Supreme Court Case No. S189856

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. PERLA ISABEL GONZALEZ, Defendant-Appellant.	Court of Appeal No. D055698 Superior Court No. FVA024527

APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY
HONORABLE MICHAEL KNISH, JUDGE

APPELLANT'S OPENING BRIEF ON THE MERITS

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APPELLANT'S OPENING BRIEF ON THE MERITS

QUESTIONS PRESENTED

1. Was the evidence sufficient to convict defendant Perla Gonzalez of first degree provocative act murder?

2. Was the instructional error in failing to tell jurors that Gonzalez had to personally premeditate the attempted murder in order to be guilty of first degree provocative act murder harmless beyond a reasonable doubt?

INTRODUCTION

Roberto Canas shot and killed Fernando Morales, Perla Gonzalez's boyfriend, during a confrontation between Morales and Canas. Morales assaulted

Canas, stabbing him with a knife. Canas got the upper hand in the fight and Gonzalez retrieved a gun and gave it to Morales, who shot Canas in a struggle for the gun. Canas took the gun from Morales and shot and killed him. Perla Gonzalez[1] was tried and convicted of the attempted murder of Canas and the first degree murder of Morales.

Perla was convicted of murder based on a provocative act theory. Given the jury's finding on the weapon use enhancement, the jury necessarily based its verdict on her vicarious liability for the acts of her accomplice, Fernando Morales. But because Morales could not himself have been guilty of his own murder, Morales' provocative acts cannot be used to convict Perla of murder. (*People v. Antick* (1975) 15 Cal.3d 79, 91-92, (*Antick*) disapproved on other grounds in *People v. McCoy* (2001) 25 Cal.4th 1111.) Under *Antick*, Perla cannot be guilty of vicariously aiding in the killing of her decedent accomplice, Morales.

Even assuming Perla could be convicted based on her aiding and abetting the decedent accomplice, she did not engage in a life-threatening provocative act sufficient to sustain the murder conviction. Perla only retrieved a gun and gave it to Morales; this act was insufficient to provoke a lethal response in Canas.

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[1] For ease of reference Perla Gonzalez will be referred to by her first name to distinguish her from her brothers, Ricardo and Jorge.

Accordingly, the murder conviction under the provocative act doctrine is not supported by sufficient evidence.

Assuming the evidence is sufficient to sustain the murder conviction, the trial court prejudicially erred in instructing the jury that they could find Perla premeditated the murder based on Morales' intent. This Court held in *People v. Concha* (2009) 47 Cal.4th 653 (*Concha I*),[2] that first degree murder liability is available for provocative act murder, but only if a properly instructed jury finds the defendant *personally* acted wilfully, deliberately, and with premeditation. Here, the trial court erroneously instructed the jury they could find that Perla premeditated and deliberated the murder if they found that Morales *or* Perla premeditated the murder.

A majority of the Court of Appeal held the error was harmless because there was evidence from which "a rational jury could conclude that Perla *personally* premeditated and deliberated." [Emphasis in original.] (Slip Opn., p. 32.) This does not comport with the standard in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), requiring the prosecution to prove beyond a reasonable doubt that

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[2] This Court in *Concha I* remanded the case to the Court of Appeal to determine whether the instructional error was harmless beyond a reasonable doubt. (*Id.* at p. 667) In *People v. Concha* (2010) 182 Cal.App.4th 1072 (*Concha II*), the Court of Appeal concluded the error was harmless.

the error did not contribute to the verdict. It is also not consistent with the standard in *Neder v. United States* (1999) 527 U.S. 1, 17, which requires the reviewing court to conclude "beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error."

Perla contested her intent, including her intent to premeditate and deliberate murder; her intent was the main issue in dispute. Further, the evidence that she planned to murder Canas cannot be characterized as "overwhelming." On the other hand, evidence that Morales premeditated the murder was very strong. This disparity in the strength of the evidence likely caused the jury to apply the erroneous instruction to find the allegation true based on Morales', not Perla's, intent.

In any event, in this case, there is no need to speculate about whether the jury considered and applied the erroneous instruction because the deliberating jury asked the court for guidance on second degree murder and the court referred them to the erroneous instruction. Given the context in which the instructional error occurred in this case, the error cannot be deemed harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Petitioner and appellant Perla Isabel Gonzalez was charged in an amended information in count 1 with premeditated attempted murder of Roberto Canas (Penal Code[3] §§ 664/187, subd. (a)) and in count 2 with first degree murder of Fernando Morales (§ 187, subd. (a)). Count 1 alleged Perla personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c). (1 CT[4] 224-225.) Perla entered not guilty pleas as to all counts, denied the arming allegation, and her case went to a jury trial. (1 CT 251.) The trial court denied Perla's section 1118 motion to dismiss. (2 CT 315.) At the close of the defense case, Perla renewed her section 1118 motion; the court denied it. (2 CT 320.)

The jury found Perla guilty of deliberate and premeditated attempted murder and first degree murder, but did not find that she personally and intentionally discharged a firearm. Instead, the jury found Perla personally used a firearm (§ 12022.53, subd. (b)) in the attempted murder. (2 CT 407-412.)

The court imposed 25 years to life on count 2 (§ 187, subd. (a)) and life with parole on count 1 (§§ 664/187, subd. (a)) plus 10 years for the firearm

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[3] All statutory references are to the Penal Code unless otherwise stated.

[4] "CT" refers to the Clerk's Transcript.

enhancement (§ 12022.53, subd. (b)) concurrent, for a total state prison term of 25 years to life. (2 CT 444-445.)

Perla appealed her convictions. (2 CT 448.) On appeal, Perla raised several issues, including *inter alia,* that the evidence was insufficient to sustain the murder conviction; that the trial court erred in failing to instruct the jury that they could not find Perla guilty of murder based on the provocative acts of the decedent accomplice; and that the trial court prejudicially erred by instructing the jury they could find Perla premeditated the murder based on Morales' mental state.

In an opinion issued on December 9, 2010, a majority of the Court of Appeal rejected Perla's arguments and affirmed her convictions. The Court of Appeal concluded that Perla's aiding and abetting Morales was sufficiently provocative to support the murder conviction, and that Perla proximately caused Morales' death by going to the scene with a loaded gun and providing it to Morales. (Slip Opn., pp. 15-17.)

A majority of the appellate court concluded the trial court erred by instructing the jury it could find Perla guilty of premeditated murder based on Morales' mental state, but held the error was harmless beyond a reasonable doubt. (Slip Opn. pp. 32-35.) Justice Aaron dissented from this portion of the opinion. Justice Aaron found the instructional error was not harmless because evidence of

Morales' culpable mental state was stronger than Perla's, increasing the likelihood that this jury relied on Morales' mental state to convict Perla of first degree murder. Justice Aaron also found it critical that the deliberating jury *specifically* requested an instruction on second degree murder, and the court supplied the erroneous instruction which "grossly misstated the law regarding a key distinction between first and second degree murder." (Slip Opn., J. Aaron, conc. & dis., pp. 1-5.)

This Court granted review on the two questions presented above.

STATEMENT OF FACTS

THE PROSECUTION CASE

The Parties and the Events Before the Shooting.

Roberto Canas was separated from his wife, Joan Curiel. Canas and Curiel had a three year old daughter, Jolie. Curiel lived with Perla Gonzalez's brother, Ricardo[5]. (2 RT[6] 228-229.) Canas was jealous of Ricardo and the two had several confrontations before the shooting that resulted in Fernando Morales' homicide. Morales was Perla's boyfriend. (5 RT 1011-1017.)

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[5] Ricardo and Jorge, Perla's brothers, will be referred to by their first names for ease of reference.

[6] "RT" refers to the Reporter's Transcript.

The night before the shooting, Canas called Ricardo and told him that he had sex with Curiel. Curiel argued with Ricardo and left. (5 RT 916-918.) As Curiel was leaving, Canas drove up. Ricardo was also leaving. (6 RT 1060-1062.) Canas blocked Ricardo's car then followed Ricardo in his vehicle. (6 RT 1063.) He tried to run Ricardo off the road. (6 RT 1065-1066.)

Curiel went to a car wash and stayed there for 15 minutes before heading home. (6 RT 1066-1067.) When she returned, Ricardo, his sister Perla, Ricardo's mother, his brother Jorge, and Morales were at the apartment. (6 RT 1067.) Perla told Curiel that if anything happened to Ricardo, they were going to "kick [Canas'] ass." (6 RT 1068.) Jorge testified that Morales had a Beebe gun. (4 RT 582; 644-645.)

Canas called and told them to go to the corner. Jorge, Morales and Perla went to the corner but Canas never showed up. (4 RT 578-582, 592-593.)

The Shooting.

Jorge Gonzalez

Jorge testified that around 10:00 the next morning, Perla picked up Jorge and told him they were going to beat up Canas, who was going to the corner of Linden and Wilson Streets to meet Curiel's mother, Rosalba Osguera, and pick up his daughter, Jolie. Perla and Jorge picked up Morales; Jorge brought a baseball

bat and told Perla he would use the bat to break Canas' car windows. (4 RT 601-602.) Jorge told Morales that he could jump into the fight if Canas got the best of him. Perla was in the car during this conversation. (4 RT 608.) Jorge saw a rifle in the trunk of the car. (4 RT 609-619.)

Perla, Morales and Jorge went to the corner of Linden and Wilson Streets where Canas was going to pick up Jolie. (4 RT 612-614.) They waited there; their car would not start. They got out of the car and Perla opened the hood. Jorge ran back to Curiel's house to get his brother Ricardo to jumpstart the car. (4 RT 619-621.) As he walked to the house, he saw Rosalba Osguera turning the corner of Wilson onto Linden Street with Canas' daughter Jolie and Curiel's other daughter Raydeen. (4 RT 619-620.)

Roberto Canas

Roberto Canas testified he went to pick up his daughter on the corner of Linden and Wilson Streets. He saw Osguera, his daughter Jolie, and Curiel's daughter and son, Raydeen and Kevin, standing on the corner. (2 RT 242-243.) Canas saw Perla and Morales standing by a parked car with the hood up. (2 RT 246-248.) Canas had not met Perla or Morales. (2 RT 249-250.)

Osguera looked edgy and told Canas to leave. (2 RT 250-251.) Morales approached Canas and said, "Hey, puto, I hear you got a problem." Osguera

moved out of the way and Morales began throwing punches. (2 RT 253-254.) Osguera got in the car with Canas' daughter and took off. (2 RT 254-255.) Canas punched Morales in the face. (2 RT 255-256.) Perla paced back and forth by the car. (2 RT 257.)

Morales pulled out a three to four inch knife and lunged at Canas, cutting his left cheek. (2 RT 261.) Canas backed up but Morales continued to come at him so Canas grabbed Morales' legs, lifted him and threw him on the ground. (2 RT 262-263.) Morales got up and ran to the back of the car. (2 RT 263.)

Canas saw Perla run to the passenger side of the car with a rifle. Perla pulled the gun's hammer back and handed it to Morales. (2 RT 266-269.) Perla had the rifle for only a couple seconds. (2 RT 272.)

Canas ran to Morales and struggled with him for the rifle. (2 RT 272.) Canas' hand slipped and he heard multiple shots. He got shot in his hand between his thumb and forefinger. As he continued to struggle, he heard two more shots. Canas got control of the rifle. Morales stood up and ran behind Canas to the sidewalk. Canas thought Morales was going to get another weapon. (2 RT 273-274.)

Perla ran north on the sidewalk. Canas believed Perla was going to try to get someone or something to hurt him. Canas shot Morales; he fell face first on

the sidewalk. (2 RT 275-276.) Canas fired between three and five shots until there were no more bullets in the rifle. (2 RT 323.) Canas shot Morales as he ran away. (2 RT 327-328.)

Curiel drove up in a blue Volkswagen, took off, then returned a minute later with Ricardo, who was driving a brown Chrysler behind her. (2 RT 279-281.) Perla dragged Morales into the Volkswagen and they drove him to the hospital. (2 RT 284-285; 4 RT 627-631.)

Canas was shot in the right bicep, the thigh and between the thumb and forefinger on his left hand. (2 RT 287-289.) The police arrived and he was transported to the hospital. (2 RT 298-299.)

Raydeen

Raydeen testified that Osguera and Jolie went to the corner to meet with Canas and drop off Jolie. They were going to tell Canas not to come because Perla and Morales were there. (3 RT 414-417.)

Osguera put Jolie in Canas' car. (3 RT 426-427.) Canas told Osguera to get in the car and leave. (3 RT 428.) Canas argued with Morales in Spanish. (3 RT 429-430.) They started fighting but she did not know who threw the first punch. (3 RT 429-430.) Although she told the police that Morales first had the knife, she testified at trial she did not know who first had the knife. (3 RT 429-

431.)

Raydeen testified Perla took the gun out of the car, but Raydeen turned around and did not see what she did with the gun. (3 RT 447.) She saw Morales and Canas fighting over the gun. (3 RT 435.) Raydeen heard the gun go off once when they were fighting and again when Morales fell. (3 RT 440.)

Rosalba Osguera

Rosalba Osguera testified she took Jolie to meet Canas. (4 RT 707-710.) When she got there, Perla told her to leave. (4 RT 714.) Canas pulled up and Morales said something to him. (4 RT 718-719.) She put Jolie in the car and saw Perla go to her car and take out a stick.[7] (4 RT 719-720.) As she left, she looked in the rearview mirror and saw Perla walking toward Curiel's house. (4 RT 726-727.)

The Crime Scene Investigation.

An officer testified that duct tape covered part of the license plate on Perla's car. (6 RT 1165-1166.) A roll of duct tape and a baseball bat were recovered from the car. (4 RT 789.) A knife and eight casings were found at the scene. (4

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7 Osguera testified she saw Perla raise the "stick" and heard gunshots. (4 RT 720.) The jury, however, found that Perla did not intentionally discharge the firearm. (2 CT 412.)

RT 766-767, 769-775, 785-788.) Two groups of casings were relatively close to one another. No casings were found near the car. (4 RT 807.)

A firearm expert testified that the semi-automatic rifle holds 14 cartridges in the magazine and fires every time the trigger is pulled. (5 RT 962-963.)

The Autopsy.

The medical examiner testified that Morales sustained four gunshot wounds. An entrance wound to the chest led the examiner to believe that Morales was positioned sideways when he sustained this wound. (4 RT 547-548.) Morales could have been standing or on the ground when he sustained this wound. (4 RT 550.)

A second entrance wound was on Morales' lower back with the bullet exiting through the abdomen. (4 RT 551-552.) A third entrance wound was to the right of the midline of the back. (4 RT 554.) The bullet's trajectory is angled upward consistent with the shooter standing over Morales while he was lying face down. (4 RT 570-571.) The gunshots were fired from a distance greater than two feet. (4 RT 546, 552, 556.)

Morales sustained several abrasions consistent with being in a physical fight and a superficial slicing injury to his lower leg consistent with a knife cut. (4 RT 562-563.)

THE DEFENSE CASE

Marlene Morales, Fernando Morales' sister, went to the crime scene four to five days after the shooting and saw a ten inch serrated knife on the sidewalk. (7 RT 1437-1441.) She kicked it into the grass because her brother was with her and she did not want him to suffer anymore. (7 RT 1442-1444.) She saw a dry red substance on the knife. (7 RT 1445-1446.) She did not tell Detective Mills about the knife when she was interviewed eight days after the shooting. (7 RT 1452.)

ARGUMENT

I.

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN PERLA'S CONVICTION FOR THE MURDER OF MORALES

A. Introduction.

Robert Canas killed Fernando Morales. The prosecution tried the murder charge on only one theory, provocative act murder. (2 CT 363-371, 377-378.)

Perla was convicted of murder based on her vicarious liability for the acts of her accomplice, Fernando Morales. But because Morales could not himself have been guilty of his own murder, Morales' provocative acts cannot be used to convict Perla of murder. (*People v. Antick* (1975) 15 Cal.3d 79, 91-92, (*Antick*) disapproved on other grounds in *People v. McCoy* (2001) 25 Cal.4th 1111.) Under *Antick*, Perla cannot be guilty of vicariously aiding in the killing of her decedent accomplice, Morales.

Even assuming Perla could be convicted based on her aiding and abetting the decedent accomplice, she did not engage in a provocative act sufficient to sustain the murder conviction. Perla's retrieval of the shotgun was not a substantial factor causing Morales' death. Perla did not initiate the attack on Canas; Morales did. Perla only retrieved the gun and cocked it; this act was

insufficient to provoke a lethal response in Canas and was not a cause of Morales' death. Accordingly, her murder conviction under the provocative act doctrine is not supported by sufficient evidence.

B. Standard of Review.

The Due Process Clause of the Fourteenth Amendment is violated when the evidence is insufficient to sustain a finding of guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317.) To uphold the provocative act murder conviction here, this Court must "review the whole record in a light most favorable to the judgment to determine whether it contains substantial evidence . . . from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

C. The Provocative Act Murder Doctrine.

To prove a murder other than felony murder, the prosecution must establish the killing was done with malice aforethought. (§ 187, subd. (a).) Malice can be express or implied. (§ 188.) Provocative act murder is a form of implied malice murder. The doctrine is used to confer murder liability on a defendant whose accomplice is killed by a victim or a police officer because of the defendant's provocative act, an act that involves a high degree of probability that it will result in death. (*People v. Washington* (1965) 62 Cal.2d 777, 782; *People v. Gilbert*

(1965) 63 Cal.2d 690, 704 (*Gilbert*), reversed on other grounds in *Gilbert v. California* (1967) 388 U.S. 263.)

In a prosecution for provocative act murder, the state must prove beyond a reasonable doubt the following two elements: (1) the defendant or his non-decedent accomplice must intentionally commit an act that involves a high degree of probability that the act will result in death; and (2) the conduct of the defendant or his non-decedent accomplice must be sufficiently provocative of a lethal response by a third party to support a finding of malice. (*People v. Caldwell* (1984) 36 Cal.3d 210, 216-217; *In re Joe R.* (1980) 27 Cal.3d 496, 504.) "To satisfy the 'mens rea' element, the defendant or his confederate must know that his act has a 'high probability' not merely a 'foreseeable possibility' of eliciting a life-threatening response from the third party." (*In re Aurelio R.* (1985) 167 Cal.App.3d 52, 57.) "To satisfy the 'actus reus' element of this crime the defendant or one of his confederates must commit an act which provokes a third party into firing the fatal shot." (*Ibid.*)

D. Perla Cannot Be Held Vicariously Liable for Aiding and Abetting Morales in His Own Murder.

An accused who aids and abets an accomplice may be guilty of provocative act murder, but only if that accomplice causes the death of another. (*Gilbert,*

supra, 63 Cal.2d at p. 704. *Gilbert* is the seminal case defining the parameters of provocative act murder. (*People v. Cervantes* (2001) 26 Cal.4th 860, 868.) In announcing the basic principles of liability for provocative act murder, the *Gilbert* court stated: "Under the rules defining principals and criminal conspiracies, the defendant may be guilty of murder for a killing attributable to the act of his accomplice. To be so guilty, however, *the accomplice must cause the death of another human being* by an act committed in furtherance of the common design. [Emphasis added.] (*Ibid.*)

Ten years later, this Court squarely addressed this principle, and upheld this rule stated in *Gilbert*, that an accused could not aid and abet a deceased accomplice in committing his own murder. (*Antick, supra*, 15 Cal.3d at pp. 91-92.) In *Antick*, the defendant and his accomplice, Bose, burglarized a home. Later, officers approached a car suspected to have been used in the burglary. Bose was seated in the driver's seat; the police ordered him out of the car. Defendant was nearby and approached the vehicle. Bose pulled out a gun and fired at the officers who then fired back and killed Bose. Defendant Antick was convicted of Bose's murder. (*Id.* at p. 83.)

This Court reversed Antick's murder conviction. Although Bose's conduct in initiating the gun battle may have established the requisite malice, Bose's

conduct did not result in the unlawful killing of *another human being*, but resulted in Bose's death. Because Bose could not be guilty of murder in connection with his own death, "it is impossible to base defendant's liability for this offense upon his vicarious responsibility for the crime of his accomplice." (*Antick*, *supra*, 15 Cal.3d at p. 91.)

"It is well settled that Bose's conduct in initiating a shootout with police officers may establish the requisite malice. As we have noted on a number of occasions, a person who initiates a gun battle in the course of committing a felony intentionally and with a conscious disregard for life commits an act that is likely to cause death. [Citations.] However, Bose's malicious conduct did not result in the unlawful killing of another human being, but rather in Bose's own death. The only homicide which occurred was the justifiable killing of Bose by the police officer. Defendant's criminal liability certainly cannot be predicated upon the actions of the officer. As Bose could not be found guilty of murder in connection with his own death, it is impossible to base defendant's liability for this offense upon his vicarious responsibility for the crime of his accomplice." (*Antick, supra*, 15 Cal.3d at p. 91.)

Later courts have reiterated the rule stated in *Antick* and *Gilbert*. "If a provocative act is committed by an accomplice who is later killed by a crime

victim, that act cannot form the basis for a provocative act murder. As the accomplice cannot be guilty of murder in connection with his or her own death, so the defendant - who stands in the shoes of the accomplice- cannot be held vicariously responsible for such a killing." (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 583, n. 5; see also, *In re Joe R.*, *supra*, 27 Cal.3d at p. 506, n.5; *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1330-1331; *People v. White* (1995) 35 Cal.App.4th 758, 765; *People v. Mai* (1994) 22 Cal.App.4th 117, 120, disapproved on other grounds in *People v. Nguyen* (2000) 24 Cal.4th 756, 758; *People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 845)

In this case, the jury convicted Perla based on a theory of aiding and abetting Morales in the assault on Canas. The jury was instructed on aiding and abetting the attempted murder of Canas and the target offenses of assault with a firearm and assault with force likely to produce great bodily injury. (2 CT 363-371.) The jury was further instructed they could find Perla guilty of the murder of Morales if she committed a provocative act in the commission of the crimes of assault with a firearm or assault with great bodily injury, and that her commission of attempted murder could be a provocative act. (2 CT 377-378.)

Perla was not a direct perpetrator; she did not attack Canas, Morales did. The jury found that Perla did not discharge the gun, only that she personally used

the weapon, consistent with her aiding and abetting in the attempted murder by retrieving the gun, not firing it. (2 CT 412.)

Morales initiated the knife attack on Canas, obtained the gun and shot Canas in the struggle over the gun. While Morales' conduct would suffice to establish malice, since Morales could not be convicted of murder for his own death, neither could Perla be convicted of murder on a theory of aiding and abetting Morales.

Nor is there any evidence Perla aided a third surviving accomplice in the shooting. (See, *People v. Briscoe* (2001) 92 Cal.App.4th 568 [defendant liable for provocative act murder because he aided and abetted a surviving accomplice, distinguishing *Antick*]; *People v. Garcia* (1999) 69 Cal.App.4th 1324; [provocative act murder liability based on aiding and abetting an accomplice who was not the murder victim]; (*People v. Superior Court (Shamis)* (1997) 58 Cal.App.4th 833, 845 ["It is only in cases like *Antick*, where the defendant's responsibility for murder is based on his vicarious liability for the acts of an accomplice who could not himself have been guilty of the offense that liability will not lie"].)

If a provocative act is committed by an accomplice who is later killed by a victim or police, that act cannot form the basis for a provocative act murder charge

under *Antick*. Consequently, Perla could not be guilty of aiding and abetting Morales in his own murder.

E. Perla's Acts Were Insufficient to Provoke a Lethal Response, And Did Not Proximately Cause Morales' Death.

Even assuming an accused could be liable for murder based on aiding and abetting a decedent accomplice, here, Perla's acts were not sufficient to provoke Canas' lethal response and did not proximately cause Morales' death.

"The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander." (*People v. Cervantes*, *supra*, 26 Cal.4th at p. 867.) The defendant must initiate the gun battle or engage in a life-threatening act that proximately causes the decedent's death to be guilty of provocative-act murder. (*Ibid.*)

1. Perla's Acts Committed Before the Confrontation With Canas Did Not Provoke Canas' Lethal Response

The accused's act must "provoke a third party to fire a fatal shot." (*In re Aurelio R.*, *supra*, 167 Cal.App.3d at p. 57.) Perla's acts occurring *before* the

confrontation between Morales and Canas cannot be considered "provocative acts" because Canas was not aware of them. Perla's earlier statements of her intent to assault Canas (6 RT 1068), her knowledge of the plan to beat up Canas (4 RT 601-602, 608), her driving in the car with a gun to Canas' location (4 RT 609-619) , and her pacing near the car where, unbeknownst to Canas, a gun was located (2 RT 257), did not provoke Canas to use lethal force, and cannot be considered provocative acts.

2. The Accused Must Proximately Cause The Accomplice's Death

A closer question is whether Perla's retrieval of the gun provoked Canas' response. Two cases, *People v. Caldwell, supra*, 36 Cal.3d 210 (*Caldwell*), and *People v. Cervantes, supra,* 26 Cal.4th 860 (*Cervantes*) are instructive, but neither case is dispositive of the issue presented in this case.

In *Caldwell*, three men, Belvin, Washington and Caldwell committed a robbery. The police pursued them in a high-speed car chase; Caldwell drove the getaway car. (*Caldwell, supra*, 36 Cal.3d at pp. 215-216.) During the chase, Caldwell's car struck a police car. The defendants' car came to a stop and an officer saw Washington armed with a shotgun pointed at him; the officer rammed his patrol car into the defendants' car, and the shotgun discharged, then flew out of Washington's hands. (*Id.* at p. 215.)

The officers took cover with their guns drawn. Belvin pointed his revolver out the window. Caldwell opened his door and crouched behind it with a gun in his hand. Washington took cover behind a post, and it appeared to the officers he might have had another weapon. (*Ibid.*) The officers ordered the defendants to drop their weapons; they did not comply. Belvin took aim and the officers fired, killing Belvin. (*Id.* at p. 216.)

Caldwell and Washington, the surviving accomplices, were convicted of murder on a provocative act theory, and challenged the sufficiency of the evidence to sustain their murder convictions. The court concluded that Caldwell and Washington acted with implied malice; both intentionally committed acts manifesting a conscious disregard for human life. (*Id.* at pp.217-218.) Washington pointed a gun at the officers and was only stopped from shooting the officers by their ramming the defendants' car. Caldwell exhibited conscious disregard for human life by driving at high speeds in the rain with his headlights off, running through stop signs and colliding with vehicles. (*Id.* at p. 218.)

The court had more difficulty with the issue of whether the defendants' malicious acts proximately caused the subsequent shooting of Belvin. (*Id.* at pp. 218-219.) The court noted that finding Caldwell's driving was a "but for" cause of Belvin's death would require "some rather heroic inferences on the part of the

jury." (*Id.* at p.219.) Ultimately, however, the court concluded that the defendants' malicious conduct of fleeing in a dangerous high-speed chase, confronting the officers with weapons, and preparing to "shoot it out" with the deputies proximately caused Belvin's death. (*Id.* at p. 222.)

In *Cervantes*, a unanimous court concluded that the defendant's act of shooting an Alley Boys gang member did not proximately cause the Alley Boys gang members' revenge killing of a member of defendant's gang, and reversed the defendant's murder conviction. (*Cervantes, supra*, 26 Cal.4th at p. 872.)

Cervantes, a Highland Street gang member, was tried on a theory of provocative act murder. He shot and seriously injured an Alley Boys' gang member at a party attended by members of both gangs. Several seconds to a minute or two later, five Alley Boys gang members shot and killed Cabrera, a member of Cervantes' gang, in retaliation. (*Id.* at p. 863.)

The court concluded that Cervantes did not proximately cause the murder of Cabrera. The court found the facts "distinguishable from the classic provocative act murder case in a number of respects." (*Id.* at p. 872.) The defendant was not the initial aggressor; there was no *direct* evidence the Alley Boys shooters were present when Cervantes shot their fellow gang member; and Cervantes was running from the scene when the fatal shooting occurred. (*Ibid.*)

The court also noted that the Alley Boys shooters were not responding to the defendant's provocative act by shooting back at him or his accomplice. (*Id.* at pp. 872-873.)

3. Perla's Retrieval of the Gun Was Not Malicious or Provocative and Did Not Proximately Cause Morales' Death

Perla's case is readily distinguishable from *Caldwell* and more similar to *Cervantes* in several respects. Significantly Morales, not Perla, initiated the lethal attack by stabbing Canas with the knife. She retrieved a gun, but then immediately ran away. Perla was not prepared, as were the defendants in *Caldwell*, to "shoot it out" with Canas. She had the rifle for "a couple of seconds" before she handed it to Morales, then fled. (2 RT 272.) Canas testified she ran north, toward Curiel's house. (2 RT 275.) Perla did not point the gun at Canas. (2 RT 273, 325.) Canas testified he was afraid when Morales drew the knife (2 RT 317); the knife attack provoked Canas, who at that point was privileged to use lethal force to defend himself.

For these same reasons, the case is closer to *Cervantes*. Like Cervantes, Perla did not initiate the lethal attack. Like Cervantes, she ran away immediately after retrieving the weapon and was not present when the two struggled for the gun and the lethal shots were fired. Although Canas testified he was concerned

that Perla might go and get someone else to harm him (2 RT 276), his conduct showed he feared Morales, his aggressor, not Perla. Perla did not initiate the attack, did not point the gun at Canas, and did not force the shooting of Morales. Her act was not a substantial factor provoking Canas' lethal response.

4. Cases Finding Provocative Act Murder Require That The Defendant Engage in a Life-Threatening Violent Act That Justifies The Lethal Response

A common thread runs through those cases upholding provocative act murder: all require some violent life-threatening act that causes the victim or police to immediately respond with lethal force. In *People v. Mai* (1994) 22 Cal.App.4th 117, defendant Mai and his accomplice entered a fabric store, grabbed the shop owner and dragged her to the back office at gunpoint. Other family members were in the back office; they were ordered to lay on the ground. The defendant Mai hit and kicked various family members until one retrieved a gun, fired a shot, and killed the defendant's accomplice. (*Id.* at p. 121.)

Mai was convicted of the murder of his accomplice killed by the shop owner. The court found that Mai's acts of hitting and kicking the shop owner and forcing her and her family members to sit in execution-style positions on the floor provoked the family member to use lethal force. (*Id.* at pp. 126, 128.)

In *In re Tyrone B.* (1976) 58 Cal.App.3d 884, the defendant and his confederate Tony agreed to rob a 7-11 store. Tony, armed with a shovel handle, and the defendant, armed with a knife, entered the store. Tony struck the clerk on the head with the shovel handle and the defendant came up from behind, and stabbed and beat the clerk. The clerk managed to obtain his gun and fired at the accomplice, killing him. (*Id.* at pp. 886-887.) The court held that the defendant and his accomplice's initiation of a simultaneous physical assault on the clerk, stabbing the clerk with a knife while the accomplice beat him with a shovel handle substantially supported a finding that the defendant intentionally and with conscious disregard for life committed acts likely to cause death and provoke a lethal response in the store clerk, and upheld the murder conviction. (*Id.* at p. 890.)

In *People v. Velasquez* (1975) 53 Cal.App.3d 547, two officers attempted to arrest the defendant and he forcibly resisted, striking both officers. Defendant's brother arrived and joined forces with the defendant. The defendant and his brother succeeded in obtaining the officer's batons and beat the officers severely. One of the officers pulled out his gun and shot and killed the defendant's brother. (*Id.* at pp. 551-552.)

The *Velasquez* court upheld the murder conviction of the defendant because he "initiated the bloody and potentially lethal battle in the process of resisting arrest, and his deliberate action resisting arrest and assaulting deputy Johnston caused deputy Khardin to react by shooting to kill in the performance of his duty, as well as in defense of Johnston." (*Id.* at pp. 889-890.)

Other cases imposing provocative act murder liability require that the defendant engage in some life-threatening violent act, such as firing a weapon or beating a victim, that provokes the victim to use lethal force. (See, *Gilbert, supra,* 63 Cal.2d at p. 703; [accomplice killed by police after defendant shot and killed another police officer]; *People v. Garcia, supra,* 69 Cal.App.3d at p. 1330 [firing a gun into the ceiling of an occupied bedroom during home invasion robbery]; *People v. Gallegos* (1997) 54 Cal.App.4th 453, 455 [defendant fired a shot at victim who returned fire, killing bystander].)

In *In re Joe R., supra,* 27 Cal.3d 496, this Court reversed a provocative act murder conviction where there was no evidence of "life-threatening acts" on the part of a minor who aided and abetted in the crime of armed robbery. In *Joe R.*, the minor and his accomplice robbed a Taco Bell at gunpoint, and while fleeing the scene stopped to rob another victim, Anderson, who was waiting at a bus stop. Anderson was taken to a remote area where Joe hit him from behind while the

accomplice held Anderson at gunpoint. Anderson managed to wrest the accomplice's gun from him and shot the accomplice while Joe fled the scene. (*Id.* at p. 501.)

On appeal, the minor argued the evidence was insufficient to sustain his murder conviction based on the provocative act doctrine. This Court held that the minor's acts of moving the victim from relative safety, his repeated threats and references to the accomplice's gun, and the minor's hitting the victim on the back of the head did not constitute provocative acts sufficient to impose liability for the murder of his accomplice. (*Id.* at pp. 506-507.)

Although the minor's punching the victim Anderson was a malicious act taken in conscious disregard for life and could have allowed the accomplice to prevail and shoot Anderson, the act did not provoke Anderson's lethal resistance and was not the proximate cause of the accomplice's death. (*In re Joe R., supra*, 27 Cal.3d at p. 507.) The court noted that none of the minor's acts initiated the deadly assault which predictably produced a lethal response from the victim. (*Ibid.*)

The court in *Joe R.* distinguished both *In re Tyrone B., supra,* 58 Cal.App.3d 884 and *People v. Velasquez*, supra, 53 Cal.App.3d 547 because those defendants perpetrated a deadly assault that produced a lethal response from the

victim. (*In re Joe R., supra*, 27 Cal.3d at p. 508.)

Here, Perla did not engage in any life-threatening violent act provoking Canas to shoot Morales. She gave Morales the gun, but it was Morales who initiated the knife attack and shot Canas multiple times. As in *Joe R.,* Perla's act of handing Morales the gun could have allowed Morales to prevail, but the act did not provoke Canas' lethal resistance and was not the proximate cause of Morales' death. Because Perla did not engage in any life-threatening acts, her murder conviction cannot stand.

5. Evidence of Perla's Attempted Murder Conviction, Based on Vicarious Liability, Is Not a Provocative Act

In *People v. Gallegos*, *supra*, 54 Cal.App.4th at p. 455 and *In re Aurelio R., supra*,167 Cal.App.3d at p. 60, the courts stated that the defendant's attempt to kill the victim is a provocative act sufficient to impose murder liability. The courts have correctly concluded that if the defendant commits an attempted murder, no "independent provocative act" separate from the "underlying felony" of attempted murder is required to be proved, as in the case of robbery. But that does not mean that all attempted murders are "provocative acts," proximately causing a lethal response, particularly in the context of aiding and abetting.

If this were the case, the defendant in *Cervantes*, who committed an attempted murder, would also be guilty of provocative act murder, even though he did not proximately cause the murder. On the other hand, if the defendant with conscious disregard for human life, but no intent to kill, shoots into a crowd, causing another to return fire, then the prosecution would be required to prove he engaged in a provocative act separate from some underlying felony, because his act and intent would not constitute an attempted murder.

While such a bright line rule has facially logical appeal, it is unnecessary, and can lead to the wrong result. The courts should be required to determine on a case by case basis whether the accused acted with malice and engaged in life-threatening provocative acts.

Here, as argued above, although the jury convicted Perla of attempted murder, it did so on an aiding and abetting theory. Perla's acts committed before she even met up with Canas are not "provocative," although they could have formed the basis for Perla's attempted murder conviction on an aiding and abetting theory, by driving Morales to the scene of the assault. The only act Perla committed at the scene, however, was handing the gun to Morales, and this act, as argued above, did not proximately cause Morales' death.

The evidence in this case was insufficient to establish a provocative act by Perla, committed with conscious disregard for life. The murder conviction violates Due Process and must be reversed. (*Jackson v. Virginia, supra*, at p. 317.)

II.

THE COURT'S ERROR IN FAILING TO INSTRUCT THE JURY THAT PERLA HAD TO PERSONALLY PREMEDITATE AND DELIBERATE WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

A. Procedural Background

This Court held in *People v. Concha, supra,* 47 Cal.4th 653, that first degree murder liability is available for provocative act murder, but only if a properly instructed jury finds the defendant *personally* acted wilfully, deliberately, and with premeditation. The trial court in this case erroneously instructed the jury they could find Perla guilty of first degree premeditated murder based on Morales' mental state. (2 CT 357, 378-379; 8 RT 1676-1677, 9 RT 1653-1654.) The Court of Appeal concluded the trial court committed instructional error, but the majority of the court found it harmless beyond a reasonable doubt. (Slip Opn., p. 32-33.)

The trial court instructed the jury on the premeditation allegation for the attempted murder charge under CALCRIM No. 601 as follows:

> If you find the defendant guilty of attempted murder under Count 1, you must then decide whether

> the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation.
>
> The defendant Perla Gonzalez acted willfully if she intended to kill when she acted. The defendant Perla Gonzalez deliberated if she carefully weighed the considerations for and against her choice and, knowing the consequences, decided to kill. The defendant Perla Gonzalez premeditated if she decided to kill before acting.
>
> The attempted murder was done willfully and with deliberation and premeditation if either the defendant or Fernando Morales or both of them acted with that state of mind. . . .

(9 RT 1653-1654; 2 CT 357.)

In its instruction on provocative act murder, the trial court instructed the jury with CALCRIM 560:

> If you decide that the defendant is guilty of murder, you must decide whether the murder is first or second degree.
>
> To prove the defendant is guilty of first degree murder, the People must prove that:
>
> One, as a result of the defendant's provocative act, Fernando Morales was killed during the commission of attempted, willful, deliberate, and premeditated murder; and
>
> Two, defendant intended to commit attempted willful, deliberate, and premeditated murder when she did the provocative act.
>
> In deciding whether the defendant intended to commit attempted willful, deliberated and premeditated murder and whether the death occurred during the commission of attempted murder, you should refer to the

> instruction I have given on attempted willful, deliberate, and premeditated murder.
>
> Any murder that does not meet these requirements for first degree murder is second degree murder.

(8 RT 1676-1677; 2 CT 378-379.)

During deliberations, the jury sent the court a note requesting an instruction on second degree murder. The note read, "Is #39 for second degree murder? We need an explanation of 2nd degree murder." (2 CT 405.) Instruction #39 was CALCRIM 570, regarding the lesser included offense of voluntary manslaughter based on heat of passion. (2 CT 380-381.) The court responded "No, #39 applies to voluntary manslaughter. See #38 for definition of 2nd degree murder in this context." Instruction #38, CALCRIM 560, referred the jury back to the attempted murder instruction, allowing the jury to find Perla premeditated the murder based on Morales' mental state. (2 CT 405; 9 RT 1802-1804.)

A majority of the Court of Appeal concluded that "the trial court's instructional 'error' was harmless beyond a reasonable doubt because the evidence before us shows a rational jury would have found Perla *personally* deliberated and premeditated the attempted murder of Canas." [Emphasis in original.] (Slip Opn., p. 32.) Although acknowledging instructional error, the majority stated, "If we were to take a further step and conclude the jury question alone requires

reversal of this issue, we would be applying a per se reversible error standard..." The majority also suggested the error was harmless because the instructions were correct "as they *then* existed" (before this Court decided *Concha*) and that the instructional error did not take " on additional significance because the trial court repeated what was then a proper instruction a second time during deliberations in response to a jury question." (Slip Opn., p. 34-35.)

Justice Aaron dissented, finding the trial court's erroneous instruction to the deliberating jury in response to its question on the critical issue of intent was not harmless beyond a reasonable doubt. (Slip Opn., J. Aaron, conc. & dis., pp. 1-5.) Justice Aaron concluded the instructional error required reversal because "(1) the jury specifically requested that the trial court provide an instruction on second degree murder; (2) in response, the court provided the jury with an incorrect instruction; *and* (3) under the facts of this case, the error in the instruction may have led the jury to find Perla guilty of first degree murder based on a finding that *Morales* premeditated and deliberated, and not on a finding that Perla personally premeditated and deliberated." [Emphasis in original.] (Slip Opn., J. Aaron, conc. & dis., p. 4, n.3.)

As Justice Aaron explained, Morales' conduct in stabbing and shooting the victim readily established *his* premeditation and deliberation. On the other hand,

Perla's conduct of retrieving the rifle was less culpable, making it more likely that the jury would base its finding of premeditation on Morales', not Perla's, mental state. Given the context in which the error occurred and the significant disparity in the evidence on the contested issue of Perla's mental state, the instructional error cannot be deemed harmless beyond a reasonable doubt.

B. The Prosecution Must Prove Beyond A Reasonable Doubt That The Error Did No Contribute To The Verdict, A Standard Not Satisfied By A Determination That A Rational Jury Could Find Perla Premeditated and Deliberated

This Court has concluded that the "willful, deliberate, and premeditated" allegation is the functional equivalent of an element of a greater offense. (*People v. Izaguirre* (2007) 42 Cal.4th 126,133; *People v. Seel* (2004) 34 Cal.4th 535, 548.) Relieving the prosecution of its burden of proving an element of the offense murder violates the defendant's federal (6th and 14th Amendments) and California (Art. I, § 15 and § 16) constitutional rights to trial by jury and due process. (See *United States v. Gaudin* (1995) 515 U.S. 506, 509-510; *Carella v. California* (1989) 491 U.S. 263, 270; *People v. Flood* (1998) 18 Cal.4th 470, 479-480.)

Because the error implicates the accused's federal constitutional rights, the standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) applies, requiring that the judgment be reversed unless the prosecution can prove

beyond a reasonable doubt that the error did not contribute to the verdict.

In *Chapman*, the court held that a prosecutor's comment on the defendant's failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609, was subject to harmless error analysis. (*Chapman, supra*, 386 U.S. at p. 22.) The court declined to adopt a standard of reversal per se, stating, "We conclude that there may be some constitutional errors which in the setting of a particular case are *so unimportant and insignificant* that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." [Emphasis added.] (*Ibid.*) *Chapman* adopted the rule that requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.)

Later in *Yates v. Evatt* (1991) 500 U.S. 391, overruled on other grounds in *Estelle v. McGuire* (1991), 502 U.S. 62, the high court concluded the *Chapman* standard of error applied to the trial court's instruction creating a mandatory rebuttable presumption on an element of the offense. In *Yates*, the jury in the defendants' murder case was instructed "that malice is implied or presumed from the use of a deadly weapon." The trial judge's charge on implied malice constituted an improper mandatory presumption that impermissibly shifted the burden of proof regarding the critical intent element of the charged offense to the

accused. (*Id.* at p. 400-401.) *Yates* found the error was not harmless beyond a reasonable doubt under *Chapman* because the evidence of the defendant's intent to kill was not clear. (*Id.* at p. 412.)

Justices Scalia and Blackmum concurred, concluding that it would be impossible to gauge the effect of the error: "to determine from the 'entire record' that the error is 'harmless' would be to answer a purely hypothetical question, viz., whether, if the jury had been instructed correctly, it would have found that the State proved the existence of malice beyond a reasonable doubt. Such a hypothetical inquiry is inconsistent with the harmless-error standard announced in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967)." (*Yates, supra*, 500 U.S. at p. 414 (conc. opn. of Scalia, J.).)

The *Yates* majority disapproved language in *Rose v. Clark* (1986) 478 U.S. 570, 579, that suggested that the *Chapman* standard of error is met if the reviewing court determines the evidence is sufficient to prove guilt beyond a reasonable doubt. The *Yates* court found this standard objectionable: "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed." (*Yates, supra*, 500 U.S. at p. 403, n.8.)

This statement is nearly identical to the standard employed by the majority in this case, which asked whether the evidence in the record "shows a rational jury would have found Perla *personally* deliberated and premeditated the attempted murder of Canas." (Slip Opn., p. 32.)

The court in *People v. Lewis* (2006) 139 Cal.App.4th 874, 887 disapproved a similar standard. After reviewing the decisions in *Chapman, Yates* and *Sullivan v. Louisiana* (1993) 508 U.S. 275, the *Lewis* court concluded: "The test is not whether a hypothetical jury, no matter how reasonable or rational, would render the same verdict in the absence of the error, but whether there is any reasonable possibility that the error might have contributed to the conviction in this case. If such a possibility exists, reversal is required. The test for harmless error suggested by the People in the present case– whether 'any reasonable jury would have found the elements of implied malice second degree murder'– is patently incompatible with this standard." (*Ibid.*)

The majority in this case derived this standard from *People v. Concha*, *supra*, 182 Cal.App.4th 1072 (*Concha II*), which in turn relied on the United Supreme Court's decision in *Neder v. United States* (1999) 527 U.S.1 (*Neder*). But as the court in *Lewis* reasoned, *Neder* involved application of the *Chapman* standard to an uncontested element of the offense, not to the contested, central

issue of the accused's intent. (*People v. Lewis*, *supra*, 139 Cal.App.4th at pp. 887-888.)

In *Neder,* the court considered whether the failure to instruct the jury on the materiality element of the crime of filing false tax returns was subject to a harmless error analysis. (*Id.* at pp. 8-16.) The Government contended that Neder failed to report over five million dollars in income, a violation of 26 U.S.C.A. section 7206(1). The jury was not instructed that it had to find that the false statements were material, a requisite element of the offense. (*Id.* at p. 6.) The defendant did not argue at trial that the false statements were not material, instead he argued that the loan proceeds he failed to report did not constitute income and that he relied on the advice of his attorney and his accountant in failing to report the income. (*Id.* at p. 16-17.)

The *Neder* court held that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Id.* at p.17.) The court saw no difficulty applying a harmless error analysis to "the narrow class of cases like the present one," involving an entirely uncontested element. (*Id.* at p. 17, n.2.) "In a case, such as this one, where a defendant did

not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee." (*Id.* at p. 18.)

The *Neder* court specifically distinguished instructional error on the uncontested element of materiality, from that of *Yates*, involving instructional error on "an issue that was the crux of the case-the defendant's intent." (*Id.* at p. 17.) This suggests that, under *Neder*, if instructional error omits the contested element of intent, rarely will such error be held harmless beyond a reasonable doubt under *Chapman*.

This Court in *People v. Flood* (1998) 18 Cal.4th 470 held that the failure to instruct on an element of the offense was not structural error, but was subject to harmless error analysis. In *Flood*, the defendant was charged with evading a vehicle operated by a peace officer under Vehicle Code section 2800.3. The prosecution must prove, as an element of the offense, that the vehicle evaded was operated by a peace officer. The trial court did not instruct the jury they had to find this element of the offense, but told the jury that the people operating the vehicle were "peace officers," removing this element of the offense from the jury's consideration. (*Id.* at p. 475.)

The court in *Flood* concluded that the court's erroneous instruction on the "peace officer" element of the offense was not structural error, and was subject to the *Chapman* standard of prejudice. (*Id.* at p. 500.) The court found the error harmless under *Chapman*, but only because the record established that the defense "effectively conceded" the issue; the defendant did not argue the prosecution failed to prove the element or present any evidence concerning the element; the jury found the officer's were "distinctively uniformed" and their vehicles were "distinctively marked;" and the evidence presented at trial, uncontested by the defense, was that the two people driving the vehicle were peace officers. (*Id.* at pp. 505-506.) The court in *Flood* concluded the error was harmless beyond a reasonable doubt, because it concerned "an uncontested, peripheral element of the offense, which effectively was conceded by defendant, was established by overwhelming, undisputed evidence in the record, and had nothing to do with defendant's own actions or mental state..." (*Id.* at p. 507.)

C. The Instructional Error Was Not Harmless Beyond A Reasonable Doubt.

The instructional error in this case does not involve a "peripheral issue" as in *Flood*, or an uncontested issue, as in *Neder*. It involved an issue central to the case: Perla's mental state. Under *Chapman*, the prosecution cannot prove beyond

a reasonable doubt that the error complained of did not contribute to the verdict obtained. The error is also not harmless under the *Neder* standard of prejudice, where "the reviewing court must conclude beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." (*Id.* at p.17.) Perla's mental state was not uncontested, nor was the evidence of her premeditation "overwhelming."

To establish premeditated and deliberate murder, there must be evidence of planning and motive which would in turn support an inference that the killing was the result of pre-existing reflection, careful thought and weighing of considerations, rather than an unconsidered or rash impulse hastily executed. (*People v. Anderson* (1968) 76 Cal.2d 15, 26.)

The evidence of Perla's intent was far from clear, and it was the critical, contested issue in the case. At best, the prosecution's evidence established that Perla was aware of the plan to beat up, not kill, Canas before she drove with Morales to meet up with Canas. (4 RT 601-608.) Perla stood by the car doing nothing when Morales confronted Canas (2 RT 257); if she had planned the murder, she would not have waited to bring out the gun. There was no direct evidence of Perla's intent; she made no statements at the scene. Her action in

handing the gun to Morales could have been the product of an unconsidered or rash impulse hastily executed. The jury could have found Perla guilty based on her aiding and abetting Morales in an assault with a firearm; they found Perla did not discharge the weapon, but only that she used it. (2 C.T. 410-411.) Evidence that Perla premeditated the murder of Canas is far from "overwhelming."

On the other hand, evidence that Morales premeditated and deliberated the lethal attack on Canas was very strong. Morales stabbed Canas and shot him multiple times. (2 RT 261, 272-273.) The jury could easily conclude from this undisputed evidence that Morales' attempt to kill Canas was the result of pre-existing reflection.

Because the evidence of Morales' culpable mental state was strong, and Perla's was relatively weak, it is more likely the jury, guided by the erroneous instruction, dispensed with the need to find Perla personally premeditated the murder, and based their finding on the strong evidence of Morales' culpable mental state.

Evidence of Perla's intent was contested at trial; it was the main issue for the jury to decide. Defense counsel started his closing summation by arguing that "there is no question this is a circumstantial case and no question that the circumstantial case has to prove what my client's intent was." (9 RT 1738.)

Defense counsel argued that even if the jury found she intended to kill, Perla acted in the heat of passion: "This isn't cold, calculated, I am going to do that.....She is – that's your rash judgment... The People want you to think she [sic] sitting there like some college coach at a football game going, well that doesn't work. Let's go to plan B." (9 RT 1765-1766.) He argued that Perla did not premeditate: "Then you get to the premeditated, wilfull, and deliberate.... You have to have all these cold, calculated decisions... It's not happening." (9 RT 1767.)

Evidence of Perla's intent was subject to several contradictory reasonable interpretations. As the dissenting Justice pointed out, "in view of the circumstances in this case, the jury's request for an instruction on second degree murder was a rational one." (Slip Opn., p. 5, conc. & dis. opn Aaron, J..)

In this case there is no need to speculate about whether a "hypothetical" jury may have applied the erroneous instruction; the jury's request for instruction on second degree murder informs that this jury focused on this very issue. At a critical time in their deliberation in which they considered the issue, the trial court guided them to the erroneous instruction. (2 CT 405.)

"To perform their job properly and fairly, jurors must understand the legal principles they are charged with applying . . . The jury's request for clarification should alert the trial judge that the jury has focused on what it believes are the

critical issues in the case." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) "When a jury makes explicit its difficulties, a trial judge should clear them away with concrete accuracy." (*Bollenbach v. United States* (1946) 326 U.S. 607, 612-613.)

The trial court here directed the deliberating jury to the erroneous instruction in response to their question on what it believed was a critical issue in the case, the difference between first and second degree murder. Under these circumstances, the instructional error cannot be deemed harmless beyond a reasonable doubt.

III.

CONCLUSION

For the foregoing reason, Perla Gonzalez respectfully requests this Court reverse the murder conviction, or, in the alternative, the true finding that she premeditated and deliberated the murder, and reduce the conviction to murder in the second degree.

Respectfully submitted,

Dated: July 13, 2011

LAURA SCHAEFER
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PERLA ISABEL GONZALEZ

Certificate of Word Count

I, Laura Schaefer, counsel for appellant certify pursuant to the California Rules of Court, that the word count for this document is 10,113 words, excluding the tables, this certificate, and any attachment permitted under rule 14(d). This document was prepared in Word Perfect with 14 point Times New Roman font, and this is the word count generated by the program for this document.

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People v. Gonzalez
Supreme Court Case No. S189856

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