COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE INES GARCIA ZARATE, Defendant and Appellant.	)	A153400 Superior Court SCN224636 (San Francisco County)

APPELLANT'S OPENING BRIEF

Appeal From The Judgment of the Superior Court
of The State of California, County of San Francisco

Honorable Samuel K. Feng, Judge

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By appointment of the Court of Appeal
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

INTRODUCTION

Pier 14 in San Francisco is a popular tourist spot on the Embarcadero, just south of the Ferry Building at the end of Market Street, known for its views of the San Francisco skyline. At 6:30 on the evening of July 1, 2015, a gun went off on a crowded Pier 14. Kate Steinle, visiting the pier with her family, was hit in the back with a bullet and later passed away. The state charged appellant Jose Garcia Zarate with the shooting.

The state's theory was simple. Mr. Garcia Zarate had brought the gun to the pier, intentionally fired it at Ms. Steinle and was therefore guilty of first degree murder. The state charged him with murder, assault with a firearm and being a felon in possession of a firearm.

The defense theory was also simple, but very different from the state's theory. Under the defense theory, Mr. Garcia Zarate did not bring a gun to the pier at all and he did not intentionally fire at anyone. Instead, while sitting on a swivel chair at the pier, he picked up a package wrapped in rags under the chair, it went off accidentally and he immediately threw it into the water to stop it from firing. Under the defense theory Mr. Garcia Zarate he did not even know he had a gun until it fired accidentally, and then he immediately disposed of it.

In light of the very different factual theories presented to the jury, the state's homicide and assault charges required jurors to decide whether Mr. Garcia intentionally shot the gun (as the state contended) or whether it went off accidentally (as the defense contended). The verdicts in this case make very clear which of these two starkly different factual theories jurors found true.

In closing argument, the prosecutor explained the state's position that "this was not an accident." Instead, she urged jurors to find Mr. Garcia Zarate intentionally shot the gun with a premeditated intent to kill, and was therefore guilty of first degree murder. The jury unanimously rejected this factual theory, acquitting of first degree murder.

Alternatively, the prosecutor urged jurors to find that Mr. Garcia Zarate intentionally shot the gun on a crowded pier -- an act obviously in conscious disregard for human life -- and was therefore guilty of second-degree implied-malice murder. The jury unanimously rejected this factual theory as well, acquitting of second degree murder.

Jurors had a third homicide option as well. They were instructed that if they acquitted of first and second degree murder, they could nevertheless convict of involuntary manslaughter if they found that Mr. Garcia Zarate at least committed a "willful act" -- brandishing a firearm -- with criminal negligence. The jury unanimously

rejected any conclusion that Mr. Garcia Zarate had committed such a willful act, acquitting of manslaughter.

But jurors went even further. Jurors were also presented with an assault option, told they could convict of assault with a firearm if defendant committed a "willful" act with a firearm that could result in application of force to another person. Yet again the jury unanimously rejected any suggestion that Mr. Garcia Zarate committed a willful act, acquitting of the assault charge.

As discussed more fully below, taken together the jury's verdicts suggest quite strongly that jurors accepted the defense theory that Mr. Garcia Zarate had not committed a willful or intentional act at all and that the gun had gone off accidentally. This left only the felon-in-possession charge.

As to this charge, the jury convicted. But given the defense presented -- and the plain import of the jury's verdicts on the homicide and assault charges -- this conviction cannot stand. Although the entire defense was that Mr. Garcia Zarate did not know he had picked up a gun until it accidentally fired – and he then immediately threw the gun in the water to stop it from firing -- the trial court failed to provide standard CALCRIM instructions on the defense of transitory possession. That defense -- applicable to charges

involving both possession of drugs and possession of firearms -- provides that if possession of the contraband (whether drugs or guns) is to dispose of the contraband, there can be no culpability for that possession.

Here, in the midst of deliberations jurors made clear they were concerned about this very issue. Jurors asked for the "definition of 'possession," they asked if there was "any time requirement for possession," and they asked if knowing possession was sufficient to establish the wrongful intent required for conviction on the felon-in-possession charge. The trial court refused defense counsel's immediate request for a transitory possession instruction and jurors convicted on this charge.

On the facts of this case, the absence of instructions on transitory possession effectively converted the felon-in-possession charge to a strict liability offense. The acquittals of first and second degree murder, involuntary manslaughter and assault all show jurors found Mr. Garcia Zarate did not commit a willful act in firing the gun -- that it went off accidentally just as the defense contended. On this record, jurors could reasonably have found that Mr. Garcia Zarate did not know he had picked up a gun until it went off, and he immediately threw the gun in the water to stop it from firing. Absent transitory possession instructions, however, jurors could not know that this type of momentary possession of the gun after it went off (and after Mr. Garcia Zarate was

therefore first aware he had a gun) would not be criminal. Because this is precisely the type of conduct that the transitory possession defense was designed to address, the court's failure and subsequent refusal to instruct on this sole theory of defense requires reversal.

STATEMENT OF APPEALABILITY

This appeal is from a judgment following trial that finally disposes of all issues between the parties and is authorized by Penal Code section 1237, subdivision (a).

STATEMENT OF THE CASE

On July 28, 2017 the San Francisco County district attorney filed a three-count second amended information against appellant Juan Garcia Zarate. (1 CT 286.) This information charged as follows:

(1) Count one charged a July 1, 2017 murder in violation of Penal Code section 187. (1 CT 286.) This count added allegations that Mr. Garcia Zarate used a firearm in violation of sections 12022.53(a) and (b) and discharged a weapon in violation of sections 12022.53(c) and (d). (1 CT 286-287.)

(2) Count two charged a July 1, 2017 possession of a weapon by a felon in violation of section 29800(a)(1). (1 CT 287.)

(3) Count three charged a July 1, 2017 assault with a deadly weapon in violation of section 245(b). (1 CT 288.) This count added allegations that Mr. Garcia Zarate (1) used a firearm in violation of section 12022.5(a) and (2) inflicted injury in violation of section 12022.7(a). (1 CT 288.)

The information added allegations that Mr. Garcia Zarate had served three separate prior prison terms in violation of section 667.5(b). (1 CT 289.) Mr. Zarate pled not guilty and denied the enhancing allegations. (1 CT 197.) The court granted defendant's motion to bifurcate trial on the prior conviction allegations. (2 RT 136.)

Opening statements began on October 23, 2017. (2 CT 469.) The state rested its case-in-chief on November 2, 2017. (2 CT 504.) The defense case began on November 6, 2017 and ended three days later. (2 CT 507, 960.)

The jury began deliberations on November 21, 2017. (2 CT 1023.) On November 30 -- after nearly 27 hours of deliberation over the course of six court days, including ten separate questions of the trial court -- the jury unanimously acquitted Mr. Garcia Zarate of murder and assault as charged in counts one and three respectively, but convicted him of being a felon in possession of a weapon. (2 CT 1023, 1024, 1027, 1031-1033 1035-1039, 1072-1073.) While the jury was deliberating, defense counsel moved to strike the three prior prison term allegations which had been bifurcated. (27 RT 2574-2575.)

The trial court sentenced Mr. Garcia Zarate on January 5, 2018. The state did not pursue the prison term allegations. The trial court then imposed a three-year upper term for the felon-in-possession charge. (2 CT 1140.)

Mr. Garcia Zarate timely filed a Notice of Appeal. (2 CT 1143.)

STATEMENT OF FACTS

The events of July 1, 2015.

At around 6:30 p.m. on July 1, 2015, Kate Steinle was walking with her father and a family friend on Pier 14 in the San Francisco Embarcadero. (13 RT 946-948.) While they were walking, there was a gunshot and a single bullet hit Ms. Steinle in the lower back, killing her. (13 RT 946-948, 952; 20 RT 1784.)

Just after the shooting, Michelle Lo -- who was also walking on the pier that evening -- spoke with police and described seeing a homeless man sitting on a swivel chair on the pier. (14 RT 958.) Lo and another woman Aryn Carpenter described hearing a gunshot and a scream and then seeing the man run. (14 RT 973-974 [Michelle Lo] 14 RT 1047-1048 [Aryn Carpenter].) Lisa Strick was also on the pier that day. (17 RT 1408.) She heard the gunshot and then saw an object fly through the air landing in the bay. (17 RT 1409-1420.)

Mr. Garcia Zarate's arrest and statement to police.

Aryn Carpenter had taken a photo of the homeless man on the pier which she gave

to police. (15 RT 1143-1144.) Based on this photograph and within an hour of the shooting, Jose Garcia Zarate was detained and taken to the police station. (15 RT 1090-1091, 1096.) There, about five and a half hours later at around 1 a.m., Mr. Garcia Zarate waived his *Miranda* rights and agreed to speak. (19 RT 1657, 1662.) He was interrogated by several officers including officers Ravano and Cavarrubias. (19 RT 1657, 1660.)

Officer Anthony Ravano admitted that Mr. Garcia Zarate had a difficult time repeating back to him questions asked of him by officers in order to show that he understood the question asked. (20 RT 1723-1724.) The officers also had to repeatedly wake him up at different points during the interview. (20 RT 1738.) In any event, it is fair to say that during the next four and a half hours, Mr. Garcia Zarate gave conflicting statements about what happened on the pier that evening. (19 RT 1663; Supp CT 1-134.)

At the beginning of the interview, Mr. Garcia Zarate denied having been at Pier 14 at all, seeing or having a gun or throwing anything into the water. (Supp. CT 17, 21.) After police presented him with photographs showing that he was at the pier, Mr. Garcia Zarate admitted that he was there that evening but still denied having seen or heard anything unusual. (Supp. CT 73.) Eventually he admitted that he had handled a gun which had discharged and which he had then thrown into the bay.

The physical evidence establishes that it is not entirely clear Mr. Garcia Zarate understood either the questioning or exactly what had happened. Thus, at trial the state's undisputed evidence would show that Ms. Steinle was approximately 90 feet away from Mr. Garcia Zarate when she was shot. (21 RT 1923-1930, 1936; 22 RT 2088.) Yet Mr. Garcia Zarate agreed with police that Ms. Steinle was only five feet away from him when she was shot. (Supp. CT 94.) Similarly, the state's evidence at trial would show that Mr. Garcia Zarate did not pass Ms. Steinle when he left the pier after the shooting. (14 RT 973-974; 15 RT 1177-1180.) Yet, Mr. Garcia Zarate agreed with police that he had passed her lying on the pier as he left. (Supp. CT 99-100, 102.)

In any event, when asked how he got the gun, Mr. Garcia Zarate explained "the gun was on the pier" and "[t]here was a rag there, something like that, like a shirt there. When I was around there . . . ." (Supp. CT 87-89. *See* Supp. CT 105.) He "saw it in a rag." (Supp. CT 90.) It was in "the rag, the shirt, wrapped up." (Supp. CT 95.) He was seated when the gun went off. (Supp. CT 82, 93.) He was holding the gun and it recoiled. (Supp. CT 97.)

Mr. Garcia Zarate gave conflicting statements on whether or not he had actually fired the gun. For example, at several points in response to repeated questions about whether or not he fired the gun, he responded "yes." (Supp. CT 79, 112.) For obvious

reasons, the prosecutor would rely on these statements in urging jurors to convict of murder. (27 RT 2465, 2470.)

At other points, however, Mr. Garcia Zarate repeatedly said it was an accident, telling police the gun "just went off" and "it went off by itself." (Supp. CT 88.) Later he repeated that "it fired on it's own." (Supp. CT 103.) Mr. Garcia Zarate was clear that he had no reason to shoot Ms. Steinle -- he did not know her, he had never seen her before and she had done nothing to disrespect him in any way. (Supp. CT 109-111.) The shooting was an accident; there was nothing about the victim or her family that would have made him point a gun at them. (Supp. CT 110-112.) For his part, defense counsel would rely on these statements in urging jurors to find that Mr. Garcia Zarate had not intentionally fired the gun and was not guilty of murder. (27 RT 2478-2479, 2524, 2526.)

As for why he threw the gun into the bay after it went off, Mr. Garcia Zarate explained that "because if not it was going to keep firing by itself . . . so I was trying to prevent the gun from shooting." (Supp. CT 89-90.) "I couldn't hold it back and I had to throw it." (Supp. CT 98.) He continued, adding that he had "no choice but to get rid of it, because if [I] had not it would have continued firing." (Supp. CT 117.)

Mr. Garcia Zarate did not see Ms. Steinle fall nor realize that the bullet hit her.

(Supp. CT 99.) He explained that he felt "horrible" to know that the bullet hit and killed the young woman. (Supp. CT 190.)[1]

The physical evidence.

Officer Andrew Clifford took a sample from Mr. Garcia Zarate's hands to test for gunshot residue ("GSR".) (16 RT 1312.) San Francisco crime lab examiner Linda Abuan tested the sample taken from Mr. Garcia Zarate and found GSR particles on his right hand. (16 RT 1353.)

As noted above, eyewitness Lisa Strick heard a gunshot and saw an object land in the water. Based on this report, officer Scott Hurley of the Underwater Hazardous Device Team searched that area of the bay. (15 RT 1116.) Mr. Hurley located the gun that fired the fatal bullet -- a Sig Sauer P239 handgun -- in the water near where Mr. Garcia Zarate was sitting. (15 RT 1125-1126.)

At some point before the shooting, the Sig Sauer P239 was stolen from the car of

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[1] Surveillance camera video footage confirmed key aspects of Mr. Garcia Zarate's statement as well as what eyewitnesses Lo, Carpenter and Strick told police; Mr. Garcia Zarate was seated in a swivel chair on the pier, Kate, her father and a family friend were walking on the pier when Kate was hit by a bullet, and something was thrown in the bay near where Mr. Garcia Zarate was seated. (15 RT 1175-1176; 1179-1180.)

John Woychowski -- a law enforcement officer for the Bureau of Land Management. (16 RT 1212, 1238-1239, 1241.) Mr. Woychowski left the gun in a backpack inside his locked car in San Francisco near the Embarcadero. (16 RT 1291.) A burglar broke into his car and stole the gun which was loaded with a full magazine as well as a bullet in the chamber. (16 RT 1218-1220, 1225.) Mr. Woychowski admitted that there was no safety mechanism on the gun to prevent unintentional discharges. (16 RT 1294.) He explained that this was intentional because the Sig Sauer was a back-up gun meant to be used only in an emergency and meant to "fire immediately." (16 RT 1294.) The parties agreed that Mr. Garcia Zarate had *not* stolen the gun from Mr. Woychowski's car. (17 RT 1388-1389.)

Medical examiner Michael Hunter confirmed that the cause of death was a gunshot wound to the lower back. (20 RT 1784.) Mr. Hunter had also examined the bullet recovered from Ms. Steinle and determined that it struck a hard surface before hitting her. (17 RT 1441; *See also* 20 RT 1796.) At the pier, crime scene investigators located the divot that was created by the bullet first striking the concrete before continuing on to hit Ms. Steinle. (17 RT 1452.) The divot was roughly 13 feet from the swivel chair where Mr. Garcia Zarate was seen sitting. (22 RT 2088.) Ms. Steinle was standing about an additional 78 feet from the divot for a total of 91 feet from Mr. Garcia Zarate. (21 RT 1929-1930, 1936; 22 RT 2088.) The recovered gun was examined and police determined

that it had only fired once. (21 RT 1956.)

The state and defense theories of the case.

As noted, the state charged Mr. Garcia Zarate with murder, assault with a firearm and being a felon in possession of a firearm. (1 CT 286-28.) The state theorized that Garcia Zarate was guilty of first degree murder, assault with a firearm and being a felon in possession of a firearm because he brought the gun to the pier, aimed it at Ms. Steinle and intentionally fired it with an intent to kill. (13 RT 878-879; 27 RT 2441.)

The defense theory was starkly different. Mr. Garcia Zarate was not guilty of any degree of homicide, assault or being a felon in possession. He did not bring a gun to the pier. He sat down on a chair at the pier and picked up an object wrapped in rags under the chair. Unbeknownst to Mr. Garcia Zarate the object was a gun; when it went off accidentally and he realized what it was, he immediately threw it into the water to stop it from firing. (13 RT 927-930; 27 RT 2479.)

The parties present conflicting expert testimony on the question of whether the gun was fired intentionally or whether it went off by accident.

The state supported its intentional shooting theory by calling retired crime scene

investigator John Evans from the San Francisco Police Department to testify. (17 RT 1432-1433.) Evans was aware of the medical examiner's determination that the fatal bullet struck a hard surface before hitting the victim. (17 RT 1441; *See also* 20 RT 1796.) On the pier, Mr. Evans located the strike mark where the bullet hit the concrete pier. (17 RT 1452.) Mr. Evans testified that there was a "straight line" between the swivel chair where Mr. Garcia Zarate had been seated and Ms. Steinle. (17 RT 1460-1461.) Over defense objection, Evans testified that it was his opinion that "a human being held a firearm, pointed it in the direction of Ms. Steinle, pulled the trigger, firing the weapon and killing the victim." (17 RT 1441, 1468.)

On cross-examination Mr. Evans admitted that hitting the concrete pier would have changed the direction of the bullet. (17 RT 1484.) Nevertheless, Mr. Evans was sure that "someone pointed a firearm" at the victim and fired the gun because "firearms do not fire by themselves." (17 RT 1512.) Mr. Evans eventually conceded that he could not say whether or not the shooting was accidental. (17 RT 1521.) Indeed, prosecution witness officer Anthony Ravano confirmed Evans' concession and testified that he was aware that San Francisco Police Department officers had had guns accidentally discharge. (20 RT 1748-1749.)

The defense also presented expert testimony on the question of whether the gun

fired accidentally, presenting firearm experts James Norris and Alan Voth. (21 RT 1896; 23 RT 2190.) Mr. Norris's experience included 4 years at as a criminalist at the San Mateo County crime lab, 13 years as a criminalist at the Santa Clara County crime lab, 8 years as director of the forensic services division of the San Francisco police department and 13 years in private practice. (21 RT 1890-1892.) Mr. Norris explained that the Sig Sauer can "accidentally discharge." (21 RT 1914.) He based his opinion on (1) the lack of any safety mechanism on the gun and (2) the gun's trigger pull or the amount of force required to pull the trigger. (21 RT 1899-1900, 1908-1910.) Mr. Norris opined that if someone were aiming the gun straight ahead or intended to hit a target straight ahead, then aiming at the location whether the divot was located would not produce that result -- once the bullet hit the concrete it would travel in a different direction that it had been aimed. (21 RT 1924.) Based on the type of gun, the location of the divot 13 feet from the chair where Mr. Garcia Zarate was seated, and the ricochet which traveled an additional 78 feet to hit the victim, in Mr. Norris's expert opinion the gun discharged when Mr. Garcia Zarate was sitting in the chair, probably bent over. (21 RT 1940.) Based on the location of the divot, it was Mr. Norris's opinion that the gun was pointed toward the ground when it discharged and was not pointed in the direction of the victim. (21 RT 1942.)

Firearms expert Alan Voth confirmed Mr. Norris's opinion. Mr. Voth's

experience included 35 years with the Royal Canadian Mounted Police where he worked as a forensic firearms examiner. (23 RT 2183-2191.) Voth explained that he was very familiar with the Sig Sauer P239 and that it can either be carried in single action mode (where the hammer is cocked back and therefore the gun fires at the first motion of the trigger) or double action mode (where the hammer is not cocked back and therefore the first motion of the trigger cocks the hammer and the second motion fires the gun). (23 RT 2193.) If the gun is in single action mode, it would not be safe to carry or hold the weapon because of the threat of an unintentional discharge. (23 RT 2192-2193.) Voth also explained that the incidence of unintentional discharge increases if someone does not know that they are handling a firearm regardless of whether the gun is in single or double action mode. (23 RT 2197.) In Mr. Voth's expert opinion, if there is a seated person, a bullet strikes the ground roughly 12 feet away, and the ricocheting bullet hits someone 78 feet further it indicates an unintentional discharge. (23 RT 2210.)

The jury verdicts.

Jurors were instructed on first degree murder, second degree murder, involuntary manslaughter and assault. Given the very different factual theories presented to the jury by the two parties, and the instructions given to the jury, these charges all required jurors to decide whether Mr. Garcia intentionally shot the gun.

For example, jurors were instructed that to convict of murder they had to find Mr. Garcia Zarate actually "committed an act that caused the death of another person." (2 CT 1002.) For first degree murder the state would have to prove that the act defendant committed was "willful," that is, that he "intended to kill." (2 CT 1004.) Jurors were instructed they could not find Mr. Garcia Zarate guilty if they found he "acted . . . accidentally." (2 CT 1017.) In closing argument, the prosecutor urged jurors to convict of first degree murder precisely because Mr. Garcia Zarate "pointed [the gun] in the direction of Kate Steinle and her father and her friend and pulled the trigger, killing her." (27 RT 2437.) She urged jurors to find Mr. Garcia Zarate intentionally shot the gun with a premeditated intent to kill, and was therefore guilty of first degree murder. (27 RT 2438-2439.) The prosecutor was clear:

> [I]n his mind, he's already decided he wants to fire this gun. And he's looking at people to see who he's going to shoot.

(27 RT 2445.) Urging jurors to reject the defense position that the gun accidentally went off she argued "this was not an accident" because "the gun did not just go off and bullets did not fly randomly." (27 RT 2437.) Jurors unanimously rejected this factual theory, acquitting of first degree murder. (2 CT 1040.)

Alternatively, jurors were instructed that they could convict of second degree murder if they found that Mr. Garcia Zarate either "intended to kill" or "intentionally committed an act [shooting the gun] . . . [t]he natural and probable consequence of the act were dangerous to human life . . . [a]t the time he acted, he knew his act was dangerous to human life . . . [a]nd he deliberately acted with conscious disregard for human life." (2 CT 1002-1003.) In closing argument the prosecutor urged jurors to find an intentional shooting with implied malice, arguing that Mr. Garcia Zarate pulled the trigger and "even if you don't believe he was aiming at anybody in particular, the barrel of that gun was pointed toward people, and he fired it." (27 RT 2439.) Jurors unanimously rejected this factual theory as well, acquitting of second degree murder. (2 CT 1050.)

The record shows jurors were given manslaughter as an option as well. Although the prosecutor did not argue for a conviction of manslaughter, the court instructed jurors they could convict of involuntary manslaughter if they acquitted of murder and found that Mr. Garcia Zarate committed a "willful act" -- brandishing a firearm -- with criminal negligence. (2 CT 1005-1007.) After acquitting of murder, the jury found that Mr. Garcia Zarate had not even committed the willful act of brandishing a firearm and acquitted of manslaughter. (2 CT 1060.)

Separate and apart from the full acquittal on the count one murder charge, jurors

also had to decide the count three assault charge. As to this charge jurors were properly instructed that they could convict of assault with a firearm if they found that Mr. Garcia Zarate had committed a "willful" act with a firearm that could result in application of force to another person. (2 CT 1010.) The jury acquitted on this count as well, unanimously rejecting the idea that Mr. Garcia Zarate committed a willful act amounting to assault. (2 CT 1066.)

The acquittals on first and second degree murder, manslaughter and assault reflect three findings of fact by the jury. All 12 jurors rejected the state's theory that Mr. Garcia Zarate either (1) fired intentionally at Ms. Steinle with an intent to kill or fired intentionally with a conscious disregard for human life, (2) "willfully" committed the act of brandishing a firearm or (3) willfully committed any act which could constitute an assault. These verdicts are entirely consistent with the theory of defense presented throughout the case: that the gun went off accidentally and Mr. Garcia Zarate then threw it in the water.

The only remaining charge was the felon-in-possession charge. As to this charge, the jury convicted. (2 CT 1064.) This appeal followed.

ARGUMENT

I. THE TRIAL COURT VIOLATED MR. GARCIA ZARATE'S FEDERAL AND STATE RIGHTS TO A JURY TRIAL, DUE PROCESS AND TO PRESENT A DEFENSE BY FAILING TO INSTRUCT THE JURY ON A CRITICAL PORTION OF THE DEFENSE THEORY.

A. The Relevant Facts.

As discussed in some detail above, the parties presented very different factual theories to the jury as to the murder and assault charges. The state's theory was that Mr. Garcia Zarate was guilty of both murder and assault because he brought the gun to the pier that day, aimed at Ms Steinle and shot her with a premeditated intent to kill. (13 RT 878-879; 27 RT 2441.) The defense theory was that Mr. Garcia Zarate was not guilty of either murder or assault. Under the defense theory, not only did Mr. Garcia Zarate *not* shoot the gun with an intent to kill, he did not shoot the gun with any intent at all; the gun accidentally discharged hitting Ms. Steinle. (13 RT 903.)

With respect to the felon-in-possession of a firearm, the parties again had very different theories. To be sure, the parties agreed (and jointly stipulated) that Mr. Garcia Zarate had a prior felony conviction. (2 CT 1012.) So the sharp difference between the state and defense theories as to this charge solely involved the question of whether Mr.

Garcia Zarate "possessed" a gun as that term is defined under California law.

Under the state's theory, because Mr. Garcia Zarate brought the gun with him to the pier, and by definition, he possessed the gun in violation of California law. (27 RT 2441.) The defense theory, however, was that Mr. Garcia Zarate had not brought the gun with him to the pier at all; instead, as he was sitting on a swivel chair at the pier, he picked up something underneath the chair wrapped in a rag and did not even know it was a gun until it accidentally fired. (13 RT 927-930.) At that point he immediately threw the gun into the bay to stop it from firing again. (13 RT 927-930.) As defense counsel summarized in closing argument, "[h]e tells you he sits down. He picks up an object. He does not know the contents of the object. It fires." (27 RT 2479.)

Significant evidence supported this theory. As noted above, shortly after the shooting, Mr. Garcia Zarate spoke with police. During the interview, Mr. Garcia Zarate explained to officer Martin Covarrubias that what turned out to be the gun was wrapped up in a rag on the pier. (Supp. CT 87-89, 90, 95.) He was seated when the gun went off and was holding it when it recoiled after going off. (Supp. CT 82, 93, 97.) He did not fire the gun; "it went off by itself." (Supp.CT 88. *Accord* Supp. CT 103 ["it fired on its own"], 110-112 [shooting was an accident].)

Expert testimony confirmed that when the gun fired, Mr. Garcia Zarate was still sitting. (21 RT 1940.) When the gun went off, Mr. Garcia Zarate threw it into the bay. (Supp. CT 88-90.) When asked why he threw the gun into the bay, Mr. Garcia Zarate explained that "because if not it was going to keep firing by itself . . . so I was trying to prevent the gun from shooting." (Supp. CT 89-90.) He continued, explaining that he had "no choice but to get rid of it, because if [I] had not it would have continued firing." (Supp. CT 117.) Mr. Garcia Zarate did not realize that the bullet hit Ms. Steinle. (Supp. CT 99.)

Mr. Garcia Zarate's own statements to police were supported by other evidence introduced at trial. The defense theory that Mr. Garcia Zarate had picked up the gun wrapped in rags from beneath a chair on the pier was confirmed by video footage showing Mr. Garcia Zarate arriving on the pier, sitting down, leaning down towards the ground and back up again before standing up after the gun discharged. (22 RT 2068-2071; 2074-2078.) And as noted, Mr. Garcia Zarate told police that after the gun discharged he threw it into the bay. (Supp. CT 89-90, 117.) This statement was confirmed by prosecution eyewitness Lisa Strick who heard the gunshot and *within seconds* saw an object in the air which landed in the bay with a splash. (17 RT 1409-1410.) The police later found the gun in the bay. (15 RT 1125-1126.)

The trial court instructed the jury in accord with standard CALCRIM instruction 2511 on the count two charge of being a felon in possession of a firearm. In order to convict, the jury was required to find the defendant (1) possessed a firearm, (2) knew that he possessed the firearm and (3) had previously been convicted of a felony. (2 CT 1012.) The trial court did not, however, give that portion of CALCRIM 2511 conveying the defense of transitory possession which would have advised jurors as follows:

> If you conclude that the defendant possessed a firearm, that possession was not unlawful if the defendant can prove the defense of momentary possession. In order to establish this defense, the defendant must prove that: 1. He possessed the firearm only for a momentary or transitory period; 2. He possessed the firearm in order to . . . dispose or destroy it; and 3. He did not intend to prevent law enforcement officials from seizing the firearm.

(CALCRIM 2511.)

The factual record of this case shows that the jury could have found (1) Mr. Garcia Zarate picked up an object in rags without knowing what was inside, (2) the gun accidentally discharged, (3) within seconds he disposed of the gun by throwing it into the bay to stop it from firing again and (4) his purpose in disposing of the gun was try to get the gun to stop firing, not to prevent law enforcement from finding it. But because the trial court failed to provide the standard instruction on transitory possession, even if the jury found these circumstances true it would have no option but to convict of felon in

possession of a firearm.

Significantly, on the record of this case this was anything but an academic point. To the contrary, it looks like this was exactly what the jury did.

Jury deliberations began on November 21, 2017. (2 CT 1023). On the fourth day of deliberations the jury submitted jury question 9 to the court, making clear it was concerned about the transitory possession issue; that is, whether under the facts of this case, Mr. Garcia Zarate actually possessed the gun, requesting:

> [C]larification of charge 2 on page 39 of the jury instructions
>
> 1) What is the definition of possession?
>
> 2) Is there any time requirement for possession?
>
> 3) Page 13 of jury instructions states that wrongful intent is required for charge 2. Are points # 1 (line 8) and # 2 (line 10) on p. 39 sufficient to demonstrate wrongful intent?

(2 CT 1034.) Defense counsel asked the court to instruct the jury with the transitory

possession language in standard CALCRIM 2512. (28 RT 2618-2619.)[2]

The trial court refused, directing jurors back to the instructions they had already received. (28 RT 2619; 2 CT 1034.) Two days later jurors unanimously rejected the state's theories of first degree premeditated murder, second degree implied malice murder, criminally negligent manslaughter and assault with a firearm, acquitting on all those charges. (2 CT 1040, 1050, 1060, 1066.) But without benefit of the transitory possession instruction, jurors convicted Mr. Garcia Zarate of being a felon in possession of a weapon. (2 CT 1064.)

As discussed in the statement of facts above, the acquittals on first and second degree murder, manslaughter and assault show that jurors rejected the state's theory that Mr. Garcia Zarate (1) fired intentionally with an intent to kill, (2) fired intentionally with conscious disregard for human life, (3) committed the "willful" act of brandishing a firearm or even (4) knowingly assaulted Ms. Steinle. Put another way, given the obvious

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[2] Counsel mis-spoke when he referred to CALCRIM 2512 rather than CALCRIM 2511, but the mistake is of no consequence. CALCRIM 2511 defines possession of a firearm by a person prohibited from possessing a firearm due to a prior felony, and contains a definition of the transitory possession defense for use if supported by the evidence. CALCRIM 2512 defines possession of a firearm by a person prohibited from possessing a firearm by court order, and contains a definition of the transitory possession defense for use if supported by the evidence. Because the definitions of transitory possession in the two instructions are identical, counsel's inadvertent reference to CALCRIM 2512 rather than 2511 is of no consequence.

negligence (at a minimum) of intentionally firing a gun on a crowded San Francisco pier, the fact that jurors acquitted of all homicide and assault charges suggests quite strongly that jurors fully accepted the defense theory of an accidental firing.

On this record, as more fully discussed below, there are two reasons reversal is required. First, as discussed in Argument I-B below, the trial court violated its *sua sponte* duty to instruct on defenses when it failed to instruct on the defense of transitory possession. This was the heart of the defense theory that Mr. Garcia Zarate picked up the package wrapped in rags under the chair not knowing what it was. Once the gun accidentally fired, he immediately threw it in the bay to make sure it would not fire again. Because there was ample evidence in the record on which the jury could have found that once Mr. Garcia Zarate understood he was holding a gun he only did so momentarily in order to dispose of it before it fired again, and because that theory was the central theory of defense, the trial court was required to instruct on the defense of transitory possession. The trial court's failure to instruct the jury on this defense violated both state law and the Fifth and Sixth Amendments and requires reversal of the felon-in-possession charge.

Alternatively, as discussed in Argument I-C below, the trial court separately erred when, in response to jury question 9, it refused defense counsel's specific request for that portion of the standard CALCRIM instruction covering transitory possession. Given the

facts of this case, the trial court's refusal to resolve the jury's confusion by providing this standard instruction also violated both state and federal law and requires reversal.

B. The Trial Court's Failure To Instruct The Jury On The Defense Of Transitory Possession Requires A New Trial.

A defendant may not be deprived of "an adequate opportunity to present [his] claims fairly within the adversary system." (*Ross v. Moffitt* (1974) 417 U.S. 600, 612.) The right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense." (*Tyson v. Trigg* (7th Cir. 1997) 50 F.3d 436, 448.) A criminal defendant is "entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63.)

Pursuant to this general rule, the failure to instruct on a defendant's theory of the case violates both the Sixth Amendment right to a jury trial and the Due Process right to a fair trial. As the Ninth Circuit has concluded, "[i]t is well-established that a criminal defendant is entitled to adequate instructions on the defense theory of the case." (*Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739.) "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct when there is evidence to support the instruction can never be considered

harmless." (*United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201.)

Not surprisingly, California courts agree that the failure to instruct on a theory of defense supported by the evidence is improper. "It is well-settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Martin* (1970) 1 Cal.3d 524, 531.) Included within this *sua sponte* duty is the obligation "to instruct on defenses, . . . if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Stewart* (1976) 16 Cal.3d 133, 140. *Accord People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on other grounds, *People v. Breverman* (1998) 19 Cal.4th 142.) These rules ensure that the jury's consideration of the case will not be limited "by strategy, ignorance, or mistake of the parties." (*People v. Wickersham* (1982) 32 Cal.3d 307, 324, overruled on other grounds, *People v. Barton* (1995) 12 Cal.4th 186.)

Pursuant to these general principles, there are three questions to resolve in

deciding if the trial court's failure to instruct on transitory possession requires a new trial here. First, is transitory possession a defense recognized by California law? If so, was there sufficient evidence to require instructions on this defense here? Finally, if there was sufficient evidence to support such a defense, was the failure to instruct on this prejudicial?

It is to these questions Mr. Garcia Zarate now turns. As discussed below (1) transitory possession is indeed a defense to the charge of being a felon in possession of a firearm and there is a standard instruction which trial courts use to instruct on the defense, (2) there was sufficient evidence to instruct on this defense here and (3) the failure to instruct on this defense left Mr. Garcia Zarate with no defense at all. Reversal is required.

1. Transitory possession is a defense to a charge of being a felon in possession.

Under state law, when a defendant is charged with possession of an illegal substance, the defendant's momentary possession of the substance for the purpose of disposal is a complete defense to the charge. (*People v. Mijares* (1971) 6 Cal.3d 415 [recognizing the transitory possession defense to possession of an illegal substance]; *People v. Frazier* (1998) 63 Cal.App.4th 1307 [same]; *People v. Sullivan* (1989) 215 Cal.App.3d 1446, 1452 [same].) The question here is whether this same defense of

transitory possession also applies to cases where the defendant is charged *not* with possessing drugs, but with possessing a firearm. For decades the answer has been clear: the transitory possession defense applies both to controlled substances and firearms.

The Supreme Court decision in *People v. Mijares*, *supra*, 6 Cal.3d 415 is a useful starting point. In that case, the defendant removed an object from the pocket of the passenger in his car and threw it out into a field. (6 Cal.3d at pp. 417-418.) The passenger was suffering from a heroin overdose and defendant drove the passenger to a fire station. (*Ibid.*) Police recovered the object which was heroin. (*Ibid.*) The defendant was convicted of possession of heroin in violation of California Health and Safety Code section 11500. (*Ibid.*) On appeal, the defendant argued that the trial court erred by failing to instruct that the possession prohibited by section 11500 did not include handling for only brief moments prior to abandoning the narcotic. (*Ibid.*) The Court of Appeal rejected the argument and affirmed the conviction. (*Ibid.*)

The California Supreme Court granted review. The Court noted two distinct salutary purposes of the defendant's possession in that case. First, "in throwing the heroin out of the car, the defendant . . . maintained momentary possession for the sole purpose of putting an end to the unlawful possession of [the passenger]." (*Id.* at p. 420.)

Second, the defendant was actually trying to dispose of the illegal substance; his knowing possession of the heroin occurred only "during the brief moment involved in abandoning the narcotic" and so should not be deemed possession under the statute. (*Id*. at p. 422. *See People v. Hurtado* (1996) 47 Cal.App.4th 805, 814 ["Recognition of the 'momentary possession' defense serves the purpose of encouraging disposal and discouraging retention of dangerous items . . . ."].) The Supreme Court reasoned that if such transitory control constituted possession, "manifest injustice to admittedly innocent individuals" could result. (*Ibid*.) The Court reversed, holding that the trial court should have *sua sponte* instructed on momentary possession. (*Id*. at pp. 422-423.)

In the years following *Mijares* two views developed in the appellate courts as to whether the transitory possession defense articulated in *Mijares* should also apply when defendant was charged with possession of a firearm. Significantly, however, both lines of authority agreed that transitory possession could indeed constitute a defense to this charge where the defendant was actually trying to dispose of the weapon.

In *People v. Pepper* (1996) 41 Cal.App.4th 1029 the Third District Court of Appeal held that the transitory possession defense did *not* apply to a felon-in-possession charge where the defendant's possession of the gun was to prevent possession by another. (41 Cal.App.4th at p. 1037.) Significantly, however, even in advancing this more limited

view of the *Mijares* transitory possession defense, *Pepper* recognized that a defendant who had unknowingly taken possession of a firearm *could* defend against a firearm possession charge by establishing that he disposed of the firearm as soon as he learned what it was – *the exact situation presented in this case*:

> [T]his is not a case where a convicted felon took possession of an object solely out of curiosity, not knowing its character as a firearm, and abandoned the gun as soon as he realized it was a firearm. . . . . [T]he abandonment of an illicit object immediately upon recognition of its nature as contraband is not considered to be 'possession' of the object for the purpose of criminal sanctions.

(41 Cal.App.4th at p. 1037.)

Shortly after *Pepper*, the Sixth District Court of Appeal rejected *Pepper* and held that transitory possession *could* be a defense in a felon-in-possession case. (*People v. Hurtado*, *supra*, 47 Cal.App.4th 805 at p. 814.) "We are convinced the 'momentary possession' defense recognized in *Mijares* extends to possession of a firearm by a felon offenses." (*Ibid.*) In reaching this conclusion *Hurtado* agreed with *Pepper* that "a brief possession solely for disposal purposes [is] a defense." (*Id.* at p. 814.)

In short, although there may be some disagreement as to whether the transitory possession defense applies when a defendant contends he possessed a weapon to prevent

unlawful possession by another, there is no disagreement whether that defense applies to a brief possession for purposes of disposal. On that point, both *Pepper* and *Hurtado* agreed. So does the Supreme Court in language that really could not be any more clear:

> We agree with the *Hurtado* court that recognition of a "momentary possession" defense serves the salutary purpose and sound public policy of encouraging disposal and discouraging retention of dangerous items *such as controlled substances and firearms*.

(*People v. Martin* (2001) 25 Cal.4th 1180, 1191, emphasis added.) And some years later the Court reiterated the point:

> *People v. Hurtado* (1996) 47 Cal.App.4th 805, 814, 54 Cal.Rptr.2d 853, established that a felon's momentary control of a firearm for purpose of disposal . . . is a defense to possession charges.

(*In re Grant* (2014) 58 Cal.4th 469, 479.)

In light of the clarity of this case law in connection with "momentary possession of a firearm for purpose of disposal" there should be no real dispute whether transitory possession can be a defense to possession of a firearm. Moreover, as noted above, there is a standard CALCRIM instruction which conveys this defense -- CALCRIM 2511. And the Bench Notes to this instruction make clear that "[i]f sufficient evidence has been

presented, the court has a **sua sponte** duty" to instruct on the defense. (Emphasis in original.) The question then becomes whether there was sufficient evidence to warrant the instruction here.

2. There was sufficient evidence to instruct on transitory possession in this case.

The Supreme Court has long made clear that in determining if there is sufficient evidence to warrant instructions, courts "should not . . . measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury." (*People v. Flannel* (1979) 25 Cal.3d 668, 684.) Further, "doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused." (*Id*. at p. 685; *People v. Wilson* (1968) 66 Cal.2d 749, 763.) And in assessing whether there is sufficient evidence to merit instructions on an affirmative defense, courts must consider the evidence "in the light most favorable to the defendant." (*People v. Mentch* (2008) 45 Cal.4th 274, 290.) Not surprisingly, the appellate courts -- including this one -- have long followed these very precepts. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137. *Accord People v. Vasquez* (2018) __ Cal.App.5th ___, 2018 WL 6804261 at * 5; *People v. Woods* (2015) 241 Cal.App.4th 461, 475; *People v. Brothers* (2015) 236 Cal.App.4th 24, 30.)

Here, considering the evidence in the light most favorable to the defense, there was ample evidence from which a reasonable jury could find that (1) Mr. Garcia Zarate picked up an object covered in a rag (2) he did not know it was a gun until it accidentally discharged (3) within seconds of discharge he disposed of the gun by throwing it into the bay and (4) he did so in order to stop the gun from discharging rather than to avoid detection. Mr. Garcia Zarate's own statements to police, the video footage and the confirming testimony of prosecutor witness Lisa Strick all support this precise scenario. And the jury's verdicts on the various homicide and assault charges show that jurors unanimously and repeatedly rejected the state's theory of an intentional shooting, an intentional brandishing or even an intentional act in pointing a gun. On this record, a reasonable juror could indeed have found "the brief moment involved in abandoning [the firearm]" was not possession under the statute. (*People v. Mijares*, *supra*, 6 Cal.3d at pp. 422.) Because there was sufficient evidence to support the defense of momentary possession, the court's failure to instruct on such a critical part of the defense was error.

Indeed, the error here is particularly puzzling because the court instructed jurors in accord with the bulk of standard CALCRIM instruction 2511 which defines the elements of the felon-in-possession charge. But the court failed to give that part of the standard instruction which covers the transitory possession defense and would have told jurors that "[i]f you conclude that the defendant possessed a firearm, that possession was not

unlawful if the defendant can prove the defense of momentary possession." (CALCRIM 2511.) To establish this defense, "the defendant must prove that . . . [he] possessed the firearm only for a momentary or transitory period . . . [he] possessed the firearm in order to . . . dispose or destroy it [] and . . . [he] did not intend to prevent law enforcement officials from seizing the firearm." (CALCRIM 2511.) So the court in this case was not charged with crafting an instruction out of whole cloth to convey a novel defense -- it merely had to instruct jurors on a portion of a standard instruction it was giving to the jury anyway.

In contending there was sufficient evidence to support a transitory possession instruction, Mr. Garcia Zarate is aware that in ruling on defense counsel's new trial motion, the trial court offered its view that the evidence was insufficient to justify instructions on this defense. Prior to sentencing, defense counsel filed a new trial motion urging the court to grant a new trial, in part, because of the absence of transitory possession instructions. (2 CT 1087.) Defense counsel made clear how portions of the defendant's statements to police directly implicated the transitory possession defense:

> The prosecution relies on the [defendant's] statement for many, many different things. One of the things they do not rely on is that he held this and got rid of it. He found something that he didn't know -- he didn't know what it was. . . . . He came in contact with it. It came into his hand. It went off. He disposed of it.

(29 RT 2713.) Defense counsel reiterated the point:

> And one thing I think we could all agree on because there's video of what took place is the moment Mr. Garcia Zarate – I mean, the moment this gun fired, it was thrown. . . . And a number of times [in the interrogation] he says he threw the gun because it was firing, to get it to stop firing, that sort of thing. . . . He's unwrapping an object. It fires. He throws it immediately.

(29 RT 2715.)

The trial court denied the new trial motion. (29 RT 2720.) With respect to transitory possession the court noted a conflict in the evidence; in another part of his interrogation, when asked whether he fired the gun, Mr. Garcia Zarate said "yes." (29 RT 2711-2712.) Based on this portion of the police interrogation the court's view was that Mr. Garcia Zarate (1) possessed the gun, (2) fired it and (3) threw it in the water. (29 RT 2713.) Accepting as true this portion of defendant's statement, the trial court believed this was not a case, like that described by the appellate court in *Pepper* (and quoted above) "where a convicted felon took possession of an object solely out of curiosity, not knowing its character as a firearm, and abandoned the gun as soon as he realized it was a firearm." (41 Cal.App.4th at p. 1037.)

With all due respect, the trial court's rationale is utterly irreconcilable with decades

of established precedent from both the Supreme Court and this Court. As noted above, in assessing whether there is sufficient evidence to merit instructions on an affirmative defense, courts may not simply look for a piece of evidence that is inconsistent with the defense and then reject the instruction; instead, they must do precisely the opposite and consider the evidence "in the light most favorable to the defendant." (*People v. Mentch*, *supra*, 45 Cal.4th at p. 290; *People v. Millbrook*, 222 Cal.App.4th at p. 1137.) The reason for this rule is simple: as the First District Court of Appeal held nearly half a century ago, when a defendant testifies jurors are entitled to accept some parts of the defendant's statement and reject other parts. (*People v. Shavers* (1969) 269 Cal.App.2d 886, 889. *Accord People v. Wickersham* (1982) 32 Cal.3d 307, 328, overruled on other grounds in *People v. Barton* (1995) 12 Cal.4th 186.) Given this reason for viewing the evidence in the light most favorable to the defendant, and as this Court has also recognized, "substantial evidence to support instructions . . . may exist even in the face of inconsistencies presented by the defense itself." (*People v. Millbrook*, *supra*, 222 Cal.App.4th at p. 1137. *Accord People v. Breverman* (1998) 19 Cal.4th 142, 162-163 and n.10.)

Put another way, because jurors are entitled to accept some parts of a defendant's statement while rejecting others, an instruction may not be denied simply because it is inconsistent with some portion of a defendant's statement. That approach -- the precise

approach taken by the trial court here -- effectively invades the function of the jury. At the end of the day it was for the jury to evaluate the conflicting statements defendant gave to police -- and whether transitory possession had been established -- not for the trial court. Under the properly applicable standards of review, and regardless of whether portions of defendant's statement did not advance the defense, there was more than sufficient evidence to justify instructions on transitory possession.[3]

3. The trial court's failure to instruct on the defense of momentary possession left Mr. Garcia Zarate with no defense and requires reversal.

The remaining question is whether the failure to instruct the jury on this defense theory requires reversal. In resolving this question the Court must first decide what standard of prejudice applies to this error. If the error violated Mr. Garcia Zarate's federal constitutional rights, then -- at a minimum -- the *Chapman* standard of prejudice applies, requiring reversal unless the state can prove the error harmless beyond a

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[3] The trial court's reliance on Mr. Garcia Zarate's statements to police that he fired the gun to reject the new trial motion is especially troubling here. As noted above, the prosecutor had explicitly relied on these very statements in urging jurors to find the shooting intentional and convict of either first or second degree murder. (27 RT 2465, 2470.) But jurors *rejected* this factual theory, unanimously acquitting of murder. (2 CT 1040, 1050.) Thus, in refusing to view the evidence in the light most favorable to the defense, the court not only applied the wrong standard in assessing the evidence supporting the transitory possession defense, but it went further and specifically relied on evidence which jurors had themselves rejected.

reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) If the error solely violated Mr. Garcia Zarate's rights under state law, then the *Watson* standard of prejudice applies, requiring reversal if Mr. Garcia Zarate can establish a reasonable probability of a more favorable outcome absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The inquiry into which standard applies to this error is not as simple as it sounds. For nearly a quarter of a century, the California Supreme Court has noted, but not resolved, the legal question of what standard of prejudice should apply to a trial court's failure to instruct on a defendant's affirmative defense. (*See*, *e.g.*, *People v. Salas* (2006) 37 Cal.4th 967, 984 ["We have not yet determined what test of prejudice applies to the failure to instruct on an affirmative defense."]; *People v. Simon* (1995) 9 Cal.4th 493, 506 n.11 ["[W]e need not decide here whether the error [in failing to properly instruct on an affirmative defense] . . . is one of federal constitutional dimension that necessitates application of the *Chapman* test for reversible error . . . ."].)

Lower courts throughout the state have repeatedly noted that this question remains open. "The California Supreme Court has not definitively resolved whether instructional error of the kind complained of here [the failure to instruct on a defense] is governed by the *Chapman* standard of prejudice or the *Watson* standard . . . applicable to state law error . . . ." (*People v. Andrews* (2015) 234 Cal.App.4th 590, 605.) "The California

Supreme Court has not yet determined the test of prejudice for failure to instruct on an affirmative defense." (*People v. Watt* (2014) 229 Cal.App.4th 1215, 1219.) "The California Supreme Court has not yet determined the standard of prejudice applicable to the erroneous failure to give a requested instruction on an affirmative defense." (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1530.)

Not surprisingly then, the lower courts have filled this vacuum with a variety of approaches. Some apply the *Watson* standard, some apply the *Chapman* standard and some apply both. (*See*, *e.g.*, *People v. Andrews*, *supra*, 234 Cal.App.4th at p. 605 [applying both standards]; *People v. Watt*, *supra*, 229 Cal.App.4th at p. 1219 [suggesting *Watson* applies]; *People v. Orlosky* (2015) 233 Cal.App.4th 257, 272 [applying both]; *People v. Williams*, *supra*, 176 Cal.App.4th at p. 1530 [applying both standards]; *People v. Saavedra* (2009) 156 Cal.App.4th 561, 569 [assuming *Chapman* applies]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 52 [applying *Watson*]*; People v. Elize* (1999) 71 Cal.App.4th 605, 616 [assuming *Watson* applies]; *People v. Mayer* (2003) 108 Cal.App.4th 403, 413 [applying *Watson*].)

Although the California Supreme Court has not yet resolved this issue, application of *Watson* (rather than *Chapman*) to this error is inconsistent with the vast body of law in the rest of the country. As noted above, a criminal defendant is "entitled to an instruction

as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States*, *supra*, 485 U.S. 58, 63. *Accord Ross v. Moffitt*, *supra*, 417 U.S. at p. 612 [a criminal defendant is entitled to "an adequate opportunity to present [his] claims fairly within the adversary system."]; *Tyson v. Trigg*, *supra*, 50 F.3d at p. 448 [the right to present a defense "would be empty if it did not entail the further right to an instruction that allowed the jury to consider the defense."].)

Pursuant to these principles, federal courts around the country have consistently recognized that criminal defendants have a federal constitutional right to instructions on defenses recognized by state law. (*See*, *e.g.*, *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099 [refusal to instruct on entrapment]; *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 852 [refusal to instruct on self-defense]; *Davis v. Strack* (2nd Cir. 2002) 270 F.3d 111, 116, 123-124 [same]; *Everette v. Roth* (7th Cir. 1993) 37 F.3d 257, 261 [refusal to instruct on self-defense]; *Whipple v. Duckworth* (7th Cir. 1995) 957 F.2d 418, 423, overruled on other grounds, *Eaglin v. Welborn* (7th Cir. 1997) 57 F.3d 496 [refusal to instruct on self-defense]; *Woods v. Solem* (8th Cir. 1989) 891 F.2d 196, 199 [refusal to instruct on self-defense].) State courts from around the country have also recognized that criminal defendants have a federal constitutional right to instructions on defenses recognized by state law. (*See*, *e.g.*, *State v. Carter* (1995) 232 Conn. 537, 545; *State v. Flynn* (2014) 299 Kan. 1052, 1069; *People v. Kurr* (2002) 253 Mich.App. 317, 326-327;

State v. Belanger (2010) 190 Ohio App.3d 377, 380-382.)

Fortunately, there may be no need for the Court to resolve this open question here. In this case, it does not matter which standard is applied. Even under the more lenient (to the state) *Watson* standard, reversal is required.

In applying the *Watson* test to other types of instructional errors, the Supreme Court has recognized that factors relevant to the *Watson* analysis include whether the factual issue removed from the jury was contested a trial and whether it was peripheral to the main issues. (*See*, *e.g.*, *People v. Flood* (1998) 18 Cal.4th 470, 489-490 [where issue not genuinely disputed at trial and was peripheral to the main issues in case, the removal of that issue from the jury will be deemed harmless under state law].) In applying *Watson* the Court has also recognized the common-sense proposition that a hung jury is indeed a more favorable result than a guilty verdict, and as such satisfies the *Watson* standard of prejudice. (*See*, *e.g.*, *People v. Kelly* (1967) 66 Cal.2d 232, 245 [defendant charged with lewd acts, jury hung at first trial, at second trial the trial court erroneously introduced prior crimes evidence which had not been introduced at the first trial; held, *Watson* standard satisfied because "[t]he two trials being otherwise substantially similar, [the hung jury] demonstrates almost to a certainty the prejudicial nature of the error."]. *Accord Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1054 [*Watson* standard

satisfied when "at least one juror" would cast a different vote]; *People v. Griffin* (1967) 66 Cal.2d 459, 466; *People v. Terry* (1964) 61 Cal.2d 137, 153 [*Watson* standard satisfied where evidentiary errors "may have led a single juror" to cast a different vote]; *People v. Hamilton* (1963) 60 Cal.2d 51, 136-137 [*Watson* standard satisfied if "only one of the twelve jurors was swayed by the inadmissible evidence . . . ."]. *See also People v. Brown* (1988) 46 Cal.3d 432, 472 n.1 [concurring and dissenting opinion of Broussard, J.][noting that a "hung jury is a more favorable verdict" than a guilty verdict]; *People v. Soojian* (2010) 190 Cal.App.4th 491, 521 [same].) Thus, applying the *Watson* standard here, the question is whether one juror could reasonably have voted to acquit had proper instructions on transitory possession been given.

The answer is yes. The critical issue at trial here was whether Mr. Garcia Zarate, a stipulated ex-felon, was in possession of the gun or merely momentarily possessed the gun for the purpose of disposing of it. The state's theory was that Mr. Garcia Zarate possessed the firearm for some time, knew he had a firearm, fired it intentionally and threw it in the water *not* for the purpose of disposing of it but to prevent police from finding it. In response, the defense theory at all points was that Mr. Garcia Zarate did not even know he possessed a gun when he initially picked it up (since it was covered with a rag), and when it fired accidentally (and he therefore knew it was a gun), he disposed of it within seconds. Put another way, under the defense theory, once Mr. Garcia Zarate

realized he was holding a gun, he possessed it only momentarily to dispose of it by throwing it into the bay to stop it from firing. In short, even assuming the *Watson* standard applies, the instructional error here was prejudicial pursuant to *Flood* precisely because (1) the factual issue at the heart of the transitory possession instruction was very much contested a trial and (2) the issue was not only *not* peripheral to the main issues in the case, it was central to the defense (*People v. Flood*, *supra*, 18 Cal.4th at pp. 489-490.)

Indeed, the jury deliberations make this plain. The jury made clear it was struggling with the felon-in-possession charge, requesting the definition of possession, whether there was a time requirement and what type of "intent" was needed to convict. (2 CT 1034.) Defense counsel specifically asked the court to instruct the jury with the transitory possession language in CALCRIM 2511. (28 RT 2618.) The court refused, electing instead to direct jurors back to the instructions they already had -- the precise instructions which had caused them to ask the question in the first place. (28 RT 2618-2619; 2 CT 1034.) Whatever else may be said about this question from the jury, it shows jurors were considering the defense theory of the case.

On this record, even if analyzed under *Watson*, it is reasonably probable that had standard instruction CALCRIM 2511 been given at least one juror could have found

transitory possession and vote to acquit. This is especially true here, where the objective record of jury deliberations show this was a close case. Jurors deliberated nearly 27 hours over the course of six court days, they asked ten separate questions of the trial court and they unanimously acquitted Mr. Garcia Zarate of first degree murder, second degree murder, manslaughter and assault. (2 CT 1023-1024, 1027, 1031-1033, 1035-1039, 1072-1073.) The case law has long recognized that these type of objective criteria reflect a close case. (*See, e.g.*, *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury deliberation shows "close case"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour deliberation]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [request for readback shows close case]*; People v. Thompkins* (1987) 195 Cal.3d 244 [same]; *People v. Williams* (1971) 22 Cal.App.3d 34, 40-41 [same]; *People v. Epps* (1981) 122 Cal.3d 691, 698 [refusal to convict on all counts shows a close case].) Reversal is required.[4]

[4] Because reversal is required under *Watson*, no separate analysis under *Chapman* is required. It is worth noting, however, that given the evidence presented at trial, the factual theories presented by the parties below, the impact of the numerous verdicts finding Mr. Garcia Zarate not guilty of first degree murder, second degree murder, manslaughter or assault, the objective record of jury deliberations and the jury question regarding the count two charge, the state cannot establish beyond a reasonable doubt that the trial court's failure to instruct on momentary possession was harmless.

C. The Trial Court's Refusal To Provide Transitory Possession Instructions On Defense Counsel's Request In Response To Jury Question 9 Violated Both State And Federal Law And Requires Reversal.

As discussed above, during deliberations the jury sent the court jury question number 9, requesting clarification of the concept of "possession" in connection with the count two felon-in-possession charge. (2 CT 1034.) Juror question 9 was a three part question, asking (1) for a "definition of possession," (2) if there was a "time requirement for possession," and (3) about the "wrongful intent" component of the charge. (2 CT 1034.) In response, defense counsel specifically requested that the court instruct in accord with the transitory possession defense set forth in standard CALCRIM 2511. (28 RT 2618-2619.) The court refused, instead referring jurors to the instructions they had already been given and the jury convicted on the count two charge. (28 RT 2619; 2 CT 1034, 1064.)

In Argument I-B above Mr. Garcia Zarate has contended that the trial court violated its *sua sponte* duty to instruct on all defenses supported by the evidence when it failed to instruct on the transitory possession defense in the first instance. As discussed more fully below, the trial court separately erred in refusing defense counsel's specific request for this instruction. As with the error discussed in Argument I-B above, this error also violated both state and federal law. For the same reasons discussed in Argument I-B-

3 above, in light of the entire record of this case -- including the positions of the parties below, the unanimous acquittals of first and second degree murder, manslaughter and assault and the length and nature of jury deliberations reflecting a close case -- this refusal to instruct on transitory possession cannot be found harmless.

Nearly 75 years ago the United States Supreme Court recognized that when a jury in the process of fulfilling its responsibility explicitly requests clarification of a legal issue, the trial judge is obligated to resolve the question directly and unequivocally. (*Bollenbach v. United States* (1945) 326 U.S. 607, 612-613. *Accord United States v. McCall* (9th Cir. 1979) 592 F.2d 1066, 1068.) California has codified this requirement. (*See* Penal Code section 1138; *accord People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; *People v. Butler* (1975) 47 Cal.App.3d 273, 279-280.) In applying this rule, courts have made clear that although "[t]he [trial] court must be careful not to invade the jury's province as factfinder . . . the court must respond to questions concerning important legal issues." (*United States v. Nunez* (6th Cir. 1989) 889 F.2d 1564, 1569.)

Where a jury asks for clarification of a legal issue, trial courts have discretion to simply refer jurors back to the original instructions only "[w]here the original instructions are themselves full and complete." (*People v. Beardslee* (1991) 53 Cal.3d 1179A, 97. *Accord People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213 [referring jurors back to original

instructions is proper where the original instructions "are themselves full and complete."]; *People v. Rigney* (1961) 55 cal.2d 236, 246 [reference back to the original instructions is proper where original instructions "fully and adequately instructed the jury" and "answer[ed] the question of the jury."].) But where the original instructions do *not* genuinely respond to the jury's question, the trial court's obligation to answer jury questions directly and unequivocally is *not* satisfied by referring the jury to the original instructions. (*See*, *e.g.*, *People v. Hardeman* (1966) 244 Cal.App.2d 1, 52. *Accord McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 838-839 (9th Cir. 1997)(en banc), overruled on other grounds *Coleman v. Calderon* (1998) 525 U.S. 141; *United States v. Warren* (9th Cir. 1993) 984 F.2d 325, 329-330; *United States v. Gordon* (9th Cir. 1988) 844 F.2d 1397, 1402; *Powell v. United States* (9th Cir. 1965) 347 F.2d 156, 157-158; *United States v. Bolden* (D.C.Cir. 1975) 514 F.2d 1301, 1308-1309.)

Here, the parties had stipulated that Mr. Garcia Zarate was an ex-felon. Nor was there any dispute that he was holding the gun when it went off, and he threw it into the water seconds afterwards. So the only issue for jurors was whether on these facts Mr. Garcia Zarate possessed the gun as defined under California law. Jury question 9 was directed to exactly this point, asking for a definition of possession, asking whether there was a time requirement for a finding of possession and asking about the wrongful intent component of the felon-in-possession charge. In light of the precise theory of defense

presented, the transitory possession instruction defense counsel requested would have answered the jury's question. In contrast, the court's reference to the original instructions conveyed no real answers at all to the jury's questions. The court erred in refusing defense counsel's specific request to instruct on the transitory possession defense.

To the extent the court's error merely violated section 1138, the applicable standard of prejudice is the *Watson* standard typically applied to errors of state law. (*People v. Ainsworth, supra*, 45 Cal.3d at p. 1020 [applying state standard of review to find similar error harmless].) Pursuant to this standard, reversal is required if there is a reasonable probability that the error affected the verdict. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Here, "'probability' . . . does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 citing *People v. Watson, supra*, 46 Cal.2d at p. 837.) As discussed in Argument I-B-3 above, the pertinent question in applying the *Watson* standard is whether absent the error a single juror could reasonably have reached a different result. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 521.)

But as noted above, the Supreme Court has recognized that a violation of section 1138 also implicates "a defendant's right to a fair trial conducted 'substantially [in] accord[ance] with law.'" (*People v. Frye* (1998) 18 Cal.4th 894, 1007.) Here, for the

reasons discussed in detail in Argument I above, the trial court's refusal to instruct on transitory possession left Mr. Garcia Zarate without any real defense to the felon-in-possession charge. To the extent the court's refusal violated Mr. Garcia Zarate's right to a fair trial, the state is required to prove -- beyond a reasonable doubt -- that the error was harmless. (*See Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Just as discussed in Argument I-B-3 above, there is no reason to resolve which standard of prejudice applies to this error. For the very same reasons discussed there, the trial court's refusal to instruct on transitory possession requires a new trial regardless of which standard applies.

CONCLUSION

The court's failure, and later refusal, to instruct on the transitory possession defense plainly available under state law left the jury with no choice but to convict on the felon-in-possession charge. After all, the parties had stipulated that Mr. Garcia Zarate was a felon. And there was no dispute that the gun was in his hands when it went off. So the only question for jurors in resolving the felon-in-possession charge was whether this constituted possession as defined under California law. That is precisely what the transitory possession instruction would have addressed and it is precisely what jurors were asking about when they sought clarification from the court on what it meant to possess a gun. The court's failure to provide instructions on this defense requires reversal.

DATED: January 11, 2019

Respectfully submitted,

/s/ Cliff Gardner
Cliff Gardner
Attorney for Appellant

WORD COUNT CERTIFICATE

I certify that the accompanying brief is double spaced, that a 13 point proportional font was used, and that there are 12,293 words in the brief.

Dated: January 11, 2019

/s/ Cliff Gardner
Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Ave. Berkeley, California, 94702. I am not a party to this action.

On January 11, 2019, I served the within

APPELLANT'S OPENING BRIEF

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

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and upon the parties named below by submitting an electronic copy through TrueFiling:

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I declare under penalty of perjury that the foregoing is true. Executed January 11, 2019, in Berkeley, California.

Declarant

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

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Case Number: **A153400**
Lower Court Case Number: **SCN224636**

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

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/s/Cliff Gardner

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