IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,)
)
Plaintiff and Respondent,) No. S232218
)
v.)
)
MARVIN TRAVON HICKS)
)
Defendant and Appellant.)

SUPREME COURT
FILED

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Deputy

Second Appellate District, Division Five, Case No. B259665
Los Angeles Superior Court No. MA058121
Honorable Kathleen Blanchard, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page(s)

APPELLANT'S REPLY BRIEF ON THE MERITS 6

INTRODUCTION 6

ARGUMENT 8

THE TRIAL COURT ERRED WHEN IT REFUSED TO INFORM THE JURY AT THE RETRIAL OF THE MURDER CHARGE THAT APPELLANT HAD BEEN CONVICTED OF GROSS VEHICULAR MANSLAUGHTER IN THE FIRST TRIAL 8

A. The requested instruction was relevant 8

B. The requested instruction would have reinforced, not contradicted, the rule that juries should not consider punishment 9

C. This Court's precedent on lesser-related offense instructions raises no impediment to the requested instruction 15

D. The not guilty by reason of insanity cases support the requested instruction 16

E. *Batchelor* and *Johnson* found instructional error independent of the nature of counsels' arguments to the jury which in any event were functionally the same as those made in this case 18

F. The instructional error was prejudicial 22

CONCLUSION 28

WORD COUNT CERTIFICATION 29

PROOF OF SERVICE 30

TABLE OF AUTHORITIES

Page(s)

STATE CASES

College Hospital, Incorporated v. Superior Court (1984)
8 Cal.4th 704 27

People v. Batchelor (2014)
229 Cal.App.4th 1102 . . . . . *passim*

People v. Birks (1998)
19 Cal.4th 108 . . . . . 15, 16

People v. Breverman (1998)
19 Cal.4th 142 . . . . . 8, 27

People v. Cox (1991)
53 Cal.3d 618 12

People v. David (1991)
230 Cal.App.3d 1109 25

People v. Dennis (1985)
169 Cal.App.3d 1135 17

People v. Dykes (2009)
46 Cal.4th 731 12

People v. Edwards (1991)
54 Cal.3d 787 17

People v. Geiger (1984)
35 Cal.3d 510 . . . . . 15, 16

People v. Guiton (1993)
4 Cal.4th 1116 27

People v. Jiminez (2015)
242 Cal.App.4th 1337 . . . . . 24, 25

Page(s)

People v. Johnson (2016)
4 Cal.App.5th 452 . . . . *passim*

People v. Moore (1985)
166 Cal.App.3d 540 . . . . 16, 21

People v. Pride (1992)
3 Cal.4th 195 12

People v. Reed (2006)
38 Cal.4th 1224 10

People v. Riel (2000)
22 Cal.4th 1153 12

People v. Sanchez (2001)
24 Cal.4th 983 10

People v. Schmeck (2005)
37 Cal.4th 240 12

People v. Soojian (2010)
190 Cal.App.4th 491 . . . . 24, 27

People v. St. Martin (1970)
1 Cal.3d 524 . . . . 8, 16

People v. Valentine (2006)
143 Cal.App.4th 1383 15

People v. Watson (1956)
46 Cal.2d 878 26

STATE STATUTES

Evidence Code section:

1150 26

Page(s)

Penal Code sections:

1179 18

1180 17

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APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Appellant has argued that when a defendant is retried for murder alone after his initial jury has deadlocked on the murder charge but convicted him of vehicular manslaughter while intoxicated, he should be entitled, on request, to an instruction informing the new jury of the historical fact of the manslaughter conviction. As held in *People v. Batchelor* (2014) 229 Cal.App.4th 1102 and now, *People v. Johnson* (2016) 4 Cal.App.5th 452, such an instruction is necessary to avoid a verdict influenced by the false impression that, absent a conviction for murder, defendant's actions will be left unpunished. Yet, at first glance, providing the jury with this information might appear to

contradict the rule that the jury must not speculate about punishment in reaching its verdict. Resolution of the issue therefore requires a balancing of the risk that absent the instruction, the verdict will be influenced by mistake, speculation and fear against the risk that the instruction itself will promote unfounded speculation about punishment.

Respondent's Answer Brief is noteworthy for focusing on the latter risk while wholly ignoring the former, as if it didn't exist. This is akin to arguing against vaccination by decrying its legitimate dangers without acknowledging existence of the disease the vaccination was designed to prevent. Appellant has described the risk which necessitates the requested instruction in section D of his Opening Brief on the Merits, and, as respondent does not dispute it, will not elaborate on it here except to point out where respondent's discussion of the asserted dangers of the requested instruction is wanting for lack of acknowledgment of the risk the instruction is designed to counter.[1]

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[1] To facilitate cross-referencing, the body of this brief will address respondent's contentions in the order they are made, with roughly corresponding subheadings.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT REFUSED TO INFORM THE JURY AT THE RETRIAL OF THE MURDER CHARGE THAT APPELLANT HAD BEEN CONVICTED OF GROSS VEHICULAR MANSLAUGHTER IN THE FIRST TRIAL

A. The requested instruction was relevant.

Respondent initially points out that the fact appellant was convicted of gross vehicular manslaughter in the first trial is irrelevant to whether he committed second-degree murder, and from that argues that the trial court was entitled to refuse the requested instruction because it would have imparted irrelevant information (Answer Brief on the Merits, hereinafter "ABM," pp. 4-5). Appellant agrees that his manslaughter conviction was irrelevant to the only question in dispute at the second trial: whether he acted with malice and was therefore guilty of second-degree murder. But it doesn't follow that informing the second jury of the manslaughter conviction was unnecessary or irrelevant to the jury's task. This Court has recognized that a jury presented with an all-or-nothing choice between conviction and acquittal is at risk of returning a conviction of the charged offense despite entertaining reasonable doubt of guilt on one or more of its elements, out of unwillingness to acquit a defendant it is persuaded has been guilty of wrongful conduct of a lesser degree (see *People v. St. Martin* (1970) 1 Cal.3d 524, 533; *People v. Breverman* (1998) 19 Cal.4th 142, 155; fuller discussion in Appellant's Opening Brief on the Merits, hereinafter OBM, pp. 27-31). The requested instruction was

relevant to that danger and necessary to alleviate it. By respondent's rationale ("Hicks's second jury was instructed on the elements of second degree murder and, thus, had all the instructions it needed to determine if Hicks was guilty or not guilty" – ABM at p. 5), no instructions on lesser included offenses would ever be required, nor would their omission, if error, ever be prejudicial, as long as the jury was instructed on the elements of the charged offense and thus "had all the instructions it needed to determine if [the defendant] was guilty or not guilty." Instructions necessary to the jury's proper performance of its task are clearly not confined to those defining the charged offense.

B. The requested instruction would have reinforced, not contradicted, the rule that juries should not consider punishment.

Respondent next predictably argues that informing the second jury of appellant's manslaughter conviction would contradict the settled rule that juries should not consider punishment (ABM, pp. 5-9). In no part of this discussion does respondent acknowledge any risk that the circumstances of the case invited the jury to ignore the court's instructions not to speculate about punishment, or address appellant's argument that knowledge of the manslaughter conviction would have reinforced them by taking the question of accountability off the table so that the jury would feel free to focus entirely on whether malice was or was not proven beyond a reasonable doubt (see OBM, p. 23).

In a recent Court of Appeal decision reaffirming *Batchelor*, the court explained in detail just how the requested instruction would have reinforced the rule against speculating about punishment:

"We are also unpersuaded that the *Batchelor* opinion is in conflict with the rule that punishment is not an appropriate consideration for the jury during the guilt phase of a trial. In the related context of the court's sua sponte duty to instruct on lesser included offenses, California precedent has recognized that forcing a jury to make an "'unwarranted all-or-nothing choice'" between conviction of the crime charged and acquittal interferes with the jury's "'truth-ascertainment function.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) Among other things, such an all-or-nothing choice may encourage the jury to return a verdict based on its own sense of rough justice, for example, by returning a conviction of the charged offense, despite entertaining reasonable doubt of guilt on some element of the offense, because it is unwilling to acquit a defendant it is persuaded has been guilty of wrongful conduct of a lesser degree. (See *People v. St. Martin* (1970) 1 Cal.3d 524, 533.) It is inappropriate to allow either the state or the defendant to force the jury to make such an all-or-nothing decision, hoping that improper considerations may weigh in their favor: "Our courts are not gambling halls but forums for the discovery of truth." (*Ibid.*)

"Of course, gross vehicular manslaughter is a lesser related offense of second degree murder, not a lesser included offense. (*People v. Sanchez* (2001) 24 Cal.4th 983, 991, overruled on another ground in *People v. Reed* (2006) 38 Cal.4th 1224, 1228-1229.) Nevertheless, the above principles articulated in the context of lesser included offenses are similarly applicable to facts such as those of *Batchelor*, and those of the case at bar. The primary task of both of defendant's juries was to determine the appropriate mens rea to attribute to defendant's actions, on largely undisputed underlying facts. Defendant's first jury had a variety of options, ranging from ordinary negligence (since defendant's counsel did not attempt to argue for a finding of no culpability) to implied malice. Defendant's second jury had to decide between implied malice and no unlawful intent, and was never provided the contextual information necessary to understand that defendant's first jury had already resolved the issue of whether defendant acted with an intermediate level of culpability, such as ordinary or gross negligence. This was an all-or-nothing choice that, in our view, as expressed here and in *Bachelor*, should have been placed in context by means of an appropriate instruction.

"Put another way: In circumstances such as this case or those of *Batchelor*, the lack of context inadvertently encourages the jury on retrial to

> consider punishment. Providing the jury some information about the results of the first trial encourages the jury to set aside the issue of punishment, as it is instructed to do elsewhere, and facilitates its ability to focus on the analysis it is properly being asked to perform, namely, to determine defendant's level of culpability. " (*People v. Johnson, supra,* 4 Cal.App.5th 452, 459-460.)

Johnson's reasoning is sound, as respondent implicitly concedes by failing to challenge it.

Respondent complains that the requested instruction would require the jury to execute the impossible mental gymnastic of "trying to consider the prior verdict, while also trying to ignore the possible punishment the defendant could receive" (ABM, p.6). Not so. The jury would be in no different position than the initial jury was, once it had determined to convict appellant of vehicular manslaughter while still contemplating his guilt of murder. By having initially charged both offenses, the prosecution *chose* to put the first jury in that position (see *Batchelor, supra*, 220 Cal.App. 4th at pp. 1116-1117; *People v. Johnson, supra*, 4 Cal.App.5th at p. 460), and it seems disingenuous to then about-face and condemn it as unsupportable.

Respondent misconstrues the "concern" at issue here and in *Batchelor* and *Johnson*. It is *not* that the defendant "was deprived of possible reluctance by jurors to convict him of murder if they had known about his manslaughter conviction" (ABM at pp. 6-7). Rather, the concern is a jury's reluctance to vote not guilty in the face of a reasonable doubt whether malice was proven because of its mistaken belief that a murder conviction is the only way of holding the defendant accountable for his undisputably criminal act. This concern is not addressed in the Answer Brief except insofar as

respondent attempt to distinguish several cases appellant cited on the inevitability of juror speculation about the consequences of their verdict (ABM, p. 7).

These cases,[2] respondent asserts, are of no help to appellant because they all deal with the penalty phase of capital cases, where the jury's task is to assess the appropriate sentence and thus necessarily includes consideration of punishment. On the contrary, respondent helps to prove appellant's point. The juror discussions in *Dykes* et al. included consideration of whether death verdicts are ever carried out, whether a defendant sentenced to life without possibility of parole might nonetheless be paroled, the relative opportunities of escape from prison depending on what sentence was chosen, and the state's history of failing to carry out death sentences. Surely, respondent is not claiming that any of these subjects is a proper consideration for a penalty jury, yet these cases acknowledge that it is natural, even inevitable, for jurors to speculate about them. See also, cases cited at OBM, fn. 3 on p. 18, recognizing a multitude of situations where instructions not to consider improper matters are of no avail.

Respondent's concern that the requested instruction could result in prejudice to both the defense and prosecution is similarly unfounded. The stated concern as to the defense is that the instruction might signal to the jury that defendant was "culpable" or that it should determine "certain facts" adverse to him (ABM at p. 8). Vagueness aside,

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[2] *People v. Dykes* (2009) 46 Cal.4th 731, 806-812; *People v. Schmeck* (2005) 37 Cal.4th 240, 305-307; *People v. Riel* (2000) 22 Cal.4th 1153, 1218-1219; *People v. Pride* (1992) 3 Cal.4th 195, 267; *People v. Cox* (1991) 53 Cal.3d 618, 696.

the signal to the jury would be that the defendant is culpable of vehicular manslaughter at the least and that all facts of that crime have been proven beyond a reasonable doubt. So what? A defendant who was not willing to concede his responsibility for manslaughter would have little reason to request an instruction declaring him guilty of it, and one who *was* willing to concede such responsibility (as was appellant, *Batchelor* and *Johnson*) would suffer nothing by it. As the *Johnson* court noted, "any concern that the defendant could be prejudiced by advising the jury that defendant was culpable or that it should determine certain facts adverse to defendant is misplaced when the defendant *wants*, as a tactical matter, to concede some culpability and does not dispute the adverse facts giving rise to that culpability." (*People v. Johnson, supra,* 4 Cal.App.5th 452, 460.)

The stated concern of prejudice to the prosecution is the one offered in the opinion below: that knowledge of the prior manslaughter conviction might induce the jury to assume that the previous jury could not come to a conclusion as to the murder charge and draw an inference from that assumption (ABM, p. 8). Again, this formulation is remarkably vague. As pointed out in the opening brief (OBM, pp. 41-42), it seems to be referring to a danger that the jury would assume that the murder charge before it was previously tried, that it was tried to a jury, that while some members of that jury found guilt of murder beyond a reasonable doubt, others did not, and that they should therefore be inclined to side with those who did not. To parse it out reveals how improbable it is; rather than an assumption followed by an inference, it consists of a series of speculations

leading to an inference that does not naturally flow from them. Respondent's asserted "Pandora's box" of dangerous ramifications (ABM, p.8) comes down to two examples lacking any logical foundation.

Finally, as to appellant's charge that the jury's ignorance of his manslaughter conviction gave the prosecutor an unfair tactical advantage, respondent answers that there was no such advantage because the prosecution's burden of proof remained unaffected and the defense was free to argue that the evidence showed only a crime less than murder (ABM, p. 9). The unfair tactical advantage discussed in the opening brief, though, has nothing to do with the prosecution's burden of proof. As explained at OBM pp. 30-31 and 37-38, it consists of placing the parties in unequal positions in the event the second jury, like the first, had some doubt whether appellant's act amounted to a crime greater than manslaughter: only the defense faced the risk of a jury confronted with an all-or-nothing choice between guilt of murder and (as far as they knew) complete acquittal; the prosecution, having secured its manslaughter verdict, never faced that risk. That appellant was free to argue to the second jury that the evidence showed only a crime less than murder only underlines his tactical disadvantage: such an argument, absent the requested instruction, amounts to asking the jury to completely absolve him of responsibility in the face of his conceded guilt of a crime resulting in the death of a two-year old girl. Again, the risk that reasonable people would be unwilling to do this is never addressed in the Answer Brief.

C. This Court's precedent on lesser-related offense instructions raises no impediment to the requested instruction.

Appellant agrees with respondent that the overruling of *People v. Geiger* (1984) 35 Cal.3d 510 by *People v. Birks* (1998) 19 Cal.4th 108 means that California defendants no longer have a unilateral right to have their juries presented with the alternative of convicting them of a crime lesser than the one charged but not included within it. (ABM, p. 9). Appellant further agrees that per *People v. Valentine* (2006) 143 Cal.App.4th 1383, a defendant has no right to have his jury instructed on the elements of an uncharged lesser related offense in order to argue to the jury that he should be acquitted of both the charged crime and the lesser because he committed only the latter and it was not charged (ABM, p. 10). None of this is pertinent to the question at hand. Appellant did not ask that the second jury be instructed on the elements of vehicular manslaughter or that they be given the option of (re)convicting him of it, and, having already been convicted of manslaughter, he certainly had no option of being acquitted of both murder and manslaughter. Moreover, appellant's request that the jury be informed of his manslaughter conviction was hardly made, as respondent puts it, "so he could use it as a defense to the murder charge" (ABM, p. 10). Rather, it was made solely so that the jury could decide the question of malice uninfluenced by the fear that anything other than a unanimous verdict of guilty would absolve an obviously culpable man of all criminal responsibility.

Appellant argued at length in the opening brief that *Geiger* was overruled for

reasons irrelevant to its recognition of the risks attendant on presenting the jury with an all-or-nothing choice between conviction and acquittal upon evidence that the defendant committed some crime while not necessarily the one charged or technically included within it (OBM, pp. 28-30). Respondent declares that "[t]his is simply not the case" but makes no attempt to explain why (ABM, p. 11). Its entire discussion of *Geiger* and *Birks* misses the point: *Geiger* is instructive on the issue at hand *not* for its subsequently overruled holding, but for its recognition that the risk identified in *People v. St. Martin, supra,* 1 Cal.3d 524 applies regardless of whether the lesser offense in question is included or closely related.[3] The *Birks* opinion nowhere disputes that recognition, and respondent declines to discuss it. If there is anything in this Court's precedent on lesser related offense instructions which is inconsistent with the holdings of *Batchelor* and *Johnson*, respondent has not identified it.

D. The not guilty by reason of insanity cases support the requested instruction.

Appellant has posited that the caselaw approving instruction on the consequences of a not-guilty-by-reason-of-insanity verdict is precedent for the instruction requested here (OBM, pp. 31-35). In the sanity context, an uninformed jury is apt to render its verdict out of the unfounded concern that a finding of not guilty by reason of insanity would lead to the release of the defendant from custody (*People v. Moore* (1985) 166

[3] The Court of Appeal in *People v. Johnson, supra,* 4 Cal.App.5th 452, 459-460, recently came to the same conclusion.

Cal.App.3d 540; *People v. Dennis* (1985) 169 Cal.App.3d 1135); in the present situation, the danger of an uninformed jury rendering a verdict out of concern over a false notion of its consequences is, if anything, more acute, since it is common knowledge that "not guilty" means that the prisoner goes free. Respondent's sole answer is that the two situations are not analogous because a sanity trial is a bifurcated proceeding as opposed to a retrial on guilt after a former jury deadlocked (ABM, pp. 12-13).

This is a distinction without a difference. Regardless of the nature of the proceeding, the same risk exists, calling for the same solution. Moreover, in its recent decision reaffirming *Batchelor*, the court in *People v. Johnson, supra,* 4 Cal.App.5th 452, 459-460, explains why respondent, and the opinion below, are wrong in relying on the rule that juries need not be informed of the history of prior proceedings and in equating the present situation with the granting of a new trial per Penal Code section 1180:

> "The People point to authority for the proposition that the Supreme Court has "never suggested that the trial court is required to inform the jury of the history of the prior proceedings . . . ." (See, e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 845 (*Edwards*).) Viewing this language in context, however, to the extent it is relevant at all, *Edwards* only supports our holding in *Batchelor*. *Edwards* involved a first jury that had convicted the defendant of murder with the special circumstance of lying in wait, but had been unable to reach a verdict regarding penalty; a second jury was empaneled to make the determination of whether to impose a death verdict. (*Edwards*, *supra*, at pp. 803-804.) The Supreme Court held that the trial court was not required to inform the second jury of the *details* of the case history; specifically, whether the first jury failed to reach a verdict regarding penalty, or whether the first jury's penalty verdict was overturned on appeal. (*Id.* at p. 845.) The Supreme Court expressed no disagreement with the circumstance that the jury was told the defendant had previously been convicted of murder with the special circumstance of lying in wait. (*Ibid.*)

> Neither *Edwards*, nor any other case cited by the People, stands for the proposition that on retrial a second jury should not be informed of the existence of the conviction returned by the first jury, or the nature of that conviction.
>
> " The People also suggest that *Batchelor* contradicts section 1180, which states as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict or finding cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the accusatory pleading." (§ 1180.) Section 1180 has no application to *Batchelor*, or the present case, because in neither case was there a grant of a new trial; the second trial was not a reexamination of an issue previously decided, but a completion of unfinished business. (See § 1179 [defining "new trial" as "a re-examination of the issue in the same court, before another jury, after a verdict has been given"].) It should be noted, however, that the concept articulated in section 1180, that in a second trial arising from the same set of facts the parties should be put, as close as possible, in the same position as if no trial had been held, is entirely consonant with, and indeed is the fundamental principle underlying, our decision in *Batchelor*. (*Batchelor, supra*, 229 Cal.App.4th at pp. 1116-1117.)"

(See also, OBM, p. 40 and fn. 9, making the same points, less inclusively.)

E. *Batchelor* and *Johnson* found instructional error independent of the nature of counsels' arguments to the jury which in any event were functionally the same as those made in this case.

Respondent repeats the claim in the opinion below that *Batchelor*'s finding of error rested in part on the prosecutor's closing argument (ABM, p. 14). The opening brief explains why this is not so: The *Batchelor* court found error without any reference to the prosecutor's argument, which was cited only as a circumstance compounding that error (OBM, pp. 39-40). Regardless, the same court in *People v. Johnson, supra,* again cited the argument of counsel (there, defense counsel's) only as illustrating how the lack of the

requested instruction is unfair to the defense even where the prosecutor refrains from capitalizing on it, i.e., as a circumstance compounding the trial court's error in failing to "succeed[] in complying with the principles . . . articulated in *Batchelor*" (4 Cal. App.5th at p. 457).

Respondent then parlays this misconstrual of the nature of the error into a claim that even if a *Batchelor*-type instruction were sometimes appropriate, it would be so only in cases where counsel made jury arguments similar to the ones in *Batchelor* and *Johnson*, and since no such arguments were made at appellant's trial, no error occurred (ABM, pp. 14-17). Aside from the erroneous premise and the difficulty of applying such a rule in a jurisdiction like ours where all but the closing jury instruction are customarily delivered *before* counsels' arguments, the jury arguments in the present case would demonstrate error even under respondent's formulation.

At appellant's trial, after securing appellant's admission on cross-examination that he was personally accountable for the crash that killed Madison Ruano[4] (6RT 4868), the prosecutor argued to the jury:

> "The defendant himself said, in evidence that you have before you, that – and he testified to this yesterday – he's responsible. He's the driver. He is the one who took Madison Ruano out of this very car seat and took her life. That's the reality." (6RT 5251)
>
> "Sometimes what needs to happen is people need to hold [those who make poor choices] personally accountable for what they've done. You

[4] Madison is referred to throughout respondent's briefing as "Madeline."

have the opportunity to do that in this case." (6RT 5255)

In the absence of knowledge that appellant had already been convicted of manslaughter, the only way the jury could comply with the prosecutor's request to hold appellant accountable was to convict him of murder (see fuller discussion at OBM, pp. 44-45).

Respondent finds this somehow different from the *Batchelor* prosecutor's statement: "There is only one count in this case that you have to decide on. This is it. Hold him accountable for killing someone" (ABM at p. 14). Had another homicide count been charged in appellant's case, the two jury arguments would indeed be different, but none was. Both here and in *Batchelor* the jury was fully aware, without need of prompting, that only a single count was before them and that therefore the only apparent means of accountability was a murder verdict. It is *this* circumstance the *Batchelor* instruction is designed to prevent and this circumstance that was exploited by both prosecutors' pleas for accountability. The fact that the prosecutor in appellant's case also argued that appellant acted with implied malice (ABM, pp. 14-15) changes nothing; that argument is necessarily a part of every second-degree murder prosecution.

Respondent's final way to distinguish the argument of appellant's prosecutor from that of *Batchelor*'s is to remark that "[u]nlike *Batchelor*, the prosecutor in Hicks's case did not convey that Hicks would go free or unpunished if the jury failed to convict him of second degree murder" (ABM at p.15). This is mysterious, as the prosecutor in *Batchelor* (and *Johnson* for that matter) never made that statement (presumably if they had, the

opinions would have mentioned it). No prosecutor has need to make such a statement since the presentation of a single charge of murder absent the information that the defendant has already been convicted of a homicide crime is sufficient in itself to convey it: All jurors understand that a not guilty verdict means the defendant goes free (*People v. Moore, supra,* 166 Cal.App.3d 540, 554).

As for distinguishing *Johnson, supra,* on the basis that Johnson's "defense counsel was precluded in the second trial from arguing that the defendant's actions only rose to the level of negligence and not implied malice" while appellant's was not (ABM, p. 16), respondent is simply inaccurate. All that Johnson's counsel was precluded from doing was "mention[ing] the prior *convictions*"[5] (*Johnson, supra,* 4 Cal.5th at p. 455). In addition to that restriction (which is nothing more than a concomitant of the refusal to deliver a *Batchelor* instruction in the first place), appellant's counsel was forbidden from mentioning any "specific other charges [than murder] and other elements" (6RT 4875). While respondent quotes from the impossibly vague and consequently ineffective jury argument to which appellant's counsel was thus relegated (ABM, p. 16), appellant and Johnson were placed in exactly the same position which the *Johnson* opinion decried:

> "In defendant's first trial, defense counsel conceded explicitly that defendant had been negligent, and that this negligence had resulted in the death of the victim, asking the jury to convict defendant of vehicular manslaughter, but not murder. On retrial, defendant was effectively foreclosed from making this argument. The

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[5] Johnson had been convicted in his first trial of hit and run with injury as well as gross vehicular manslaughter while intoxicated.

jury was instructed on excusable homicide and murder, but no intermediate level of culpability. Defense counsel could concede that the collision was more than "just an accident," and could dispute that it rose to the level of second degree murder. But defense counsel could not ask the jury to hold defendant responsible for negligence (whether ordinary or gross), or point to the circumstance that defendant had already been held responsible for gross negligence by the first jury. The defense was thereby placed in a substantially weaker rhetorical position in the retrial." (*People v. Johnson, supra,* 4 Cal.5th 452, 457-458.)

In other words, respondent has it backwards. The *Johnson* court didn't "reverse[] the conviction because defense counsel was precluded in the second trial from arguing that the defendant's actions only rose to the level of negligence and not implied malice" (ABM at p. 16), it reversed because the refusal to apprise the jury of the prior manslaughter conviction gave the jury the false impression that, absent a conviction for murder, defendant's actions would be left unpunished. The effective impediments to counsel's jury argument flow inevitably from that enforced ignorance. *Johnson*, as well as *Batchelor* is on all fours with the present case.

F. The instructional error was prejudicial.

Appellant will not repeat his explanation why this Court should find prejudice (OBM, pp. 42-46) except as necessary to address respondent's contentions to the contrary.

Regardless of the asserted "compelling" nature of the evidence supporting the murder charge (ABM, p. 17),[6] the first jury did not find it sufficiently compelling to agree

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[6] Although respondent's description of the evidence segues from "compelling" at the first trial to "overwhelming" at the second (ABM, p. 17), functionally

on a unanimous verdict. Furthermore, the failure to agree was not a product of a rogue juror who refused to evaluate the evidence dispassionately, but of a "genuine disagreement" over whether murder was proven beyond a reasonable doubt (4RT 2413-2415). Respondent concedes that the evidence in the second trial was similar to that in the first, but offers up three differences that, impliedly, made the case for murder stronger (ABM, p. 20). They did not. Walid Arnaut's testimony about appellant's mental state at the hospital (5RT 4216-4219) is duplicative of Adam Moore's testimony at the first trial (3RT 1505-1508). The testimony of the motorcyclist that appellant yelled "You guys are stupid . . . Get out of my way" (4RT 3667) might show anger and aggression, but is hardly indicative of conscious disregard of risk to life. Joshua Wupperfield's testimony that people under the influence of PCP are capable of making decisions did not contradict David Vidal's testimony at the first trial describing several effects of PCP use that are arguably inconsistent with unconsciousness (e.g., the distortion of judgment, which presupposes the ability to make judgments and therefore consciousness) and not

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the same evidence was presented at both, as explained below. It is notable that in listing the assertedly "overwhelming" evidence of malice, the opinion below gives prominence to the horrific nature of Madison's fatal injuries (slip opinion, p. 3), a circumstance that is relevant to many things, though appellant's mental state is not one of them. If a reviewing court can be so affected by the horror of a crime to mistakenly factor in its dreadful consequences to resolve a question of fact, a jury is all the more apt to be so misled, especially if it feels a need to hold the defendant accountable. This is another illustration of the risk that an all-or-nothing choice between murder and acquittal in the face of a devastating criminal act will inject improper considerations into the deliberative process.

purporting to claim that unconsciousness was one of them (5RT 3910-3915). The evidence at the two trials being functionally equivalent, there is a reasonable probability that it was the lack of middle ground between murder and acquittal, rather than more compelling evidence, that enabled the second jury to reach a verdict that the first could not (see *People v. Soojian* (2010) 190 Cal.App.4th 491, 520 [previous hung jury indicative of prejudice from error occurring on retrial]).

Respondent makes much of the evidence that appellant knew that driving under the influence was dangerous to life (ABM, p. 18). But presumably every second-degree murder prosecution premised on drunk driving has proof of that knowledge. More is needed to conclusively prove malice: the defendant must not only be equipped with that knowledge (which virtually every adult has), but must in addition drive with conscious disregard of the danger; in other words, he must think about it, if even for a second (see *People v. Jiminez* (2015) 242 Cal.App.4th 1337,1358). Knowing a thing is not the same as considering it,[7] and implied malice requires both. If it did not, virtually every person whose drunk driving resulted in a fatality would be conclusively guilty of murder.

Although there was sufficient circumstantial evidence that appellant both processed this knowledge *and* determined to drive in spite of it, there was also both

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[7] A person may know it's dangerous to drive without fastening a seatbelt, but do so anyway because she didn't think about it when getting into and driving the car. This wouldn't equate to a conscious disregard for the consequences of driving without a seatbelt.

circumstantial and direct evidence that he did not. Appellant testified that his only thought was to get to his brother and he did not process the danger of what he was doing (6RT 4821-4823, 4866-4867). This lack of conscious disregard was circumstantially corroborated by the reports of numerous witnesses that throughout the drive, appellant was irrational and delusional, talking to himself, screaming, hallucinating and barking like a dog (4RT 3678, 3684-3686, 3689; 6RT 4504-4505), all consistent with a lack of considered thought. That he was assessed as alert and oriented after the crash (ABM, p. 19) doesn't prove a similar mental state before it; shocking events have a way of shocking people into reality.

Respondent's most damning claim of lack of prejudice is that appellant "testified that he made a conscious decision to drive the car that day, even though he realized that people could be killed by someone driving under the influence of drugs or alcohol" (ABM at p. 19, citing 5RT 4304-4306). Had that been appellant's testimony, respondent would have a point, but it was not. There is nothing in the cited RT pages that tethers appellant's fore-acquired knowledge of the dangers of drunk driving with what he realized and thought about when he decided to drive; moreover, in addition to this testimony being read to the jury at the retrial, it was originally given at the first trial where it failed to result in a murder verdict.

Respondent cites *People v. Jiminez, supra,* 242 Cal.App.4th at pp. 1358-1360 and *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1116 for the "overwhelming" nature

of the evidence appellant had malice (ABM, p. 19). These are cases which held only that the evidence they enumerated was ample enough to overcome a claim of insufficient evidence of malice (a claim appellant has never forwarded), *not* that it was so overwhelming as to render an error harmless. Nor did either of these cases contain the direct and circumstantial evidence of lack of malice presented at appellant's trials. As such, they neither establish that the evidence in the present case was overwhelming, nor that it was so compelling as to render harmless the error claimed here.

Respondent's assertion that appellant's case does not involve the type of prosecution closing argument found harmful in *Batchelor* nor the restriction on the defense argument imposed in *Johnson* is answered in section E, *ante*; both claims are false.

Finally, respondent makes the astonishing claim that because appellant has not demonstrated that the jury *in fact* considered or assumed that he would be released if they found him not guilty, he "does no more than speculate" about prejudice and is therefore unable to show it (ABM, p. 20). By this formulation, no defendant would ever be capable of showing prejudice from trial error absent the production of juror declarations (which are unavailable per Evidence Code section 1150) about the considerations that led to their verdicts. On the contrary, what a defendant must do to show prejudice under the standard of *People v. Watson* (1956) 46 Cal.2d 878 is demonstrate a "reasonable chance, more than an abstract possibility" that upon consideration of the entire record, including the

evidence, instructions and jury arguments, he would have received a more favorable verdict, even if that consists of a hung jury, had the error not occurred. (*College Hospital, Inc. v. Superior Court* (1984) 8 Cal.4th 704, 715; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130; *People v. Breverman* (1998) 19 Cal.4th 162, 165; *People v. Soojian, supra,* 190 Cal.App.4th 491.) Appellant has done so. His murder conviction should be reversed.

CONCLUSION

For the foregoing reasons and those expressed in Appellant's Opening Brief on the Merits, this Court should approve the decisions in *People v. Batchelor* (2014) 229 Cal.App.4th 1102 and *People v. Johnson* (2016) 4 Cal.App.5th 452 and hold that the trial court erred to appellant's prejudice in refusing to inform the jury at the retrial of his murder charge that he had been convicted of gross vehicular manslaughter in the first trial.

DATED: December 19, 2016

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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WORD COUNT CERTIFICATION
People v. Marvin Travon Hicks

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 6,068 words.

NANCY GAYNOR

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is 520 S. Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On December 19, 2016, I served the within

APPELLANT'S REPLY BRIEF ON THE MERITS

in said action, by emailing a true copy thereof to:

Kamala D. Harris, Attorney General
docketingLAawt@doj.ca.gov.

and by placing a true copy thereof enclosed in a sealed envelope, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California.

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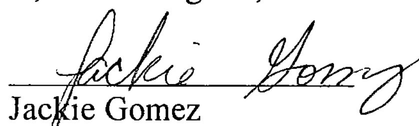
I declare under penalty of perjury that the foregoing is true and correct.

Executed December 19, 2016, at Los Angeles, California.



Jackie Gomez