IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

DANIEL SANCHEZ COVARRUBIAS,

Defendant and Appellant.

_____/

Case No. S075136
(Monterey Superior Court
No. SC942212(C))

AUTOMATIC APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF MONTEREY

HONORABLE ROBERT MOODY, JUDGE, PRESIDING

APPELLANT'S PRE-ARGUMENT SUPPLEMENTAL BRIEF

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Under Appointment by the Supreme
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TABLE OF AUTHORITIES

Pursuant to the California Rules of Court, Rules 8.520(d) and 8.630(d), appellant Daniel Sanchez Covarrubias submits the following supplemental briefing to address new authorities which were not available when appellant's reply brief was filed. These new authorities relate to three questions raised by appellant's opening Claim 10 (AOB, pp, 136-179; RB 58-64; ARB 21-37.)

I.
IS LARCENOUS INTENT AN ELEMENT OF ROBBERY?

In his opening brief appellant contended that an essential element of robbery is "a specific intent to steal, i.e., to permanently deprive an owner of his property [citations]." (See e.g., *People v. Ford* (1964) 60 Cal.2d 772, 792-793 [judge must go beyond the literal language of PC 211 to include specific intent to steal when defining robbery by giving former CALJIC No. 72-B "even without a request therefore by defendant"].) Former CALJIC No. 72-B provided, inter alia, as follows:

> ...**[I]n the crime of robbery, a necessary element is the existence in the mind of the perpetrator of the specific intent to permanently deprive an owner of his property; and, unless such intent so exists, that crime is not committed.**" [Emphasis added] (*People v. Spencer* (1963) 60 Cal.2d 64, 87.)

Appellate decisions since completion of the briefing in the present case confirm that *Spencer*, *Ford*, and former CALJIC No. 72-B correctly defined the mens rea of robbery:

— *People v. Williams* (2013) 57 Cal.4th 776, 786-787 — **"Because California's robbery statute (§ 211) uses the common law's phrase "felonious taking," and because at common law "felonious taking" was synonymous with larceny, we conclude that larceny is a necessary element of robbery."**

— *People v. Anderson* (2011) 51 Cal.4th 989, 1002 [Justice Kennard asserts that "**[r]obbery includes the mental element necessary to prove theft, the specific intent to permanently deprive the owner of the property**" and then observes: "**No one disputes this here.**"].)

— *People v. Bacon* (2010) 50 Cal.4th 1082, 1117 ["**Theft and robbery have the same felonious taking element, which is the intent to steal, or to feloniously deprive the owner permanently of his or her property.**"]

— *People v. Chun* (2009) 45 Cal.4th 1172, 1183-1184 [**the intent-to-permanently-deprive requirement, although nonstatutory in the limited sense that no California statute uses those words, is based on statute.**]

— *People v. Aguilera* (2016) 244 Cal.App.4th 489, 502 ["Here, the **jury was properly instructed pursuant to CALCRIM No. 1600 that the requisite intent for robbery existed if the defendant intended 'to deprive the owner of [the property] permanently....'** "]

II.
COULD A RATIONAL JURY HAVE FOUND THAT APPELLANT DID NOT ACT WITH LARCENOUS INTENT?

Respondent contends that any error in removing the intent to permanently deprive issue from the jury was harmless because there was "substantial evidence," that appellant, planned to rob and kill. (RB 64.) Decisions since completion of the briefing have expressly rejected substantial evidence as the standard of prejudice for the omission of an essential element of the charge.

Instead the reviewing court must determine whether or not "the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. [Citations]." (*People v. Mil* (2012) 53 Cal.4th 400, 417.)

"This is the converse of the substantial evidence test. If the record shows some evidentiary basis for a finding in the defendant's favor on the omitted element, the People have not met their burden and [the reviewing court] must reverse. [Citation to *Mil* at pp. 417-19]." (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1166; see also, *People v. Boyce* (2014) 59 Cal. 4th 672, 729 ["on this record we cannot conclude with confidence how the jury would have

resolved [the omitted issue] had it been presented to them."]; *People v. Bailey* (2012) 54 Cal. 4th 740, 754 [record contained evidence that could have lead a rational jury to find the omitted element lacking].)

In other words, if the omitted element is a "**live issue**" the reviewing court is not in a position to conclude with confidence how the jurors would have resolved that issue had it been presented to them. (*People v. Pearson* (2012) 53 Cal. 4th 306, 323-324.)

In the present case the question of whether appellant acted with larcenous intent was a "**live issue.**" The prosecution relied on plea bargained accomplice testimony to allege that appellant knowingly joined a plot to steal from and murder an entire family. The defense challenged this testimony by exposing its inconsistencies and the accomplice's willingness to tell outright lies in order to secure his extremely favorable plea bargain. (See AOB, pp. 41-44.) And, the special verdicts demonstrated that the jury substantially discredited the accomplice testimony by unanimously rejecting the knife-use allegation and failing to return verdicts on the allegations of use-of-a-firearm and conspiracy-to-commit-murder. (See AOB, pp 10-11.)

Furthermore, even without considering the accomplice's lack of credibility appellant's recorded statement that he did not have larcenous intent and intended only to help recover property belonging to his cousin, Antonio, constituted substantial evidence that he did not act with larcenous intent. "'The testimony of a single witness, including the defendant, can constitute substantial evidence....'[Citations]" (*People v. Gonzalez* (2016) ____Cal. App. ___, 200 Cal.Rptr.3d 607, slip opn p. 45.)

The jury also could have doubted that appellant formed larcenous intent based on evidence such as appellant's intoxication, the items of value

which were not taken from the crime scene, and the evidence of appellant's non-violent nature which was inconsistent with the prosecution's theory that appellant knowingly joined a plot to rob and kill an entire family.

In sum, it cannot be determined with confidence how the jurors would have resolved the "live issue" of larcenous intent had that issue been before them.

III.
DOES THE RECORD DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE JURORS RELIED ON A THEORY OTHER THAN ROBBERY?

A. The Record Must Demonstrate Juror Reliance On A Valid Theory

"When one of the theories presented to a jury is legally inadequate, such as a theory which fails to come within the statutory definition of the crime the jury cannot reasonably be expected to divine its legal inadequacy. **The jury may render a verdict on the basis of the legally invalid theory without realizing that, as a matter of law, its factual findings are insufficient to constitute the charged crime.** In such circumstances, reversal generally is required unless it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." [emphasis added]. (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1456 [citing and quoting *People v Perez* (2005) 35 Cal.4th 1219, 1233; see also *People v. McDonald* (2015) 238 Cal.App.4th 16, 27["reversal is required unless the record demonstrates, beyond a reasonable doubt, that the verdict was actually based on a valid ground. [Citations]"]; see also (*People v. Whitmer* (2014) 230 Cal.App.4th 906, 920-921; *People v. Chun, supra,* 45 Cal.4th at 1201.)

In the present case, the prosecution expressly relied on three theories of first degree murder: (1) premeditation and deliberation, (2) burglary felony murder, and (3) robbery felony murder. (See e.g., 52 RT 10226)[1] However, the record does not demonstrate beyond a reasonable doubt that all jurors reached their verdicts without relying on robbery.

B. Premeditated and Deliberate Murder

The record does not demonstrate that the jurors unanimously relied on a valid theory of premeditation and deliberation to convict appellant of first degree murder. None of the verdicts included an express or implied finding that appellant personally premeditated and deliberated or directly aided and abetted a premeditated murder.

Moreover, the jurors' problems with the credibility of the accomplice testimony and their inability to return a conspiracy to commit murder verdict are logically inconsistent with the supposition that all the jurors found beyond a reasonable doubt that appellant acted with a deliberate and premeditated intent to kill.

Nor is premeditated and deliberate murder based on the natural and probable consequences doctrine a valid alternative theory of first degree murder.[2] First, the target offense of robbery was not valid due to the omission of larcenous intent from the definition of robbery and the burglary was also an invalid target offense because the jurors could have

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[1] The felony murder theories were based on direct commission of the felony, aiding and abetting the felony, and conspiracy to commit the felony. (6 CT 1278-80.)

[2] The judge instructed on this theory of murder (6 CT 1256; 1264 [conspiracy]; 53 RT 10435-36; 10440 [conspiracy]) and the prosecutor relied on it during argument to the jury. (52 RT 10221, 10225 [conspiracy]; 10234-35.)

relied on intent to commit robbery as the predicate for finding burglary. (See Section C, below.) Second, first degree murder predicated on the natural and probable consequences doctrine is precluded by this Court's decision in *People v. Chiu* (2014) 59 Cal. 4th 155. This is so regardless of whether the natural and probable consequences liability is predicated on conspiracy or aider and abettor liability.[3] Affirmance of appellant's first degree murder convictions based on the natural and probable consequences doctrine would violate the state (Art. I, sections 7 and 15) and federal (6th and 14th Amends.) constitutional rights to due process and public trial by jury. The rights to due process and to a public trial before an impartial jury "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged . . . .' [Citation.]" (*Apprendi v. New Jersey* (2000) 530 U.S. 466; 476-77; *People v. Figueroa* (1986) 41 Cal.3d 714.)

C. Burglary Felony Murder

Although the jury found conspiracy to commit burglary and the burglary felony murder special circumstance, the record does not demonstrate that the jury relied on a non-robbery based theory of burglary. The instructions gave the jury the option of finding burglary based on intent to commit robbery. (6 CT 1311-12; 53 RT 10466:1-2,15-16; 56 RT 11004:12-13, 27-28.) Thus, it cannot be determined if the burglary-based

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[3] "...[W]hen the California Supreme Court in *Chiu* was explaining the natural and probable consequences doctrine, it understood its applicability to both aiding and abetting and conspiracy theories." (*People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356.) Thus, it is error to allow the jury to reach a verdict of first degree murder by finding "the defendant conspired to commit the target crime and first degree murder was a natural and probable consequence of the target crime." (*Id.* at p. 1357; see also *In re Lopez* (2016) 246 Cal.App.4th 350, 357.)

verdicts were founded on a legally valid theory. (See *People v. Whitmer*, *supra*, 230 Cal.App.4th at 920-921.

Moreover, respondent has conceded that first degree burglary felony murder was an invalid theory under the *Ireland* doctrine. (Respondents Brief at p. 70.)

IV.
CONCLUSION

The disposition of appellant's Claim 10 depends on the answers to three straight forward questions: (1) Is larcenous intent an element of robbery? (2) Could a rational jury have found that appellant did not act with larcenous intent? (3) Did all jurors rely on a valid theory to reach their verdict? The answers to these questions demonstrate that appellant Daniel Sanchez Covarrubias is to be executed for crimes the jury never found he committed.

Dated: May ___, 2016

_____

THOMAS LUNDY
Attorney for Appellant
DANIEL SANCHEZ COVARRUBIAS

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.630(b)(2), I certify that the attached Appellant's Reply Brief uses 13 point Times New Roman font and contains 2025 words in *WordPerfect* computerized format.

Dated: May 16, 2016

Thomas Lundy
Attorney for Appellant
Daniel Sanchez Covarrubias

PROOF OF SERVICE

I DECLARE THAT:

I am a resident of Sonoma County and employed in the County of Sonoma, State of California. I am over the age of eighteen and not a party to the within action. My business address is: 2777 Yulupa Avenue, PMB 179, Santa Rosa, CA 95405. On May 16, 2016, I served an **APPELLANT'S PRE-ARGUMENT SUPPLEMENTAL BRIEF** in People v. Covarrubias **Case No. S075136** on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with first class postage thereon, fully prepaid, in the United States mail, at Santa Rosa, California, addressed as follows:

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct and executed on May 16, 2016, at Santa Rosa, California.

_____
Thomas Lundy