In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ANTHONY ARANDA, JR,

Defendant and Appellant.

Case No. S188204

Fourth Appellate District, Division One, Case No. SWF010404
Riverside County Superior Court, Case No. D055701
The Honorable Albert J. Wojcik, Judge

ANSWERING BRIEF ON MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
TAMI FALKENSTEIN HENNICK
Deputy Attorney General
State Bar No. 222542
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2274
Fax: (619) 645-2271
Email: Tami.Hennick@doj.ca.gov
Attorneys for Plaintiff and Respondent

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QUESTION PRESENTED

Is the trial court's failure to give a standard reasonable doubt instruction (CALJIC No. 2.90) reversible per se or is such failure subject to harmless error review? If so, should harmless error be assessed under *People v. Watson* (1956) 46 Cal.2d 818, or *Chapman v. California* (1967) 386 U.S. 18?

INTRODUCTION

Appellant shot and killed another man during a fight at a house party. The district attorney charged appellant with murder and street terrorism. Appellant argued that he acted in self-defense. The jury convicted him of the lesser included offense of voluntary manslaughter, and of the street terrorism charge.

The appellate court found the trial court committed federal constitutional error when it failed to instruct the jury with CALJIC No. 2.90 regarding the prosecution's general burden of proof and the reasonable doubt standard. With regard to appellant's manslaughter conviction, the court held that the failure to give the instruction was cured through subsequent instructions, and deemed the error harmless beyond a reasonable doubt. The court found that other instructions did not cure the error as to the street terrorism charge and reversed appellant's conviction on that count.

With regard to appellant's manslaughter conviction, the instructions as a whole properly conveyed the concept of reasonable doubt to the jury; thus, omission of CALJIC No. 2.90 was not federal constitutional error. Because state law requires trial courts to instruct with CALJIC No. 2.90, the omission of the instruction here amounted to an error of state law only. Nevertheless, even had the court instructed the jury with CALJIC No. 2.90, appellant would not have received a more favorable result; thus, the error

was harmless. Respondent acknowledges that the instructions did not adequately convey the concept of reasonable doubt to the jury with regard to the street terrorism conviction, and is not challenging the Court of Appeal's reversal of that count.

STATEMENT OF THE CASE

The Riverside County District Attorney filed an information charging appellant with first degree murder (Pen. Code,[1] §§ 187, subd. (a)). The information further alleged that appellant committed the murder for the benefit of a criminal street gang, and by means of personally and intentionally discharging a firearm (§§ 186.22, subd. (b), 12022.53, subd. (d), 12022.5, subd. (a), 1192.7, subd. (c)(8)). It further charged appellant with unlawfully carrying a concealed weapon as an active participant in a criminal street gang (§ 12025, subd. (b)(3)); and street terrorism (§ 186.22, subd. (a)). Finally, it alleged that appellant suffered three prior prison terms (§ 667.5, subd. (b)). (2 CT 327-329.)

A jury acquitted appellant of murder, but convicted him of voluntary manslaughter and street terrorism. (4 CT 860, 864, 873-875.) The jury found true the firearm allegations, but found the gang allegation not true. (4 CT 860, 876-878.) Appellant thereafter admitted the prison prior offense allegations. (SCT[2] 2.)[3] The trial court sentenced appellant to 24 years, 8 months in state prison. (4 CT 919; SCT 3.)

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[1] Statutory references are to the Penal Code unless otherwise indicated.

[2] "SCT" refers to Supplemental Clerk's Transcript.

[3] Upon the prosecution's motion, the trial court dismissed the firearms charge in count 2 (4 CT 774; 3 RT 705) and struck the section 12022.53 firearm enhancement as inapplicable to a conviction of voluntary manslaughter (4 CT 860; 4 RT 763-764).

The Court of Appeal found the trial court erred in failing to instruct the jury with CALJIC No. 2.90 regarding the prosecution's general burden of proof and the reasonable doubt standard. With regard to appellant's manslaughter conviction, the court held that "the sum of the instructions sufficiently relayed the concept of reasonable doubt to the jury," citing *Victor v. Nebraska* (1994) 511 U.S. 1, 5 [114 S.Ct. 1239; 127 L.Ed.2d 583,] (*Victor)*; and *People v. Mayo* (2006) 140 Cal.App.4th 535, 549-550. (Slip Opn., at p. 9.) The court then concluded that the failure to give the instruction was cured through subsequent instructions. Even though the court found that other instructions cured the error in omitting CALJIC No. 2.90, the court neverthless held the omission was federal constitutional error, but found it harmless under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824; 17 L.Ed.2d 705] (*Chapman*). The court reversed the street terrorism conviction, finding that the specific charge did not include any reference to the prosecution's burden of proof or reasonable doubt. (Slip Opn. at pp. 2.)

On November 16, 2010, appellant filed a petition for review in this Court. On January 26, 2011, this Court granted review.

A. Factual and Procedural Background

On the evening of Friday, September 10, 2004, Adam, Angela, and Luis Gonzalez went to a house party in Hemet. Luis was a member of the "18th Street" street gang. (1 RT 61-63.) Members of a rival gang, the "Southside Criminals" were present at the party. (1 RT 64-66, 153.) Angela, Adam, and Luis spent time drinking alcohol and smoking marijuana in the back yard with everyone else at the party. (1 RT 70, 154-156; 2 RT 243, 246.) Appellant arrived at the party around 10:00 p.m. (2 RT 240.) Appellant was a member of the "Hemet Trece" street gang. (2 RT 387-388.) Members of the Southside Criminals and Hemet Trece gangs got along with one another. (2 RT 422.) After appellant arrived, Adam

introduced himself, saying he had been in "the joint" with some of appellant's "homeboys." (2 RT 241.)

After staying at the party for about two or three hours, Adam left with Luis and Angela. (1 RT 69-71.) Adam had taken $30 from a Southside Criminals gang member at the party, and agreed to come back to the party with some methamphetamine. (1 RT 157; 2 RT 232-233.) Adam revealed this as Luis was getting ready to drive the group home, and asked Luis and Angela to take him to get the drugs along the way. They refused. (1 RT 74-76, 157-158.)

After they got home, Adam received a call from the people who had given him the money to buy drugs, demanding their money back. (1 RT 159; 2 RT 236.) Adam was loud and "hyped up" about the call. (1 RT 115, 124.) He wanted to go back to the house. (1 RT 114.) Luis told Adam to calm him down and not to worry about it. (1 RT 115, 160-161; 2 RT 251-252.) Adam thought the people at the party should not have been "disrespecting like that." (1 RT 160, 162; 2 RT 233.) Luis and Angela agreed to take Adam back to the party so he could return the money; they did not want people coming to their house looking for them. (1 RT 74-77, 115-116, 161.) Luis drove the group back there. (1 RT 77, 116.)

When they arrived, Adam and Luis went through the side gate and into the back yard. (1 RT 77-78, 162-163.) The back yard was crowded with 20 to 30 people. (1 RT 80-81, 163-164.) Adam took a "macho prison attitude," and started yelling things like, "Why are you calling my house?" or "Who's disrespecting the house?" (1 RT 79-80, 163; 2 RT 224, 233-234.) Adam and appellant started fighting, and then everyone got involved. (1 RT 81, 128, 166-167.)

The fight with appellant moved from the back yard to the side of the house. (1 RT 167-168.) Appellant and Adam exchanged punches along the way. (2 RT 238.) Adam was eventually able to break away from the fight

and get to the front yard, where he looked for Angela. (2 RT 204-205.) Appellant was standing by Angela's car holding a gun. (2 RT 205.) Appellant pointed the gun at Adam. (2 RT 205-206, 235.) Adam talked to appellant, trying to calm him down. (2 RT 206.) Appellant turned around and walked toward San Jacinto Street. (2 RT 206, 210.)

About 30 to 40 seconds later Adam heard gunshots. (2 RT 209, 235.) Adam found Luis lying on his back in the street at the corner of Val Verde and San Jacinto. (1 RT 91; 2 RT 211, 230.) Luis looked at Adam, confused, but he did not say anything. (1 RT 91; 2 RT 211-212.) Angela and Adam decided Luis could not wait for an ambulance so they drove him to the hospital. (1 RT 92-93; 2 RT 212-213.) Luis later died there. (1 RT 94.)

The autopsy of Luis's body revealed he had suffered a gunshot wound to his hip. (2 RT 177-179.) The bullet traveled through Luis's hip bone, across his intestines, and into his right hip. (2 RT 179-180.) The bullet perforated the iliac vein, causing significant bleeding -- almost half of Luis's blood volume had collected in his abdominal cavity. (2 RT 180-181.) This was the fatal injury. (2 RT 180-181.) The gunshot wound showed no evidence of stippling – burns caused by close contact with gun powder – which indicated the gun was fired no closer than three feet away. (2 RT 323-328.)

Luis also had a bruise injury on the back of his head. (2 RT 181-183.) The injury could have been the result of a blunt force trauma or a fall in which Luis struck his head on the ground. (2 RT 183-184.) He had no other apparent injuries. (2 RT 187.)

Investigation of the scene in the hours after the shooting revealed a rock on the ground in the area near where Luis was found shot. (2 RT 265.) The rock appeared to have droplets of blood on it. (2 RT 266, 272, 375.)

Investigators conducted a video recorded interview of appellant on September 15, 2004. (2 RT 328, 332-333.)[4] At no time did appellant mention anything about having acted in self defense. (2 RT 354.) Instead, appellant denied having been at the party and claimed the witnesses who placed him there were lying. (2 RT 355; see 4 CT 702-732.)

B. Defense

Appellant testified in his own behalf. He acknowledged he was a member of the Hemet Trece gang at the time of the shooting in September 2004, but claimed he was no longer active in the gang. (3 RT 594, 627.)

At one point during the fight, appellant heard Louis arguing with people at the gate who were saying, "Fuck you, get the fuck out of here." (3 RT 612-614.) Appellant walked toward Luis. (3 RT 616-617, 643.) He told Luis, "Get the fuck out of here." (3 RT 616.) Luis responded, "Fuck you," and started waving a rock in his hand. (3 RT 616-617, 642.) When appellant again told Luis to "get the fuck out of there," Luis "rushed" appellant with the rock. (3 RT 617, 642.) Appellant pulled out the gun. (3 RT 617.) When Luis came within 10 to 12 feet of him, appellant shot Luis. (3 RT 617-618.) Luis dropped the rock and fell to the ground. (3 RT 618.)

Appellant testified he meant to shoot Luis, but not to kill him. (3 RT 618, 633, 640, 643-644.) He testified he wanted to stop Luis from smashing him with the rock. (3 RT 618, 622, 634, 639.) He claimed he thought he was going to die at Luis's hands. (3 RT 634.) Appellant denied the shooting had anything to do with gangs. (3 RT 622.)

After shooting Luis, appellant left the scene. (3 RT 619-620.) Two days later, he buried the gun in some bushes somewhere off Alesandro

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[4] The video was played at trial and a transcript of the interview was distributed to the jury. (2 RT 353-354; Exh. No. 82-A.)

Street. (3 RT 620-621.) He claimed that he had lied to police because he thought they would not believe his story. (3 RT 623, 645.)

ARGUMENT

I. OMISSION OF CALJIC NO. 2.90 WAS NOT FEDERAL CONSTITUTIONAL ERROR AND WAS NOT REVERSIBLE PER SE

Appellant contends that omission of CALJIC No. 2.90 is structural error, and is reversible per se under *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278 [113 S.Ct. 2078, 124 L.Ed.2d 182] (*Sullivan*).) (BOM 43-57.) With regard to appellant's manslaughter conviction, the pre-trial instructions, combined with the pinpoint and other instructions viewed as a whole, correctly conveyed the concept of reasonable doubt and the presumption of innocence to the jury. Therefore, omission of CALJIC No. 2.90 was not federal constitutional error. This Court last reviewed a somewhat similar claim in *People v. Vann* (1974) 12 Cal.3d 220 (*Vann*) and found otherwise. Since then, there have been two major changes in the law: The United States Supreme Court has clarified the federal constitutional standard for instructing on reasonable doubt, and both the high court and this Court have set forth the standard for reviewing claims of instructional error. These changes in the law have undermined *Vann's* holding. In any event, *Vann* is factually distinguishable because the specific offense instructions there did not incorporate the reasonable doubt standard as they did here. However, state law still requires the trial court to instruct with CALJIC No. 2.90. Thus, the omission here amounted to an error of state law only, and was harmless in any event.

A. Background

1. Pretrial instructions

Jury selection began January 6, 2009. (1 ART[5] 1.) On the second day of voir dire, January 7th, in discussing the role of the jury in a criminal case, the trial court explained that the prosecution bore the burden to prove each element of a charged offense beyond a reasonable doubt to permit a conviction of that offense:

> Each crime, each alleged crime, but each crime has certain ingredients. And we call those elements. To find one guilty of a crime, whatever it might be, could be shoplifting, could be any crime, but to find him guilty of any crime you must be convinced of guilt beyond a reasonable doubt as to elements one, two, three, whatever the number is, as to those elements. Okay?"

(1 ART 108.) As the court commenced examination of various members of the panel, it advised the entire panel that its questions and comments were directed to everyone in the courtroom. (1 ART 113-114: 19-24.) During the ensuing examination, the court reiterated that the burden of proof was on the prosecution. (1 ART 123:6-8)

In questioning the prospective jurors, the court came to Corazon Quindoza, who stated she could not remain impartial in a murder case and would be biased against appellant. (1 ART 154.) The court responded by admonishing Quindoza about the presumption of innocence and the burden of proof, telling her:

> [T]o be a juror, you have to agree to accept the jury instructions, the law, the tenets of the law. And one of them is, and we'll get into this in a little while, an accused person, person accused of committing a crime is presumed innocent. Mr. Aranda, as he sits here, is presumed innocent. A person is accused of any crime, in any court in our land, is presumed innocent. And then

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[5] "ART" refers to the Augmented Reporter's Transcript on appeal.

> the burden of proof is with the People, with the prosecution, Mr. DeLimon. He's got to do something. He has to convince you of guilt to a certain standard. And we'll talk about that.

(1 ART 154.) Quindoza maintained she would vote for guilt regardless of the state of the evidence, even after the prosecutor also admonished her that she must acquit appellant if the state of the evidence did not convince her of guilt. (1 ART 154-155.) In the presence of the rest of the panel, counsel stipulated that Quindoza be excused. (1 ART 155-156.)

Later, in the presence of all the remaining prospective jurors, the court specifically discussed the presumption of innocence and the reasonable doubt standard, stating:

> A defendant in a criminal case is presumed innocent until the contrary is proved. If you have a reasonable doubt – the word that we use probably more often in the law than any other word is that word, "reasonable." If you have a reasonable doubt whether the defendant's guilt is satisfactorily shown, he is entitled to a verdict of not guilty.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in a condition that they cannot say they feel an abiding conviction of the truth of the charge. If you have a reasonable doubt as to the defendant's guilt, the defendant is entitled to a verdict of not guilty.

(1 ART 179-180.)

The court then specifically addressed Juror Numbers 1, 2, and 4, and two other prospective jurors, confirming they understood and would apply the reasonable doubt standard. (1 ART 180.) It next inquired whether the rest of the prospective jurors accepted they must apply this standard and find appellant guilty only if convinced of his guilt beyond a reasonable doubt; they collectively responded "yes." (1 ART 181.)

The court continued discussing the burden of proof, contrasting it through various factual examples with the lower standards of proof applicable in other settings: the preponderance of the evidence standard in civil cases; the probable cause standard police officers use in determining whether to make arrests; and the clear and convincing evidence standard in family law matters. (1 ART 181-182.) It told the jurors that the reasonable doubt standard "is the highest standard of them all." (1 ART 182.) The court then individually questioned 11 other prospective jurors, including Juror Number 11, confirming each of them understood and would apply this standard. (1 ART 182-183, 184-185.) The court confirmed the same with the entire panel. (1 ART 183-185.)

The court went on to address several prospective jurors individually, including Juror Number 4 and Juror Number 11, confirming that each understood he or she had to be convinced beyond a reasonable doubt as to each element of the charged offenses to convict appellant. (1 ART 191-195.) The court used the elements of the charge of murder as an example here. (1 ART 194.) The court then confirmed the entire group understood this, and reiterated that the principle applied to all charges. (1 ART 195-196.) Shortly thereafter, the court repeated that the prosecution bore the burden of proof in the context of explaining appellant's right not to testify. (1 ART 214-215.) It also reiterated the reasonable doubt standard in discussing the gang allegations, saying the jury must be satisfied beyond a reasonable doubt as to the required elements before finding a group qualified as a "criminal street gang." (1 ART 228-229.)

Later, the prosecutor acknowledged it was his burden to prove each element of each offense beyond a reasonable doubt. (1 ART 253: 3-12, 255: 15-17, 256: 9-13.) He confirmed with the group collectively, and with Juror Number 2 individually, that they would follow this standard. (1 ART 257: 9-17.) Before the court recessed the proceedings for the day, in the

presence of the rest of the panel, it dismissed a prospective juror who indicated he was biased against gang members and would not abide by the duty to apply the standard of reasonable doubt. (1 ART 262-266.)

When jury selection resumed the following day, January 8th, the court reiterated the applicable burden of proof and the presumption of innocence, confirming individually with prospective jurors, and then the entire panel, that each understood these principles. (2 ART 290, 302-303, 303-305.) In this vein, the court again contrasted the reasonable doubt standard with the lower standards in other settings, saying it was "the highest standard in the law," and confirming the group understood this. (2 ART 305-306.) Thereafter, in the presence of the entire remaining panel, the parties stipulated to the excusal of a prospective juror who indicated he was biased against the defense and could not accept the instructions, standards, and presumptions of innocence the court had discussed. (2 ART 337.) They reached the same stipulation with respect to another prospective juror who said she could not be unbiased toward the defense despite what the court and counsel had stated. (2 ART 344.)

When the court addressed a prospective juror who stated she had served as a juror in a civil trial, it reiterated that civil cases apply the standard of preponderance of the evidence but the standard in this case was "beyond a reasonable doubt," and confirmed the juror understood this was a "big difference." (2 ART 348.)

The court then again individually confirmed with several prospective jurors, including Juror Number 8, and then the entire panel, that each of them understood the standard of proof was beyond a reasonable doubt as to each element of the offense and appellant was entitled to an acquittal if that standard was not met. (2 ART 352, 353-354.) The court also confirmed that another prospective juror, and the entire panel, understood appellant

was "cloaked with the presumption of innocence" and the burden of proof was on the prosecution. (2 ART 352-353.)

As the proceedings continued, the court again confirmed with the entire group that it understood the prosecution must prove appellant's guilt beyond a reasonable doubt to warrant a conviction. (2 ART 360-361.) Defense counsel reiterated the presumption of innocence in questioning one of the panel members. (2 ART 369-370.) The prosecutor reiterated the jury must consider all the evidence and be convinced beyond a reasonable doubt, and confirmed with several jurors, including Juror Number 8 and Juror Number 5, that they understood this. (2 ART 372.) The final panel of 12 remaining jurors and alternates was sworn and empanelled. (2 ART 388.)

The first day of trial was January 12, 2009. At the start of the proceedings, the court admonished the jurors that they must decide the case based solely upon the evidence presented at trial, and not be influenced by the fact that the defendant has been arrested, charged, or brought to trial. (4 CT 777; 1 RT 35-36; CALJIC No. 0.50 [Pre-Trial Admonition].) Before the testimony began, the court read the charges and reiterated they were not evidence against appellant and that he had denied all charges and allegations. (1 RT 54-56.)[6] The prosecution then presented its case.[7]

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[6] Before the testimony began, Juror Number 7 was excused because of personal problems and she was substituted with one of the alternate jurors. (1 RT 51-54.)

[7] During a break in the presentation of the prosecution's case, Juror Number 9 was excused because she had reportedly developed an irresolvable bias against appellant (she told the court she had learned appellant had a criminal record, which she could not set aside), and she was replaced with another of the alternate jurors. (1 RT 107-110.)

2. Pre-Deliberation instructions

After the close of the prosecution's case, the parties discussed the instructions the court intended to give, but made no mention on the record about general instructions on the burden of proof and presumption of innocence. (3 RT 508-588, 651-666.)

The trial court delivered the final charge to the jury on January 22, 2009, after the defense rested its case. (4 CT 774; 3 RT 667.) It used the standardized CALJIC instructions. At the outset, the court reiterated that the jury must decide the case based solely upon the evidence presented at trial, and must not be influenced by the fact that the defendant has been arrested, charged, or brought to trial. (4 CT 779; 3 RT 670-671; CALJIC No. 1.00 [Respective Duties of Judge and Jury].) It also told the jury to "[c]onsider the instructions as a whole and each in light of all the others." (4 CT 780; 3 RT 671; CALJIC No. 1.01 [Instructions to be Considered as a Whole].)

Apparently through inadvertence, the court did not include in its instructions CALJIC Number 2.90 – the general instruction on the prosecution's burden of proof and the presumption of innocence. The most current version of that instruction provides:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] [her] guilt is satisfactorily shown, [he] [she] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] [her] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that

> they cannot say they feel an abiding conviction of the truth of the charge.

(CALJIC No. 2.90 [Presumption of Innocence – Reasonable Doubt – Burden of Proof] (2005).)

The court's instructions did, however, address the prosecution's burden of proof in various specific contexts. In discussing circumstantial evidence, the court explained:

> [E]ach fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

(4 CT 786; 3 RT 674; CALJIC No. 2.01 [Sufficiency of Circumstantial Evidence – Generally].) In discussing the jury's determination of appellant's guilt on the charge of murder, and the degree of murder, the court stated:

> If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree as well as a verdict of not guilty of murder in the first degree.

(4 CT 813; 3 RT 685; CALJIC No. 8.71 [Doubt Whether First or Second Degree Murder].) It further explained:

> If you are convinced beyond a reasonable doubt and unanimously agree that the killing was unlawful, but you unanimously agree that you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant

> the benefit of that doubt and find it to be manslaughter rather than murder.

(4 CT 814; 3 RT 685; CALJIC No. 8.72 [Doubt Whether Murder or Manslaughter].)

In this context, the court also instructed the jury:

> If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime of first degree murder as charged in Count 1 and you unanimously so find, you may convict him of any lesser crime provided you are satisfied beyond a reasonable doubt that he is guilty of the lesser crime.

(4 CT 824; 3 RT 689-690; CALJIC No. 8.75 [Jury May Return Partial Verdict – Homicide].) In addition, the court explained:

> To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury.

(4 CT 823; 3 RT 689; CALJIC No. 8.50 [Murder and Manslaughter Distinguished].)

Finally, the court instructed the jury regarding justifiable homicide, stating:

> Upon a trial of a charge of murder, a killing is lawful if it was justifiable/excusable. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not justifiable/excusable. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty.

(4 CT 830; 3 RT 696; CALJIC No. 5.15 [Charge of Murder – Burden of Proof re Justification or Excuse].)

The court also addressed the burden of proof in the context of the gang and firearm enhancement allegations. In each of the instructions

describing the elements of these allegations, the court instructed the jury: "The People have the burden of proving the truth of this allegation. If you have a reasonable doubt that it is true, you must find it to be not true." (4 CT 825, 826-827; 3 RT 693, 694, 695; CALJIC No. 17.24.2 [Felonies Committed for the Benefit of Street Gangs], Great Bodily Injury/Firearm [no CALJIC Number assigned], CALJIC No. 17.19 [Personal Use of Firearm].) The court's instruction on the elements of street terrorism, however, did not include a reference to the burden of proof. (See 4 CT 839; 3 RT 699-702; CALJIC No. 6.50 [Gang Crime].)

During closing argument, neither counsel addressed the burden of proof or the presumption of innocence. (3 RT 710-745.) As noted, the jury ultimately acquitted appellant of murder but found him guilty of voluntary manslaughter. (4 CT 860, 864, 873-874.) It convicted him on the charge of street terrorism, sustained the firearm allegations, and found the gang allegation not true. (4 CT 860, 875-878.)

B. Legal Principles

In order to demonstrate jury instructions were misleading, a defendant must prove a reasonable likelihood the jury misunderstood the instructions construed as a whole. (*People v. Cain* (1995) 10 Cal.4th 1, 36, 40; *People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Benson* (1990) 52 Cal.3d 754, 801-802; *People v. Jenkins* (1994) 29 Cal.App.4th 287, 297.) """The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole."""" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147.) A reviewing court must assume the jurors were intelligent persons and capable of understanding and correlating all jury admonitions and instructions which were given. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) As the United States Supreme Court has commented:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretations of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has happened at trial likely to prevail over technical hairsplitting.

(*Boyde v. California* (1990) 494 U.S. 370, 380-381 [108 L.Ed.2d 316, 110 S.Ct. 1190].)

In *Boyde,* the court observed that prior cases had applied a variety of standards, such as whether a juror "could have" drawn an impermissible inference, or whether a juror "would have" done so. (*Id.* at pp. 378-379.) In deciding whether there was a reasonable likelihood the jury misunderstood the instructions, the *Boyde* court looked not only to the language of the instructions themselves, but also to the context of the proceedings, including the evidence presented and the argument of counsel. (*Id.* at pp. 383-386; see also *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385] (reaffirming the *Boyde* reasonable likelihood test).) The California Supreme Court adopted the *Boyde* test in *People v. Benson, supra*, 52 Cal.3d at pages 801-802, and later in *People v. Kelly, supra*, 1 Cal.4th at page 525.

C. Omission of CALJIC No. 2.90 Was Not Federal Constitutional Error

The federal Constitution does not require courts to define "reasonable doubt" or the "presumption of innocence." The court here fulfilled its obligation under the federal Constitution, which was to instruct the jury that every element of the murder charge had to be proved beyond a reasonable doubt. (*Victor, supra,* at p. 5.) There is not a reasonable likelihood that the jury understood the directions to mean anything different. Thus, there was no federal error.

The Due Process Clause protects a criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the charged offense. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 1068]; *People v. Mayo, supra,* 140 Cal.App.4th at pp. 541-542.) Thus, the burden is on the prosecution to prove beyond a reasonable doubt each element of the offense and the facts necessary to establish those elements. (*Sullivan, supra,* 508 U.S. at pp. 277-278.) Neither the state nor the federal Constitution expressly mentions the presumption of innocence. (*People v. Morris* (1968) 260 Cal.App.2d 848, 850.)

California law mandates something more than the federal Constitution. Instructing the jury that a criminal defendant is presumed innocent "has been part of our statutory law since statehood." (*People v. Morris*, *supra,* at p. 850; see §§ 1093, 1096.) As such, trial courts are required to specifically instruct the jury on both of the burden of proof and the presumption of innocence. (See *People v. Vann* (1974) 12 Cal.3d 220, 225-226 (*Vann*); *People v. Sering* (1991) 232 Cal.App.3d 677, 688.) This includes a "specific instruction that the defendants were presumed to be innocent and that the prosecution had the burden of proving their guilt beyond a reasonable doubt," "buttressed by additional instructions on the meaning of that phrase." (*Vann, supra,* 12 Cal.3d at pp. 225-226, 227.) Isolated or limited references to the standard of proof are not adequate to instruct jurors that defendants should be acquitted unless each element of a crime was proven beyond a reasonable doubt. (*Id.* at p. 227.) In California, trial courts satisfy this threshold requirement by instructing the jury with the standard reasonable doubt instruction, CALJIC No. 2.90.[8] (§ 1096.)

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[8] Or alternatively, with CALCRIM No. 2.20, which provides:
(continued...)

a. The instructions as a whole correctly conveyed the concept of reasonable doubt to the jury

CALJIC No. 2.90 and its counterpart, CALCRIM 220, encompass two separate, albeit related concepts: That the People have the burden of proving a defendant guilty beyond a reasonable doubt; and that a criminal defendant is presumed innocent until the contrary is proved. The trial court correctly instructed the jury with both of these concepts, notwithstanding omission of a standard instruction.

(...continued)

> The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/have) been arrested, charged with a crime, or brought to trial.
>
> A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise].
>
> Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.
>
> In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty.

CALCRIM No. 220 [REASONABLE DOUBT] (2006)

In *Victor, supra*, at p. 5, the United States Supreme Court concluded the United States Constitution "neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. [Citation.]" (*Ibid.*) "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury[.]" (*Holland v. United States* (1954) 348 U.S. 121, 140 [75 S.Ct. 127, 99 L.Ed.2d 150], internal quotes omitted.) "'Jurors know what is 'reasonable' and are quite familiar with the meaning of 'doubt.'" (*People v. Mayo, supra*, 140 Cal.App.4th at p. 552, quoting *United States v. Glass* (7th Cir. 1988) 846 F.2d 386, 387.) "[T]he phrase 'abiding conviction' has an 'antique ring' that, although current in 1850, has 'long since fallen into disuse' and leaves jurors confused about its intended meaning." (*People v. Mayo, supra,* at p. 551, quoting *People v. Brigham* (1979) 25 Cal.3d 283, 299 (conc. opn. of Mosk, J.).)

> [S]o long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt [citation], the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. [Citation.] Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.' [Citation.]

(*Victor*, at p. 5.) If so, there is no violation of the federal Constitution. (*Ibid.*)

Here, the court instructed the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, and the instructions as a whole correctly conveyed the concept of reasonable doubt to the jury. As set forth above, the trial court repeatedly explained -- and indeed strongly emphasized -- the principles related to the prosecution's burden of proof and the presumption of innocence during jury selection. From the very beginning of the process, the court admonished the entire pool of prospective jurors that the prosecution must prove each and every element

of each charge beyond a reasonable doubt to warrant a finding of guilt. (1 ART 108, 113-114, 123.) Moreover, tracking the very language in CALJIC No. 2.90, the court specifically instructed the jurors on the presumption of innocence and the definition of reasonable doubt. (1 ART 179-180.) It even went so far as to contrast the standard of proof with lower standards applicable in different settings – at three different times – emphasizing that the standard here was "the highest in the law." (1 ART 181-182; 2 ART 305-306, 348.)

The court made a point of repeatedly examining the prospective jurors, individually and collectively, to confirm that all of them understood these principles and agreed to apply them in determining appellant's guilt with respect to each element of each charge and allegation against him. (1 ART 180-181, 182-183, 184-185, 191-196, 214-215, 228-229; 2 ART 290, 302-303, 303-305, 352, 352-353, 353-354, 360-361.) In addition, both the prosecutor and defense counsel reminded the jurors of these principles. (1 ART 154-155, 254, 255, 256, 257; 2 ART 369-370, 372.)

While pre-empanelment instructions alone are unlikely to adequately convey the concept of reasonable doubt to the jury, see *Vann, supra*, 12 Cal. 3d at p. 227, fn. 5, here, in addition to other pinpoint instructions, the correct reasonable doubt standard was discussed forcefully, and discussed at length during those proceedings. The court and parties drove these points home in a very powerful way: in the presence of the entire panel, four prospective jurors were excused – two on the first day and two on the second day – *specifically because* they were unwilling or unable to abide by the obligation to apply the standard of proof and presumption of innocence. (1 ART 154-156, 262-266; 2 ART 337, 344.) These events sent a clear message to all the prospective jurors, which they simply could not ignore: faithfully applying the presumption of innocence and burden of proof was at the heart of the jury's task in this case. Thus, the reasonable doubt

instructions during voir dire, when considered within the context of the proceedings as a whole, would have led a reasonable juror to believe that the prosecutor was required to prove every element of the charged crimes beyond a reasonable doubt. (See *Boyde v. California, supra*, 494 U.S. at p. 331.)

Moreover, in instructing the jury at the end of the case, the trial court repeatedly reiterated the burden of proof in the context of describing the deliberative process the jury must follow with respect to the murder charge. In five separate instructions -- each of which included multiple references to the term "reasonable doubt" – the court explained that the prosecution bore the burden of proof and that the jury must: acquit appellant of the charge if it had a reasonable doubt whether the killing was unlawful; find the killing was manslaughter if it had a reasonable doubt whether the killing was perpetrated in the heat of passion or upon a sudden quarrel; and, if it found the killing was murder, to fix the degree of murder as second if it had a reasonable doubt whether the murder was of the first degree. (4 CT 813-814, 823-824, 830; 3 RT 685, 689-690, 696.) The court repeated these core principles in the context of describing the elements of the gang and firearm enhancement allegations – telling the jury the prosecution had the burden to prove each allegation and that the jury must find them not true in the event of a reasonable doubt. (4 CT 825-827; 3 RT 693-695.)

Finally, the court's instruction regarding circumstantial evidence explained that, before the jury could rely on such evidence to draw an inference essential to guilt, it must find the prosecution had proved beyond a reasonable doubt the facts or circumstances necessary to support that inference. (4 CT 786; 3 RT 674.) Thus, here, the instructions as a whole correctly conveyed the concept of reasonable doubt to the jury.

This is what the Court of Appeal correctly concluded. It held that, with regard to count 1, "the sum of the instructions sufficiently relayed the

concept of reasonable doubt to the jury." (Slip Opn. at p. 9.) The court cited *Victor* and *Mayo* in support of its holding. Hence, the court initially concluded that the trial court did not commit federal error. Somewhat confusingly, however, the Court of Appeal went on to conclude that the trial court nevertheless committed federal constitutional error in omitting CALJIC No. 2.90, but found the error harmless under the *Chapman* standard of review. (Slip Opn. at 9-10.)

The similar circumstances in *Mayo* help illustrate why there was no federal error here. Mayo was charged with murder and the prosecution alleged he personally used and discharged a firearm in the commission of the offense. (*Id.* at pp. 539-540.) During voir dire examination, the trial court read CALJIC No. 2.90 to the entire panel of prospective jurors and reiterated the requirements of reasonable doubt and the presumption of innocence several times. (*Id.* at p. 541, fn. 5.) However, apparently through inadvertence, the court failed to include CALJIC No. 2.90 in the instructions after the close of the evidence. (*Ibid.*) Mayo was convicted as charged. (*Id.* at p. 541.)

On appeal, Mayo claimed this omission of CALJIC No. 2.90 was structural error under the federal Constitution requiring reversal *per se* or, at the least, was not harmless beyond a reasonable doubt. (*People v. Mayo, supra*, 140 Cal.App.4th at p. 541.) The Court of Appeal rejected this claim. It found that, taken together, "the instructions fully and repeatedly informed the jurors that Mayo was entitled to an acquittal unless each element of the crime charged was proved beyond a reasonable doubt." (*People v. Mayo, supra*, 140 Cal.App.4th at p. 545.)

Specifically, the jury was instructed: the prosecution must prove each element of the murder charge beyond a reasonable doubt; the jury must give Mayo the benefit of any reasonable doubt as to whether the murder was of the first or second degree and fix the murder as second degree in the

case of such doubt; and it must give Mayo the benefit of any reasonable doubt as to whether the crime was murder or manslaughter, and find the crime to be manslaughter provided it was satisfied beyond a reasonable doubt he was guilty of that offense. (*People v. Mayo, supra*, 140 Cal.App.4th at p. 545 [referring to CALJIC Nos. 8.10, 8.11, 8.43, 8.50, 8.71, 8.72, 8.75.) The jury was also instructed that the prosecution had the burden to prove the personal use allegation and must find the allegation not true if the jury had a reasonable doubt that it was true. (*Id.* at p. 545, fn. 9 [referring to CALJIC No. 17.19.5].) In addition, the jury was instructed "of the constitutional requirement that guilt be judged solely on the evidence presented . . ." (*Id.* at p. 550 [referring to CALJIC Nos. 1.00 & 1.03].)

The *Mayo* court reasoned that, considered together, these instructions fully informed the jury of its obligation to acquit Mayo of the charged offense unless the prosecution proved each and every element of the offense beyond a reasonable doubt. (*People v. Mayo, supra*, 140 Cal.App.4th at pp. 545-547, 550.) As such, the omission of CALJIC No. 2.90 before deliberations did not constitute federal constitutional error. (*Id.* at pp. 548, 550.) The court accepted the Attorney General's concession that omission of CALJIC No. 2.90 was an error of state law pursuant to *Vann, supra,* 12 Cal.3d at p. 226, and invoked the *Watson* standard for determining the harmlessness of the error. (*Id.* at pp. 539, 548, fn. 13, 551.)

The court went on to find the error harmless. As the court explained, the evidence of Mayo's guilt was strong. (*People v. Mayo, supra*, 140 Cal.App.4th at p. 551.) The trial court had repeatedly explained the concepts of reasonable doubt and presumption of innocence to the panel of prospective jurors. (*Id.* at p. 552.) Its pre-deliberation instructions fully informed the empanelled jury of the prosecution's burden to prove each element of the charged offense. (*Id.* at pp. 551-552.) And, none of counsels' arguments invited the jurors to consider evidence outside that

which was adduced at trial. (*Id.* at p. 552.) Thus, it was not reasonably probable that instructing the jury under CALJIC No. 2.90 at this stage would have led to a more favorable result. (*Ibid.*)

Appellant contends that *Mayo* is "easily distinguished" from the case at hand, because Mayo was charged and convicted of murder, and appellant was charged and acquitted of murder, and convicted of voluntary manslaughter and street terrorism. (BOM 61.) But this distinction does not inure to appellant's benefit. The court instructed the jury that it could only convict appellant of manslaughter if it unanimously agreed the killing was unlawful, but had a reasonable doubt as to whether it was murder. (4 CT 814; 3 RT 685; CALJIC No. 8.72.) It further instructed the jury that if it was not satisfied beyond a reasonable doubt that that appellant was guilty of first degree murder, it could convict him of a lesser crime only if it the jury was satisfied beyond a reasonable doubt that appellant was guilty of the lesser crime. (4 CT 824; 3 RT 689-690; CALJIC No. 8.75 In addition, the court explained that the burden was on the prosecution to prove beyond a reasonable doubt that the killing was unlawful, and was not justifiable or excusable. (4 CT 830; 3 RT 696; CALJIC No. 5.15.) Thus, the court fully instructed the jury with regard to the prosecution's burden and reasonable doubt with regard to appellant's manslaughter conviction. Indeed, the fact that appellant was acquitted of murder suggests that the jury understood all too well the requirement of proof beyond a reasonable doubt. The record reflects that there is no reasonable likelihood the jury misunderstood the instructions as appellant contends. (See *Boyde, supra,* at pp. 383-386.)

b. The court adequately conveyed the principle of the presumption of innocence to the jury

Similarly, due process does not mandate the "'use of the particular phrase presumption of innocence – or any other forms of words . . .'" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 72, quoting *Taylor v. Kentucky*

(1978) 436 U.S. 478, 485 [98 S.Ct. 1930, 56 L.Ed.2d. 468] (*Taylor*).) As the United States Supreme Court has made clear, what is commonly known as the presumption of innocence is actually an *assumption* of innocence, and what it means is that the prosecution must prove its case by actual evidence presented. (*Taylor v. Kentucky, supra,* 436 U.S. at p. 483, fn. 12.) The presumption of innocence is logically implicit in the requirement that proof be beyond a reasonable doubt. (*Id.* at p. 483.) In fact, the Court has clarified that '"the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution.'" (*People v. Friend* (2009) 47 Cal.4th 1, 7, quoting *Kentucky v. Whorton* (1979) 441 U.S. 786, 789 [99 S.Ct. 2088; 60 L.Ed.2d 640.) "Rather, this traditional formulation 'simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial.'" (*People v. Hawthorne, supra,* 4 Cal.4th at p. 72, quoting *Taylor v. Kentucky, supra*, 436 U.S. at p. 486; accord *People v. Friend, supra,* 47 Cal.4th at p. 78.) "Accordingly, we decline defendant's invitation to confine instruction on the presumption of innocence to any rigid or narrowly precise terms." (*People v. Hawthorne, supra,* 4 Cal.4th at p. 72; accord *People v. Friend, supra,* 47 Cal.4th at p. 78.) "As long as the court's charge to the jury conveys the substance of the principle, it will satisfy due process." (*Ibid.*)

In *Taylor,* the Supreme Court reversed a conviction in a case where the trial court had failed to instruct on the presumption of innocence. (*Taylor v. Kentucky, supra,* 436 U.S. at pp. 480-490.) The Kentucky courts subsequently interpreted the decision as meaning that the jury must always be instructed on the presumption of innocence. (*Kentucky v. Whorton, supra,* 441 U.S. at pp. 786-787.) This interpretation was wrong, however. As the Supreme Court made clear when it followed up in *Taylor* in *Whorton,* the problem in *Taylor* had not been the lack of instruction on the

presumption of innocence, but that the prosecution had argued that guilt could be inferred from the defendant's status as the accused, and the court's "Spartan" instructions (consisting apparently of a single paragraph) had done nothing to counter this notion. (*Kentucky v. Whorton, supra,* 441 U.S. at p. 789; *Taylor v. Kentucky, supra,* 436 U.S. at p. 481, fn. 7.) In that situation, the defendant's due process right to be convicted only on the evidence in the case had not been sufficiently protected. (*Kentucky v. Whorton, supra,* 441 U.S. at p. 789.) Thus, under the particular facts of *Taylor*, it was possible the jury considered facts outside the evidence in arriving at its judgment. (*Ibid.*)

Hence, there is no requirement that the trial court specifically instruct the jury with the words "presumption of innocence" unless there was some reason to believe that the jury might decide the case based on matters that were not evidence. (*Kentucky v. Whorton, supra,* 441 U.S. at p. 789-790, citing *Kentucky v. Taylor, supra,* at pp. 487-488 ["[The] combination of the skeletal instructions, the possible harmful inferences from the references to the indictment, and the repeated suggestions that petitioner's status as a defendant tended to establish his guilt created a genuine danger that the jury would convict petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial."].)

Here, there is no reason to believe that the jury might do so. Unlike in *Taylor,* there was no invitation to the jury to convict appellant simply because he had been accused of a crime, or for any other reason that was not based on the evidence. There was thus no danger that appellant's due process right to be judged solely on the evidence against him would be compromised.

Moreover, the final charge reinforced this concept to the jury. At the beginning of the charge, the court reminded the jury it must determine appellant's guilt based solely upon the evidence adduced at trial. (4 CT

779; 3 RT 670-671.) As explained, this is the core concept underlying the presumption of innocence -- which need not be explained with any particular formulation. (*People v. Hawthorne, supra*, 4 Cal.4th at p. 72, quoting *Taylor, supra*, 436 U.S. at p. 486 ["this traditional formulation [in CALJIC No. 2.90] 'simply represents one means of protecting the accused's constitutional right to be judged solely on the basis of proof adduced at trial'"]; accord *People v. Friend, supra,* 47 Cal.4th at p. 7.) This instruction plainly and unambiguously informed the jury that it could decide the case, as *Taylor* requires, "solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." (*Taylor v. Kentucky, supra,* 436 U.S. at p. 485.) The phrase "presumption of innocence" is not necessary, and as *Taylor* noted, is unlikely to mean much to a lay juror. (*Taylor v. Kentucky, supra,* U.S. at pp. 485-486.) Thus, there was no federal error.

c. *Sullivan* does not compel reversal

Despite the standards set forth in *Victor* and *Sullivan,* appellant argues that *Sullivan* mandates reversal here. (BOM 43.) As explained above, because the instructions as a whole properly conveyed the concept of reasonable doubt to the jury, no federal constitutional error occurred at all. Hence, this argument is meritless.

In *Sullivan*, the Supreme Court held that an instruction that lowers the prosecution's burden of proof or provides a constitutionally deficient definition of reasonable doubt is structural error requiring reversal per se. (*Sullivan, supra*, 508 U.S. at p. 279.) There, the trial court instructed the jury with a reasonable doubt instruction that had been disapproved in *Cage v. Louisiana* (1990) 498 U.S. 39, 41 [111 S.Ct. 38; 112 L.Ed.2d 339].) *Sullivan* concluded that a trial court's constitutionally deficient definition of reasonable doubt wholly denied the defendant his Sixth Amendment right

to a jury trial, and as a result there had effectively been no jury verdict within the meaning of the Sixth Amendment. (*Sullivan, supra*, at p. 278.) The court stated:

> There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question of whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(*Sullivan, supra*, at p. 280.) The Court determined such error was structural because if the appellate court applied the *Chapman* standard of prejudicial error, the judge, rather than the jury, would be determining the defendant's guilt. (*Sullivan, supra*, at p. 281.)

In contrast, the circumstances in this case present a different question than that resolved in *Sullivan*: Whether the omission of a constitutionally adequate instruction on this point (as well as on the presumption of innocence) is federal constitutional error and requires reversal *per se*? It simply cannot be a federal constitutional error, because the opinion in *Victor,* decided after *Sullivan*, clarified that due process does not require trial courts to define reasonable doubt provided the jury is informed of the constitutionally correct standard of proof. Appellant appears to acknowledge this, stating:

> The omission of a standard reasonable doubt instruction, however, might not always result in "[d]enial of the right to a jury verdict of guilty beyond a reasonable doubt," [citation]. Other instruction(s) could conceivably cover the same territory as the missing instruction.

(OBM 45.)

Moreover, courts have long recognized a lower risk of prejudice when the instructional error involves an omission: "'An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.'" (*People v. Avila* (1995) 35 Cal.App.4th 642, 663, quoting *Henderson v. Kibbe* (1977) 431 U.S. 145, 155 [97 S.Ct. 1730, 52 L.Ed.2d 203].

At least three other states have reached similar conclusions based on *Victor*. For example, the Utah Supreme Court held that "we now adhere instead to the *Victor* test for assessing the validity of reasonable doubt instructions. Simply put, we need only ask whether the instructions, taken as a whole, correctly communicate the principle of reasonable doubt, namely, that a defendant cannot be convicted of a crime "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."' (*State v. Austin* (Utah 2007) 165 P.3d 1191, 1195.) Notably, the Michigan Supreme Court held that giving an affirmatively misleading definition differs substantially from merely declining to define reasonable doubt. It held that failure to define reasonable doubt is not error at all, because it is not because "the instructions that were given allowed the jury to determine reliably the defendant's guilt or innocence." (*People v. Allen* (Mich. 2002) 643 N.W.2d 227, 232.) Also, in Texas, "if there is a total omission of the instruction on reasonable doubt, such error defies meaningful analysis by harmless-error standards. However, if the jury is given a partial or substantially correct charge on reasonable doubt, then any error therein is subject to a harm analysis." (*Olivas v. State* (Tex. 2006) 202 S.W.3d 137, 143.)

d. Prior court decisions finding federal constitutional error in the omission of CALJIC No. 2.90 do not compel a finding of federal error here

In further support of his claim, appellant cites the various cases in which reviewing courts found reversal was warranted on account of the trial court's omission of CALJIC No. 2.90 from the final instructional charge. (See BOM 46-56.) These cases are not persuasive because the opinions are based on this Court's decision in *Vann,* and there have been significant changes in the law since *Vann* was decided. The cases are also distinguishable based on factual differences upon which the opinions are based.

In *Vann,* the People argued that the failure to give the standard instruction was not prejudicial error because the point was otherwise covered and the jury was aware that the People were required to prove the defendants guilty beyond a reasonable doubt. In support of their position the People pointed out that CALJIC No. 2.01 was given, by which the jurors were told they could not find defendants guilty

> based on circumstantial evidence unless the proved circumstances are not only consistent with the theory that the defendant is guilty of the crime, but cannot be reconciled with any other rational conclusion and each fact which is essential to complete a set of circumstances necessary to establish a defendant's guilt has been proved beyond a reasonable doubt.

(*Vann, supra,* 12 Cal. 3d at pp. 226-227.) *Vann* concluded that this instruction failed to tell the jurors that a determination of guilt resting on direct testimony must also be resolved beyond a reasonable doubt. And, as this Court held, because the prosecution depended in large part on direct evidence, an instruction which requires proof beyond a reasonable doubt only as to circumstantial evidence might have been interpreted by the jurors as "importing the need of a lesser degree of proof where the evidence is

direct and thus of a higher quality." (*Ibid.*) The People also pointed to an instruction on character evidence which told the jury that "evidence of good character may be sufficient to raise a reasonable doubt whether a defendant is guilty, which doubt otherwise would not exist' and to the trial court's instruction regarding the reasonable doubt standard of proof that it gave jury panel members during jury selection. This Court found both instructions insufficient to cure the court's instructional error. (*Vann, supra*, 12 Cal.3d at p. 227, fn. 6.) *Vann* further found the failure to instruct with the standard instruction was not cured by other pre-empanelment directions given to the jury, reasoning that other instructions told the jury that it was to follow only the pre-deliberation instructions and nothing else.[9] (*Ibid.*) It also rejected the notion that the closing arguments of defendants' counsel helped to cure the error, because "[i]n its final charge the court made it clear that the jurors were to follow the law as explained by the court, and were not to follow rules of law stated in argument but omitted from the instructions." (*Id.* at p. 227, fn. 6.)

In reversing the judgment, *Vann* applied the federal harmless error standard set forth in *Chapman.* However, as explained above, *Victor*, decided years after *Vann*, clarified that the failure to specifically instruct

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[9] Prior to selection of jurors, the court instructed the jury panel that it would be "incumbent . . . upon the People to prove the allegations as to each defendant, and to prove them beyond a reasonable doubt, to a moral certainty, before you would be entitled to return a guilty verdict." The court thereafter instructed that "[a]t the conclusion of the evidence in the case the court will give you instructions on the law as it relates to the evidence." The court gave final instructions 16 days later. At that time the court did not refer back to its preliminary remarks made before the selection of the jurors, and stated, "it is my duty to instruct you on the law that applies to this case, and you must follow the law as I state it to you." Toward the end of the charge the court concluded, " You have been instructed on all the rules of law that may be necessary for you to reach a verdict." (*Vann, supra,* 12 Cal.3d at p. 227, fn. 6.)

with CALJIC No. 2.90 itself does not amount to federal constitutional error when the jury is otherwise adequately apprised of the concept of reasonable doubt. *Vann* did not hold that federal constitutional error results when, as here, remaining instructions regarding the charged offenses cured the failure to give CALJIC No. 2.90.

In *People v. Elguera*, the First District Court of Appeal considered circumstances similar to those in *Vann* in which the trial court omitted the standard instruction on the reasonable doubt standard of proof in its final jury instructions. (*People v. Elguera, supra*, at pp. 1216, 1218–1220.) There, as in *Vann*, the trial court instructed the jury panel members during jury selection on the reasonable doubt standard of proof; gave CALJIC No. 2.01 on circumstantial evidence as part of its final jury instructions; and both counsel in closing arguments repeatedly referred to the reasonable doubt standard of proof. (*People v. Elguera, supra*, at p. 1217- 1219, 1222.) In addition, in *Elguera,* unlike in *Vann*, a full instruction on the reasonable doubt standard of proof was given during jury selection, which occurred on the same day as the trial and jury deliberations; the prosecutor's evidence on the crucial disputed issue was entirely circumstantial; and before counsels' closing arguments the trial court reminded the jury that the prosecutor had the burden of proof. (*People v. Elguera, supra*, at pp. 1217, 1221.) Citing *Vann,* the *Elguera* court found the trial court erred by failing to instruct the jury sua sponte on the presumption of innocence and the reasonable doubt standard of proof during the trial rather than during jury selection; and to make the instruction available with other written instructions. *Elguera* then followed *Vann* and applied the *Chapman* standard of reversible error. The court concluded it was not convinced beyond a reasonable doubt that the error had no effect on the verdict and reversed the judgment. (*Elguera, supra*, at p. 1220-1224.)

In contrast to the case at hand, in neither *Vann* nor *Elguera* did the trial court discuss the burden of proof in connection with the charged offenses. (See *Vann, supra*, 12 Cal.3d at pp. 225-226; *Elguera, supra*, 8 Cal.App.4th at pp. 1217-1219.) Here, the court discussed and instructed on that concept in connection with the charged offenses – both before and after the trial. Moreover, in *Elguera*, the "[d]efendant's exculpatory version of events was neither physically impossible nor contradicted by any direct evidence," (*Elguera, supra*, 8 Cal.App.4th at p. 1224), whereas, here, appellant's claim of self defense was simply not viable.

Since this Court's decision in *Vann,* and the appellate decision in *People v. Elguera,* the United States Supreme Court has clarified that the federal Constitution does not require trial courts to define reasonable doubt. Instead, taken as a whole, the instructions need only correctly convey the concept of reasonable doubt to the jury. (*Victor, supra,* at p. 5.) A constitutionally inadequate instruction on reasonable doubt, however, constitutes reversible error. (*Sullivan, supra,* at p. 278.) Moreover, the Court has explained that in reviewing claims of instructional error, a reviewing court looks at the language of the instructions themselves, and the context of the proceedings, to decide whether there was a reasonable likelihood the jury misunderstood the instructions construed as a whole. (*Boyde v. California, supra,* 494 U.S. at pp. 383-386.) Since *Vann*, California has adopted this standard. (*People v. Kelly, supra,* 1 Cal.4th at p. 525.) The context of the proceedings includes the discussion of reasonable doubt that occurred during voir dire.

Subsequent to *Sullivan* and *Victor,* the Fourth District Court of Appeal has rejected the claim that the omission of CALJIC 2.90 requires reversal *per se*, noting the nation's high court had clarified since *Vann* that due process does not require specific definitions of reasonable doubt or the presumption of innocence. (*People v. Flores* (2007) 147 Cal.App.4th 199.

208, 210-211.) In reversing the convictions, *Flores* distinguished itself from *Mayo*, noting that in *Mayo* the trial court's instructions on elements of the charged offense and lesser offenses expressly instructed the jury on the standard of reasonable doubt. (*People v. Flores, supra,* 147 Cal.App.4th at p. 218.) In contrast, in *Flores,* the instructions on the elements of the charged offenses omitted any reference to the applicable burden of proof. (*Id.* at p. 219.) *Flores* concluded that it was bound to apply the federal harmless error analysis because:

> [A]t least in a case where the jurors have been told the prosecution must prove its case beyond a reasonable doubt and there has not been an erroneous definition of that burden of proof, the harmless-error standard applied by our Supreme Court in *Vann, supra*, 12 Cal.3d 220 remains the controlling law. We are satisfied that there has not been an intervening authority from the United States Supreme Court which undermines that precedent [citation]. Accordingly, we are bound to follow the decision of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

(*People v. Flores, supra*, 147 Cal.App.4th at p. 211.)

In contrast, the First District Court of Appeal in *People v. Crawford* (1997) 58 Cal.App.4th 815, citing *Sullivan,* concluded the trial court's error in not instructing with the general instruction on the prosecution's burden of proving the defendant's guilt beyond a reasonable doubt was federal constitutional error, and reversible per se. (*People v. Crawford, supra*, 58 Cal.App.4th at pp. 817, 821–823.) The court in *Crawford* rejected the argument that the trial court's instruction on reasonable doubt during jury selection, and the giving of CALJIC No. 2.01, rendered the court's error subject to *Chapman's* harmless error analysis. (*People v. Crawford, supra*, 58 Cal.App.4th at p. 820, 823-825.)

In *People v. Phillips,* the Second District Court of Appeal, also citing *Sullivan,* concluded the trial court's error in not instructing the jury with the standard instruction on the prosecution's burden of proving the defendant's

guilt beyond a reasonable doubt was structural error as well. (*People v. Phillips* (1997) 59 Cal.App.4th 952, 956-958.) The court rejected the People's argument that other instructions relating to reasonable doubt, pre-empanelment instructions, and argument from counsel rendered the court's error harmless. According to the court, "the trial court's error suffered no less a constitutional defect than did the trial court in *Sullivan*." (*People v. Phillips, supra*, at pp. 957–958.) Notably, in *Phillips*, the parties argued over the proper definition of reasonable doubt such that "the jurors were bound to be confused as to the exact meaning the phrase." (*People v. Phillips, supra*, 59 Cal.App.4th at p. 958.) The parties here engaged in no such dispute; they did not specifically discuss the definition of reasonable doubt in their arguments. (See 3 RT 710-745.)

Neither *Phillips* nor *Crawford* mentioned or considered the United States Supreme Court opinion in *Victor*. And, as *Flores* noted, neither did either opinion consider or even mention the decision in *Kentucky v. Whorton, supra*, 441 U.S. at p. 789, where the United States Supreme Court clarified that an omission of an instruction on the presumption of innocence is not inherently prejudicial and must instead be evaluated under the "totality of the circumstances" to determine whether the defendant received a fair trial. (*Flores, supra*, 147 Cal.App.4th at p. 210-211; see *Whorton, supra*, 441 U.S. at p. 789.) Accordingly, the opinions omit an analysis of the seminal cases on the issue, and therefore neither opinion is persuasive in resolving the case at hand.

As a matter of precedent, lower courts have been obligated to follow *Vann* in finding federal constitutional error and applying the *Chapman* standard in the omission of CALJIC No. 2.90. (See *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1220; *People v. Flores* (2007) 147 Cal.App.4th 199, 211.) However, as explained, the United States Supreme Court has clarified since *Vann* that where, taken as a whole, the instructions correctly

convey the concept of reasonable doubt to the jury, there is no federal constitutional violation. (*See Victor, supra,* p. 5.) Thus, here, there was no federal error in instructing the jury with regard to appellant's manslaughter conviction. Respondent has not found any cases decided by this Court in which a violation of state law only has been deemed structural error and, thus, reversible per se. It would, therefore, be anomalous if this Court were to hold that the omission of CALJIC No. 2.90 here was structural error.

D. Omission of CALJIC No. 2.90 from the Final Instructional Charge Did Not Violate Appellant's Federal Constitutional Rights, Thus the Error Should be Evaluated Under the Standard Set Forth in *Watson*

If a trial court's instructional error violates the United States Constitution, the reviewing court assesses the error under the standard stated in *Chapman v. California.* (*People v. Mower* (2002) 28 Cal.4th 457, 484.) This requires the People, "in order to avoid reversal of the judgment, to "prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained."" (*Ibid.*) However, if a trial court's instructional error violates only California law, a reviewing court assesses the error under the standard set forth in *People v. Watson.* (*Ibid.*) This allows the People to avoid reversal unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Ibid.*)

As noted above, California law requires the trial court to instruct the jury, sua sponte, with CALJIC No. 2.90. (*Vann, supra,* 12 Cal.3d at pp. 225-226, 227.) The trial court did not do so here. While such omission was not a federal constitutional error, it did amount to an error of state law. However, because appellant would not have received a more favorable result had the jury been instructed with CALJIC No. 2.90, the error was harmless.

First and foremost, the above analysis demonstrates that the jury was fully apprised of proof beyond a reasonable doubt and the presumption of innocence: namely, that appellant was presumed innocent, and must be acquitted, of all charges and allegations unless the prosecution carried its burden of proving beyond a reasonable doubt each and every element of those charges and allegations. Repeating CALJIC No. 2.90's discussion of the burden and presumption under these circumstances was not necessary to ensure the jurors appreciated the meaning and impact of these principles. This is particularly true when, as already noted, the nation's high court has made clear that the jury need not be instructed on these principles with any particular formulation or set of words. (*Victor, supra*, 511 U.S. at p. 5; *Taylor, supra*, 436 U.S. at p. 485.) It is enough that the court's instructions as a whole correctly informed the jury of the burden of proof and presumption of innocence. (*Victor*, at p. 5; Taylor, at p. 485; *Whorton, supra*, 436 U.S. at p. 789; *People v. Hawthorne, supra*, 4 Cal.4th at p. 72.) And they did.

The definition of reasonable doubt is all that was missing from the charge. However, there is no indication that the jury was at all confused about the meaning or application of burden of proof. That is, '"the jury did not request a further explanation of the reasonable doubt standard, as it surely would have done had it been confused as to the meaning of reasonable doubt."' (*People v. Chatman* (2006) 38 Cal.4th 344, 408 [where the Supreme Court cited lack of confusion in finding that the trial court's failure to repeat the definition of reasonable doubt at the penalty phase was harmless].) Moreover, the verdicts demonstrate that the jury understood and followed the instructions, as evidenced by the fact that the jury acquitted appellant of murder and the substantive gang allegations, both charges in which the court specifically instructed the jury regarding proof beyond a reasonable doubt. It is not reasonably probable that appellant

would have received a more favorable verdict had the jury been given the definition of reasonable doubt.

This is especially so given that "[e]xperience has shown that attempts to define reasonable doubt add little in the way of clarity and often add much in the way of confusion and controversy." (*United States v. Taylor* (D.C. Cir. 1993) 997 F.2d 1551, 1558.) "[P]roof beyond a reasonable doubt" is part of a class of terms about which "a jury which did not understand them would not understand an explanation of them." (*People v. Brigham, supra,* 25 Cal. 3d at p. 314, (Mosk, J., concurring, citing *People v. Halbert* (1926) 78 Cal.App.598, 612.)

Further, the evidence strongly supports the jury's verdict of voluntary manslaughter. Appellant's self-defense claim was not credible. During the police interview, appellant did not mention anything about having acted in self defense. (2 RT 354.) Instead, appellant denied having been at the party and claimed the witnesses who placed him there were lying. (2 RT 355; see 4 CT 702-732.) In addition, appellant asked his girlfriend to lie for him and to tell police that he was with her that night, not at the party. (2 RT 304.)

Furthermore, appellant showed up at the party with a gun. (2 RT 400.) Appellant displayed the gun in a threatening manner to at least one other person before killing Louis. (2 RT 205-206; 3 RT 617-618.) Then, after shooting Luis, appellant left the scene, and two days later, he buried the gun in some bushes. (3 RT 619-621.)

The mere of exercise of reiterating the burden of proof and presumption of innocence under CALJIC Number 2.90 before deliberations began would not have affected the jury's conclusion – particularly when the court's other instructions had already fully apprised the jury of these principles. For all the reasons outlined above, omission of CALJIC No. 2.90 was harmless because it is not reasonably probable that a result more

favorable to appellant would have been reached in absence of the error. (*Watson, supra,* 46 Cal.2d at p. 836.)

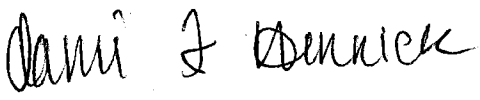
CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court affirm the Court of Appeal's decision.

Dated: November 29, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



TAMI FALKENSTEIN HENNICK
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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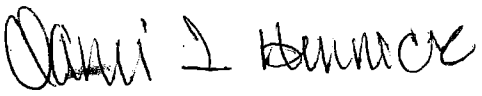
CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWERING BRIEF ON MERITS** uses a 13 point Times New Roman font and contains 12,438 words.

Dated: November 29, 2011

KAMALA D. HARRIS
Attorney General of California



TAMI FALKENSTEIN HENNICK
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

Case Name: **People v. Aranda, Jr**
No.: **S188204**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 29, 2011, I served the attached **ANSWERING BRIEF ON MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

William J. Capriola
Attorney at Law
P.O. Box 1536
Sebastopol, CA 95473
Attorney for Appellant
Two Copies

The Honorable Albert J. Wojcik, Judge
c/o Riverside County Superior Court Clerk
Southwest Justice Center
30755-D Auld Rd, Ste 1226
Murrieta, CA 92563

The Honorable Paul E. Zellerbach
District Attorney
Riverside County District Attorney's Office
3960 Orange Street
Riverside, CA 92501

California Court of Appeals
750 B Street, #300
San Diego, CA 92101

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on November 29, 2011, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 29, 2011, at San Diego, California.

Carole McGraw
Declarant

Signature

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