST APPLIES BY VIRTUE OF THE ALLEGATION OF A VIOLATION OF PENAL CODE SECTION 187(a)

By way of a supplemental brief, appellant modified argument XIV from a contention that second-degree malice murder was a lesser-included offense under the statutory-elements test for such offenses, to an argument that second-degree malice murder was a lesser-included offense under *both* the statutory-elements test *and* the accusatory-pleading test. In short, appellant has withdrawn his concession that the accusatory pleading test does not apply.

The substantive argument is simple. If an accusatory pleading that alleges that a murder was committed with "malice aforethought" raises, under the accusatory pleading test, the occasion for instruction on second-degree malice murder as a lesser-included offense, even when the prosecution's primary theory is first-degree felony-murder – as *Anderson* (*People* v. *Anderson* (2006) 141 Cal.App.4th 430, 444-445) and *Campbell* (*People* v. *Campbell* (2015) 233 Cal.App.4th 148, 162) hold --, then an accusatory pleading that alleges "a violation of section 187(a)" provides the same occasion insofar as Penal Code section 187(a) proscribes "the unlawful killing of a human being, or a fetus, *with malice aforethought*." (Emphasis added.) Appellant argued, in anticipation of respondent's brief, that an argument predicated on notice and lack of notice, such as that outlined in *People* v. *Huynh* (2012) 212 Cal.App.4th 284 (at pp. 313-314), misses the point. Respondent, for his part, simply adopts *Huynh*'s argument that there was no obligation to instruct on malice murder since the prosecution pursued only felony murder, the defense knew "from the get-go" that the case was being pursued only on that theory r, and the information in *Huynh* pled only Penal Code section 187(a) – and not the actual language included in 187(a) -- "malice aforethought."

This argument rests on an empty formalism. There is no substantive difference between alleging a violation of Penal Code section 187(a) and alleging a homicide committed "with malice aforethought." As for notice, it was pointed out in appellant's supplemental opening brief that notice does not at all affect the question of whether or not to instruct on a lesser-included offense, except to the extent that one party has been prejudicially misled by the other party. (See *Sheppard* v. *Rees* (9th Cir. 1990) 909 F.2nd 1234, 1237.) A prosecutor is not misled, however, merely because the *he* chooses to pursue one theory to the exclusion of other possible theories. Otherwise, notice is not, in this context, an issue; the ascertainment of truth is. This has already been well articulated by this Court:

> " 'Our courts are not gambling halls but forums for the discovery of truth.' [Citation.] Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function. Consequently, neither the prosecution nor the defense should be allowed, based on their trial strategy, to preclude the jury from considering guilt of a lesser offense included in the crime charged. To permit this would force the jury to make an 'all or nothing' choice between conviction of the crime charged or complete acquittal, thereby denying the jury the opportunity to decide whether the defendant is guilty of a lesser included offense established by the evidence." (*People* v. *Barton* (1995) 12 Cal.4th 186, 196.)

Moreover, the omission of an option for a lesser-included offense in a capital offense is unconstitutional because it impairs the reliability of the fact-finding process. . (*Beck* v. *Alabama* (1980) 447 U.S. 625, 646-647.)

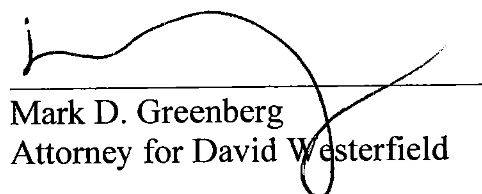
Huynh and respondent are incorrect. Second-degree malice murder was, in this case, a lesser-included offense under the elements test, as outlined in appellant's opening brief, and under the accusatory pleading test, as outlined in appellant's supplemental opening brief and in this brief. Failure to instruct on this lesser-included offense was both state-law error and a violation of the Eighth Amendment. If the judgment is not reversed for other reasons in this case, it must be reversed for the failure to instruct on the lesser included offense of second-degree malice murder.

CONCLUSION

For the reasons stated in this brief and in appellant's opening, reply, and supplemental opening briefs, appellant's conviction for first-degree murder must be reversed.

Dated: February 24, 2016

Respectfully submitted,

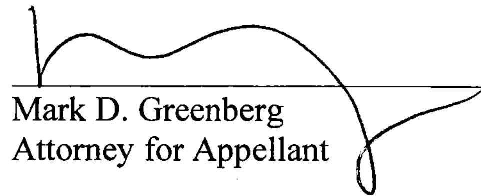


Mark D. Greenberg
Attorney for David Westerfield

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 827 words.

Dated: February 24, 2016



Mark D. Greenberg
Attorney for Appellant

[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 REPLY 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 February 24, 2016, 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 February 24, 2016 at Oakland, California.

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