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ORIGINAL

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,  
 Plaintiff and Respondent,  
 v.  
 PAUL D. ANDERSON,  
 Defendant and Appellant.

Case No. S175351  
 SUPREME COURT  
 FILED

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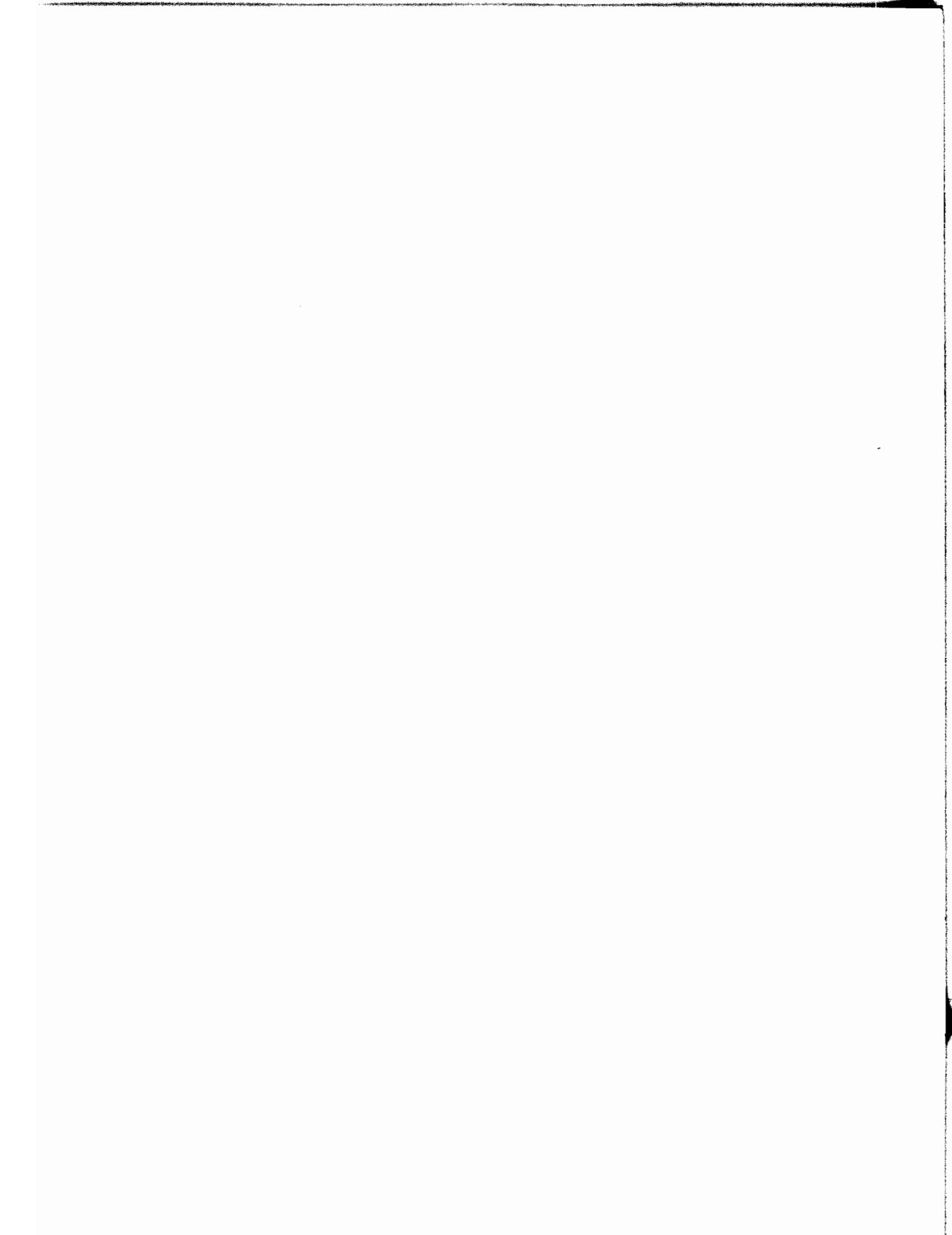
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Fourth Appellate District, Division One, Case No. D054740  
 Riverside County Superior Court, Case No. RIF113459  
 The Honorable Richard Couzens, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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## ISSUE PRESENTED

Was the defendant entitled to sua sponte instruction on accident as a defense to robbery, and if so, was the court's failure to so instruct prejudicial?

## STATEMENT OF THE CASE

Appellant spent the evening of November 7, 2003, smoking methamphetamine and arranging a romantic rendezvous with his drug-dealer, Ginger Maynard. (2 RT 238-239, 242; 5 RT 850-852.) But appellant did not have a car. (2 RT 242-243.)

So, armed with a number of shaved keys, appellant entered the nearby gated Boulder Crest apartment complex parking lot and began looking for a car to steal. (1 RT 41; 5 RT 853-854.) He found success with 19-year-old Pamela Thompson's car. (1 RT 22; 5 RT 855-856.) Thompson was upstairs in her apartment getting ready to meet her boyfriend for the evening. (1 RT 127, 132, 142.) Once inside her car, appellant drove up to the security gate, assuming that it would open automatically. (5 RT 856.) But the gate required a remote control to open. Appellant backed the car into an unoccupied parking spot, and sat and waited for an incoming car to open the gate. (1 RT 56, 68; 5 RT 856.)

As appellant waited, Thompson returned to the parking lot and discovered that her car was missing. (1 RT 25.) Upset, she began walking the parking lot. (1 RT 26, 74-80.) Simultaneously, appellant observed that the security gate was finally opening as another car entered the parking area. (5 RT 857.)

But before appellant could escape, he was caught by Thompson. (5 RT 857-858.) Apartment resident Rudy Espinoza, and his girlfriend Anya Gonzalez, heard Thompson yelling. (2 RT 158.) They characterized the yelling as "a quarrel between a couple" (2 RT 157) and as "a fight going

on.” (2 RT 157, 179-180.) It sounded like the woman “was talking to someone and she was, like, yelling like at somebody.” (2 RT 180.) Gonzalez further observed that, during the dispute, the female voice moved towards the location of the parking gate. (2 RT 185-186.) From the gate area, the female voice shouted “[s]top, stop, stop[.]” (2 RT 185.) Two or three seconds after hearing the female voice demand “stop,” Gonzalez heard “a real loud thump.” (2 RT 186-187.) Esponzoza also heard the impact, following “the noise of [a car] accelerat[ing].” (2 RT 159, 163.) After the impact, he heard “screeching tires going off, going away” as the car was “leaving the apartments.” (2 RT 157, 160, 164.)

Anderson was charged with first-degree murder, robbery, and receiving stolen property. (Pen. Code, §§ 187, 211, 496, subd. (a).) It was further alleged that the murder was committed in the special circumstance of a robbery. (Pen. Code, § 190.2, subd. (a)(17).) (1 CT 148-149.)

Appellant admitted in trial testimony that, as he was attempting to escape through the closing security gate, he observed Thompson some 8'-10' in front of the car. (5 RT 858.) Appellant offered that, although he “swerved as fast as [he] could,” he struck Thompson. (5 RT 858-859.) Indeed, forensic pathologist Mark Fajardo, M.D., testified that the car traveled directly over Thompson's body “from head to toe.” (4 RT 791.) The undercarriage of the vehicle left a “large grease deposit on the right side of [Thompson's] torso”<sup>1</sup> and caused Thompson to suffer massive rib

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<sup>1</sup>Given the position of grease deposits observed on Thompsons' body, as transferred from the undercarriage of her car, coupled with the lack of drag marks, the medical examiner testified that the car traveled directly over Thompson's body. (4 RT 745, 747-754 769, 791-793.) This evidence contradicted appellant's direct examination testimony wherein he claimed that he may have hit Thompson as he swerved away from her to avoid her. (5 RT 859.)

and skull fractures. (4 RT 747, 752-753.) Thompson's step-father,<sup>2</sup> Joe Dietz testified that he came sprinting out of the apartment complex and discovered Thompson sprawled in the street with blood pouring from her head. (1 RT 78-84.) When she stopped breathing, Dietz began CPR until paramedics arrived. (1 RT 84-85.) Thompson died three days later. (1 RT 99-100.)

In his testimony appellant acknowledged that he was stealing Thompson's vehicle. He claimed, however, that he did not mean to run her over as he stole her car. (5 RT 860, 866.) Moreover -- although he acknowledged hearing Thompson order him to "stop," saw her "looking" at him, observed that her hand was up, and ultimately "felt" the car travel over Thompson's body -- appellant asserted that his act of running the car over Thompson was purely "accident[al]." (5 RT 880, 912; 6 RT 1074-1075.)

Appellant did not testify that he attempted to stop the car before running over Thompson. Nor did he testify that he stopped the car after recognizing that he had run the teenager over.

Upon reaching a safe haven, appellant rummaged through Thompson's purse and took her driver's license and credit card, which he later used. (3 RT 501-502; 5 RT 980.) Later that evening he abused drugs, wrote drug-dealer Ginger Maynard a love note, and bought her a rose. (5 RT 864, 959.)

After being instructed that a first-degree-murder verdict could be reached if appellant's killing of Thompson was willful, deliberate and premeditated, or if the killing occurred during the commission of a robbery, the jury rendered guilty verdicts as to first-degree murder and robbery. Further, as to the murder conviction, the jury found that the murder was

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<sup>2</sup>Joe Deitz testified that Pamela Thompson "came into" his life when she was three years of age. (1 RT 40.)

committed under the special circumstance of robbery. Thompson was sentenced to prison for life without the possibility of parole, plus a consecutive three year term. (2 CT 343-345.)

On appeal, appellant claimed that the trial court prejudicially erred because it did not instruct the jury, sua sponte, as to the "defense of accident under Penal Code section 26." Appellant acknowledged that section 26 by its terms exempted from criminal liability those persons who committed their act free from evil design. But he asserted that, notwithstanding that he was engaged in the evil act of stealing Thompson's car when he struck and killed her, he was entitled to have the jury instructed as to "the defense of accident" based on his testimony that the killing had been merely an unintended consequence of that theft.

The Court of Appeal agreed. It ruled that,

a [Penal Code] section 26 defense of accident would necessarily apply when a defendant only accidentally strikes his or her victim during asportation of stolen property.

(Slip Opn. 18.)<sup>3</sup> In reaching its decision, the Court of Appeal necessarily concluded that Penal Code section 26 must be available to an evil actor for purposes of attacking a specific element of a crime -- here, the force or fear necessary for robbery --rather than attacking criminal liability completely.

On that premise, the Court of Appeal reversed the convictions and the special circumstance finding. The court held that, with regard to the crime of robbery, the trial court erred by failing to instruct sua sponte as to "the defense of accident." The court reasoned that, although appellant admitted that he was in the process of stealing Thompson's car and therefore was engaged in an evil design when he struck and killed her, his testimony that striking her was unintentional entitled him to an instruction on the Penal

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<sup>3</sup>Except as otherwise indicated, the remainder of appellant's claims are not pertinent here.

Code section 26 accident incapacitation. The Court of Appeal further held the purported error to be prejudicial.

### **SUMMARY OF ARGUMENT**

The Court of Appeal erred. Its conclusion that the accident incapacitation applies when a defendant "accidentally" applies force, killing his or her victim during the asportation of stolen property was based on a misinterpretation of the principles governing Penal Code section 26. Penal Code section 26 has no application in this case, as it was uncontested that appellant was engaged in felonious criminal conduct when the killing occurred. Indeed, the section has been interpreted by this Court as applicable only to the actor who committed an act or made an omission charged as a crime through misfortune or by accident, when it appears that there was no evil design. Here, by his own testimony, appellant was well into an evil design when he struck and killed Thompson.

Further, Penal Code section 26 does not truly describe a "defense," but rather defines the capacity to commit a crime. As such, a trial court has no sua sponte duty to instruct, even when there is substantial evidence of accident, because evidence of accident is relevant only to dispute that a criminal actor possessed the requisite criminal intent to commit a charged crime. And here there was not even substantial evidence. Even if accident was a defense, the evidence did not support the giving of such an instruction. Finally, even if appellant were entitled to an accident instruction, the error was harmless given the weight of the prosecution's evidence.

## ARGUMENT

### **I. THE PENAL CODE SECTION 26 PROVISION FOR INCAPACITY ON ACCOUNT OF ACCIDENT HAS NO APPLICATION IN THIS CASE AS IT WAS UNCONTESTED THAT APPELLANT WAS ENGAGED IN FELONIOUS CRIMINAL CONDUCT**

The principle that a person acting accidentally or by misfortune is incapable of forming the sinister intent necessary to commit a crime originated in the English common law. Codified by the California Legislature in 1850 as part of the Crimes and Punishment Act, and subsequently entered into the Penal Code as section 26 in 1873, the principle has remained virtually unchanged in the 159 years since its inclusion in California law. During that time, no California court has ever interpreted the principle in the manner in which the Court of Appeal did here -- treating Penal Code section 26 as excusing an admittedly evil actor of actively engaging in felonious criminal activity.

#### **A. The Express Language and Legislative History of Penal Code Section 26 Demonstrates That, to Be Deemed Incapable of Committing a Crime on Account of Accident, the Actor Must Not Have An Evil Intent.**

Penal Code section 26 provides, in pertinent part,

All persons are capable of committing crimes except those belonging to the following classes: . . . # . . . Five -- Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was *no evil design*, intention, or culpable negligence.

(Pen. Code, § 26, subd. (5), emphasis added.) The plain language of the statute dictates that Penal Code section 26 does not apply to an individual, such as appellant, who is actively engaged in an evil design. Further, the tenet upon which the Penal Code section 26 concept of incapacitation on account of accident is based, as it originated in the common law, is that the

incapacitation defense is available solely to those who are *entirely* morally innocent.

Under settled canons of statutory construction, in construing a statute [the reviewing court must] ascertain the Legislature's intent in order to effectuate the law's purpose.

(*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 389; *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) The reviewing court “must look to the statute's words and give them ‘their usual and ordinary meaning.’” (*Imperial Merchant Services, Inc.*, at p. 389, quoting *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601.) “‘The statute's plain meaning controls the court's interpretation unless its words are ambiguous.’” (*Imperial Merchant Services, Inc.*, at p. 389, quoting *Green v. State of California* (2007) 42 Cal.4th 254, 260.)

Here, because Penal Code section 26 expressly provides that persons who operate by accident, such that they possess “no evil design,” are incapable of committing a crime, it follows that a person who possesses an “evil design” is capable of committing a crime and outside the ambit of the statute for any purpose. Because section 26 specifically provides complete immunity to those persons to whom the section is applicable, and therefore necessarily excludes all others, the statutory language permits but a single reasonable interpretation: A person, such as appellant, engaged in an evil design, is capable of forming the requisite mental state and therefore committing a crime, such that section 26 has absolutely no application. Given the unambiguous language of the statute, this Court is not required to consider other aids, such as the statute's purpose, legislative history, and public policy. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

Even if the plain-meaning rule were not dispositive, so that this Court were required to consult other tenets of statutory interpretation and evidence of the statute's meaning, they would only confirm that section 26 may not be applied in a manner that excuses an evil actor from the consequences caused by his determination to commit a crime.

Where more than one statutory construction is arguably possible, this Court's "policy has long been to favor the construction that leads to the more reasonable result." (*Webster v. Superior Court* (1988) 46 Cal.3d 338, 343.) "This policy derives largely from the presumption that the Legislature intends reasonable results consistent with the apparent purpose of the legislation." (*Imperial Merchant Services, Inc. v. Hunt, supra*, 47 Cal.4th at p. 389, citing *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165–1166.) Thus, this Court's task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting, rather than defeating, the statute's general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results. (*Imperial Merchant Services, Inc.*, at p. 389, citing *People v. Jenkins* (1995) 10 Cal.4th 234, 246; *People v. Simon* (1995) 9 Cal.4th 493, 517; *Fields v. Eu* (1976) 18 Cal.3d 322, 328.)

A review of the history of the Penal Code section 26 concept of "accident" incapacity, based on basic principles originating in the common law, compels the conclusion that the Legislature, intent on codifying the common-law rule, was *not* attempting to protect those who were in any way acting corruptly. On April 16, 1850, the California Legislature passed the Crimes and Punishment Act. The First Division of the Act identified those "persons capable of committing crimes." (Stats. 1850, ch. 99, p. 229.) Section 1 of the First Division specified that, in every crime, "there must be an union or joint operation of act and intention, or criminal negligence." (*Ibid.*) Section 9 of the First Division further provided that "[a]ll acts

committed by misfortune or accident shall not be deemed criminal when it satisfactorily appears that there was *no evil design or intention* or culpable negligence." (*Id.* at p. 230.)

The Legislature retained the evil-design or intent limitation when it adopted the Penal Code, including Section 26, on February 14, 1872. As adopted, subdivision six of that section provided, "[p]ersons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was *no evil design*, intention, or culpable negligence[.]" are incapable of committing crimes. (Original Pen. Code, § 26, enacted 1872, p. 21, emphasis added.) Section 26 had been modeled after, inter alia, section 16 of Field's Draft and section 16 of the New York Penal Code. (See A.L.R. Notes following original Pen. Code, § 26, enacted 1872, p. 21.) Significantly, Field's Draft codified many principles of the common law. (See, e.g., *Standard Livestock Co. v. Pentz* (1928) 204 Cal. 618, 640 ["It may be stated incidentally that the original Field Code, as to most of its provisions, was framed not upon the basis of statutory law in [New York], but upon the decisions of its courts prior to the formation of said code."]) The Legislature's citation to the Field's Draft reasonably indicates that the Legislature intended to embrace principles originating in the common law when it recognized Penal Code section 26 "accident" incapacity.

Indeed, Field's Draft, which was submitted for consideration to the New York Legislature in 1864, sought to "bring within the compass of a single volume the whole body of the law of crimes and punishments in force" within the state of New York. (Field, Noyes & Bradford, *Proposed Penal Code of the State of New York*, Preliminary Notes, (1864).) The drafters of the Field Code had complained that "the existing statute law of crimes" in the state of New York was inadequate as its incompleteness and often dictated "the necessity of reference to the common law to determine

what are the elements which constitute the offense." (*Ibid.*) As such, the drafters sought to "embrace [in order to codify] every species of act or omission which is the subject of criminal punishment." (*Ibid.*)

"[T]he defense of accident has long been recognized under the common law." (Instructors, The Judge Advocate General's School, *The Defense Of Accident: More Limited Than You Might Think* (1989) Army Law. 40; see also Robinson & Grall, *Element Analysis In Defining Criminal Liability: The Model Penal Code And Beyond* (1983) 35 Stan. L.Rev. 681 [analogous to the common law of mistake are court decisions discussing the defenses of accident and misfortune].) In 1768, discussing the history of the English criminal law, Sir Matthew Hale, "commentator" of the common law (*Wholey v. Caldwell* (1895) 108 Cal. 95, 100), examined the extent that the law would excuse the actor who had acted by way of accident and misfortune, or "*per infortunium*." (Hale, *Historia Placitorum Coronae* (1736) p. 38.) Hale wrote,

. . . if the act that is committed be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of *England* to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offense capital.

(Hale, *supra*, at p. 38.)

Hale illustrated the morally innocent actor:

[I]f a man be doing a lawful act without intention of any bodily harm to any person, and the death of any person thereby ensues, as if he be cleaving wood, and the axe flies from the helve, and kills another, this indeed is manslaughter, but *per infortunium*; and the party is not to suffer death, but is to be pardoned of course.

(Hale, *Historia Placitorum Coronae supra*, at p. 39.) In contrast, the morally corrupt actor would not be entitled to similar pardon under the law:

So it is if be doing an unlawful act, though not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide and not per infortunium; for the act was voluntary, though the event not intended; and therefore the act itself being unlawful, he is criminally guilty of the consequence, that follows[.]

(*Ibid.*)

Similarly, in 1883, James Fitzjames Stephen, authority on the common law (see *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 329 [121 S.Ct. 1536, 149 L.Ed.2d 549]; *Oliver v. State* (1983) 53 Md.App. 490, 501), addressed the concept of "excusable" homicide: "[T]he law of England recognizes [a] distinction[]" between accidental and intentional killings. (3 Stephen, *History of the Criminal Law of England* (1883) pp. 15-16.) Providing the following scenarios, Stephen contrasted two types of accidental. First, "A. fires a gun at a mark. The gun bursts and kills B." Second, "A. fires a gun at C. with intent to murder him, the gun bursts and kills B., A's accomplice." (*Ibid.*) Regarding these two scenarios, Stephen provided:

In [both cases] the death of B. is what may be called a pure accident; it is not only unintended, but it arises from circumstances which a prudent man would not naturally foresee or take precautions against, and which A. cannot have thought of, for if he had, he would certainly not have fired the gun. But in the first case A. is doing an innocent, and in the [second] a most wicked action.

(*Ibid.*) Indeed, under English law, a "homicide caused accidentally by an unlawful act is unlawful." (*Ibid.*) "The expression, 'unlawful act,' includes [inter alia] all acts contrary to public policy or morality. . . and particularly all acts commonly known to be dangerous to life." (*Ibid.*)

In addition to relying on Field's Draft, the 1872 Legislature in passing Penal Code section 26 further acted against the backdrop of section 9 of the Crimes and Punishment Act of 1850. There the Legislature had previously

embraced the common law tenet that "[a]ll acts committed by misfortune or accident shall not be deemed criminal when it satisfactorily appears that there was no evil design or intention or culpable negligence." (Stats. 1850, ch. 99, p. 230.) That principle carried into its present form in 1872, when the Legislature decreed:

Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence[,] are not among those classes of individuals "capable of committing crimes.

(Original Pen. Code, § 26, enacted 1872, p. 21.)

The language employed by the Legislature in 1872 remains identical to this day. (Pen. Code, § 26, subd. (5).) Accordingly, the legislative history of Penal Code section 26 negates the conclusion that the incapacity created by the section may be invoked by an actor engaged in morally corrupt behavior.

**B. No Court Has Ever Held That the Penal Code Section 26 Accident Incapacity Applies to An Admittedly Evil Actor**

Until the Court of Appeal's decision in this case, no court has ever held that the Penal Code section 26's provision for "accident" incapacity applies, so as to negate a specific element of a charged crime in order to avert criminal responsibility, to a morally corrupt individual admittedly engaged in felonious conduct. The "accident" type of incapacity exists only when the defendant acts without forming any mental state necessary to make his or her actions a crime -- that is to say, without any mens rea of any kind. (See *People v. Stuart* (1956) 47 Cal.2d 167, 171 [accident made available "where the undisputed evidence show[ed] conclusively that defendant was morally entirely innocent . . . ."] ) Instead, courts have explained that,

A person who commits a prohibited act “through misfortune or by accident, when it appears that there was no evil design, intention or culpable negligence” has not committed a crime.’

(*People v. Jeffers* (1996) 41 Cal.App.4th 917, 922, emphasis added, quoting Pen. Code, § 26.) And they have recognized that, as a general proposition, “persons who commit an act through misfortune or by accident with no evil design, intention, or culpable negligence are not criminally responsible for the act.” (*People v. Guinn* (1983) 149 Cal.App.3d Supp. 1.) As articulated over half-century ago by the Court of Appeal:

“Misfortune” when applied to a criminal act is analogous [to] the word “misadventure” and bears the connotation of accident while doing a lawful act (citations omitted).

(*People v. Gorgol* (1953) 122 Cal.App.2d 281, 308.)

In the instant case, by appellant's own testimony, it is undisputed that he was *not* engaged in a “lawful act” when the deadly force was employed in the course of his felonious theft crime. He admittedly was engaged in auto theft, which led directly to the death of the victim – and to the crime of robbery. Notwithstanding his admittedly evil purpose and design, appellant claims that the victim's death was an unintended consequence of his felonious endeavor, and therefore an accident. However, the concept of “accident” is “contradistincti[ve]” to the concept of “purpose and design.” (See *People v. Wells* (1949) 33 Cal.2d 330, 338 [the term malice aforethought denotes purpose and design in contradistinction to accident and mischance], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 323–325; *People v. Silva* (1953) 41 Cal.2d 778, 782 [same].) The cases addressing the concept of “accident” incapacitation illustrate this principle.

In *People v. Stuart, supra*, 47 Cal.2d 167, this Court addressed the application of the notion of accident to the “morally entirely innocent” defendant. (*Id.* at p. 171.) There, the defendant, a pharmacist, was charged

with manslaughter for violating a Health and Safety Code provision prohibiting the selling of any adulterated or misbranded drug. (*Id.* at p. 172.) The defendant filled a prescription for an infant calling for sodium citrate; the bottle labeled sodium citrate actually contained sodium nitrite, which proved fatal to the infant. The defendant was unaware that the bottle was mislabeled. (*Id.* at pp. 169-170.) “[T]he undisputed evidence show[ed] conclusively that *defendant was morally entirely innocent* and that only because of a reasonable mistake or unavoidable accident was the prescription filled with a substance containing sodium nitrite.” (*Id.* at p. 171 [emphasis added].)

Moreover, section 26 of the Penal Code lists among the persons incapable of committing crimes . . . “[persons] who committed the act . . . charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.”

"The question [] thus presented" was whether "*in the absence of any evidence of criminal intent or criminal negligence[]*" the defendant pharmacist could be found criminally liable. (*Id.* [emphasis added].) This Court ruled that the pharmacist could not be found guilty. (*Id.* at p. 174.)

*People v. Acosta* (1955) 45 Cal.2d 538, 540-541, presents another case where the evidence allowed for the jury to determine that the defendant was morally entirely innocent. There, the defendant was convicted of grand theft of an automobile and two counts of manslaughter. (*Id.* at p. 539.) At trial, the prosecution presented evidence that the defendant, drunk, got into a taxi for a ride home. (*Id.* at p. 539.) During the ride, the defendant scuffled with the driver and struck him with the driver's clip board. (*Id.* at p. 540) Therefore, the driver, who had a history of bailing out of his taxi when feeling threatened, jumped out of the moving taxi. The defendant, who had been in the back seat, moved into the front seat and attempted to gain control of the taxi which then struck the victims'

vehicle, killing the victims. (*Ibid.*) However, the defense evidence suggested that the driver's actions, preceding his exit from the cab, had frightened the defendant and that the defendant attempted to gain control of the cab only after the driver exited. (*Id.* at pp. 540-541.) Said another way, the defense asserted that the defendant was morally entirely innocent, the victim of poor circumstances, and that, should the jury have accepted such an accounting, the defendant would be entitled to acquittal. (*Id.* at pp 543-544.) This Court ruled that, given the "state of the evidence defendant was entitled to his requested instruction as to accident or misfortune." (*Id.* at p. 544.) Unlike appellant here, Acosta's version of the facts presented him as morally entirely innocent, the victim of pure misfortune.

The Court of Appeal's conclusion that appellant could be afforded recognition under Penal Code section 26 as a "victim of misfortune" appears based on its belief that appellant's evil design might not have been calculated to include the death of another person. This Court's decision in *In re Christian S.* (1994) 7 Cal.4th 768, illustrates the flaw in the Court of Appeal's reasoning. There, this Court addressed the application of the self-defense doctrine to the evil actor who finds himself embroiled in misfortune. The court determined that the self-defense doctrine is unavailable to the evil actor whose unfortunate circumstance is entirely the product of his or her own wrongful conduct:

It is well established that the ordinary self-defense doctrine -- applicable when a defendant reasonably believes that his safety is endangered -- may not be invoked by a defendant who, *through his own wrongful conduct* (e.g., the initiation of a physical assault or the commission of a felony), *has created circumstances* under which his adversary's attack or pursuit is legally justified. (See generally, 1 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Defenses, § 245, p. 280; 2 Robinson, Criminal Law Defenses (1984) § 131(b)(2), pp. 74-75.) It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example,

the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction if the felon killed his pursuer with an actual belief in the need for self-defense.

(*In re Christian S. supra*, 7 Cal.4th at p. 773 fn 1, emphasis added.) The same policy reason for denying self-defense to a criminal actor applies to denying Penal Code section 26 “accident” incapacity to a criminal actor.

The appellate courts consistently have held that,

[a]ccident or misfortune requires the defendant to prove three negatives: he did not act with an evil design; he did not act with intent; and, he did not act with “culpable negligence.”

(*People v. Thurmond* (1985) 175 Cal.App.3d 865, 873.) “The burden is on the defendant to establish the absence of evil design, intention and culpable negligence.” (*Id.* at p. 871; see also *People v. Attema* (1925) 75 Cal.App. 642, 655 [“accidental discharge” of the pistol does not excuse homicide if discharge occurred “in the course of . . . attempt to accomplish a felony purpose]”). Given this legal landscape, the Court of Appeal below could not cite a single decision in the 159 years since the California Legislature adopted the common law principle of accident that has held that the Penal Code section 26 “accident” exemption applies to a person otherwise engaged in committing a criminal act -- let alone a specific intent crime -- or applies on an element-by-element basis to excuse a particular offender's level of culpability to a lesser offense. Indeed, had the trial court instructed the jury with the precise language of Penal Code section 26 -- providing that a defendant acting with “no evil design[,]” is “[in]capable of committing crimes[,]” -- the jury would have been *required* to reject the defense theory that despite his evil design, appellant “accidentally” used force during flight, killing the victim.

## **II. AS PENAL CODE SECTION 26 ACCIDENT INCAPACITY IS NOT A DEFENSE, THE TRIAL COURT WAS NOT REQUIRED TO GIVE SUA SPONTE INSTRUCTIONS**

A trial court has a sua sponte duty to instruct the jury as to recognized defenses to elements of charged offenses where 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. However, a trial court is not required, without request, to provide a pinpoint instruction relating evidence to the elements of the charged offenses for purposes of directing attention to that evidence from which a reasonable doubt of a defendant's guilt could be engendered. Accordingly, a distinction exists between a recognized defense to a charged crime, such as self-defense, versus a defense line of attack that seeks to erode proof of an element of a crime, such as the mental-state element. Evidence that tends to support a finding that a defendant engaged in criminal activity was operating entirely by accident or misfortune, embraces the legal recognition of an incapacity to commit a crime. (Pen. Code, § 26.) On the other hand, evidence which merely tends to show a defendant did not possess the requisite mental state to commit a crime, is an attack on the prosecution's burden to prove all the elements of the charged offense beyond a reasonable doubt. Therefore, an instruction tailored to such a situation is a "pinpoint" instruction and need not be given in the absence of a defense request.

Here, it was undisputed that appellant's operation involved the theft of a car. Notwithstanding the illicit nature of his activity, appellant testified that his application of force against the victim, as he fled, was purely accidental. Based on appellant's testimony, the Court of Appeal concluded that the trial court was required, sua sponte, to instruct the jury that evidence of appellant's accidental use of force was relevant to disprove that

appellant harbored the "secondary mental state" required to commit robbery, the intent to use force or fear. (Slip Opn. 16, 18-19.) Respondent does not agree that Penal Code section 211 contains unexpressed "secondary" elements. Notwithstanding, in its conclusion that the trial court had a sua sponte instructional duty to instruct the jury that appellant's accidental use of force could rebut the prosecution's burden of proof as to appellant's intent to use force is flawed because the instruction would simply seek to attack the prosecution's burden to prove a mental element of the charged offense beyond a reasonable doubt. As is discussed below, defense evidence attempting to rebut the prosecution's proof of an element of the offense, including the mens rea element, does not invoke a sua sponte instructional duty.

**A. Law Regarding Sua Sponte Instructions Concerning Recognized Defenses**

It is 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. St. Martin* (1970) 1 Cal.3d 524, 531, emphasis added, see also *People v. Carter* (2003) 30 Cal.4th 1166, 1219 [“the trial court normally must, even in the absence of a request, instruct on general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case[”].)

The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court also encompasses an obligation to instruct on defenses ... and on the relationship of these defenses to the elements of the charged offense.

(*People v. Sedeno* (1974) 10 Cal.3d 703, 716 italics omitted, overruled in part on a different ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10.) It is a "familiar rule that a trial court has a sua sponte duty to give instructions relating a recognized defense to elements of a charged offense." (*People v. Saille* (1991) 54 Cal.3d 1103, 1117, citing *People v. Sedeno*, *supra*, at p. 716.) A trial court's duty to instruct, sua sponte, on particular defenses is more limited, arising "only 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. Barton* (1995) 12 Cal.4th 186, 195, quoting *People v. Sedeno*, *supra*, at p. 716.)

Conversely, a trial court does not have a sua sponte duty to give a pinpoint instruction. (*People v. Saille*, *supra*, 54 Cal.3d at p. 1117.) Such instructions "are required to be given upon request when there is evidence supportive of the theory[.]" (*Id.* at p. 1119.) A pinpoint instruction relates evidence to the elements of the charged offense and to the jury's duty to acquit if the evidence produces a reasonable doubt. (*Id.* at p. 1117.) Upon request, a defendant is entitled to an instruction relating particular facts to any legal issues, for purposes of directing attention to that evidence from which a reasonable doubt of his guilt could be engendered. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Eckert* (1862) 19 Cal. 603, 605.)

Such a requested instruction may, in appropriate circumstances, relate the reasonable doubt standard for proof of guilt to particular elements of the crime charged or may "pinpoint" the crux of a defendant's case . . . .

(*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885, citations omitted.)

The distinction between "recognized defense[s] to elements of a charged offense" (*People v. Saille*, *supra*, 54 Cal.3d at p. 1117) versus defense lines of attack that seek to erode proof of an element of a crime by

introducing evidence bearing on the question of whether the "defendant actually had the requisite mental state[]" (*Id.* at p. 1119) thus determines the trial court's sua sponte instructional duties. Notably, the *Saille* court provided that, "when a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking sua sponte instructional duties." (*People v. Saille, supra*, at p. 1117.)

As is discussed below, evidence of the existence of accident in this context does not tend to establish a "defense" to a crime. Rather, it represents an attempt by the defense to raise a doubt as to the persuasiveness of the state's evidence of an element of a crime that the prosecution must prove beyond a reasonable doubt. Such evidence seeks to dispute that a defendant in fact possessed the requisite mens rea. Consequently, an instruction on its relevance constitutes a pinpoint instruction that the defense must request.

**B. Evidence of Accident Does Not Raise a True "Defense;" Rather, It Disputes Evidence That the Defendant Harbored the Requisite Mens Rea**

As discussed, Penal Code section 26 offers a list of "class[es]" of individuals (*People v. Halvorsen, supra*, 42 Cal.4th at p. 417) who are incapable of committing crimes based on an inability to form a criminal mens rea. (See Pen. Code § 26.) Although the Penal Code section 26 accident incapacity has sometimes been characterized as a "defense" (1 Witkin & Epstein, California Criminal Law (3d ed. 2009) Defenses, ch. 3, § 241, (Witkin); 3 Millman, Sevilla & Tarlow, California Criminal Defense Practice (2009) Defenses and Justifications, ch. 73, § 73.01[5], (Matthew Bender)), the "accident incapacity" serves merely to cast reasonable doubt as to the truth of the prosecution's evidence of the elements of the crime. A number of this Court's decisions support the conclusion that a specific jury

instruction as to the evidence of accident seeks to direct attention to the defense evidence from which a reasonable doubt of a defendant's guilt could be engendered as to the existence of the defendant's mens rea. In such a case, as discussed above, no such sua sponte duty to instruct should exist.

In *People v. Saille, supra*, 54 Cal.3d 1103, this Court examined the "defense" of voluntary intoxication, as relevant to the defendant's mens rea. Discussing the impact of the Legislature's abolition of the defense of diminished capacity, the Court noted that, although voluntary intoxication technically was never a defense,

[w]hen voluntary intoxication became subsumed by diminished capacity, it was treated as a part of the defense of diminished capacity. [Citations.] The withdrawal of diminished capacity as a defense removed intoxication from the realm of defenses to crimes. Intoxication therefore became relevant only to the extent that it bears on the question of whether the defendant actually had the requisite specific mental state.

(*Id.* at p. 1119.)

[U]nder the law relating to mental capacity as it exists today, it makes more sense to place on the defendant the duty to request an instruction which relates the evidence of his intoxication to an element of a crime, such as premeditation and deliberation. This is so because the defendant's evidence of intoxication can no longer be proffered as a defense to a crime but rather is proffered in an attempt to raise a doubt on an element of a crime which the prosecution must prove beyond a reasonable doubt. In such a case the defendant is attempting to relate his evidence of intoxication to an element of the crime. Accordingly, he may seek a "pinpoint" instruction that must be requested by him [citation], but such a pinpoint instruction does not involve a "general principle of law" as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court....

(*Id.* at p. 1120.)

The *Saille* court's analysis highlights the distinction that exists between "recognized defense[s] to elements of a charged offense" (*People v. Saille, supra*, 54 Cal.3d, at p. 1117) versus those defense lines of attack which seek to erode proof of a defendant's requisite mental state, by introducing evidence bearing on the question of whether the "defendant actually had the requisite mental state." (*Id.* at p. 1119.) Similarly, the "defenses" of mistaken identification or alibi are not in fact recognized defenses, and therefore do not compel the trial court to instruct as to them sua sponte. (*Ibid.*, citing *People v. Rincon-Pineda, supra*, 14 Cal.3d at p. 885.) This Court explained that the mistaken-identification and alibi lines of attack, in appropriate circumstances and upon request, may be highlighted in a jury instruction that "relate[s] the reasonable doubt standard for proof of guilt to particular elements of the crime charged [] or [] pinpoint the crux of a defendant's case[.]" (*People v. Rincon-Pineda, supra*, at p. 885, quotations omitted; see *People v. Saille, supra*, at p. 119 [instructions relating particular facts to a legal issue in the case, such as mistaken identification or alibi, are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte].) These defense lines of attack simply seek to erode proof of a particular element that must be proven beyond a reasonable doubt by the prosecution.

A similar conclusion has been reached with regard to provocation: "[P]rovocation is relevant only to the extent it 'bears on the question' whether defendant premeditated and deliberated." (*People v. Rogers* (2006) 39 Cal.4th 826, 878, quoting *People v. Saille, supra*, 54 Cal.3d at p. 1119; accord *People v. Ward* (2005) 36 Cal.4th 186, 214; see also *People v. Rios* (2000) 23 Cal.4th 450, 467 [provocation negates malice].) "The evidentiary premise of a provocation defense is the defendant's emotional

reaction to the conduct of another, which emotion may negate a requisite mental state." (*People v. Ward, supra*, at p. 215.)

In *People v. Gutierrez* (2009) 45 Cal.4th 789, this Court likewise rejected the defendant's argument that the trial court possessed a sua sponte duty to instruct the jury as to third-party culpability. (*Id.* at p. 824.) The Court reasoned:

[T]he jury was instructed, pursuant to CALJIC No. 2.90, that a criminal defendant is presumed innocent, that he is entitled to a verdict of not guilty if the jury has reasonable doubt regarding his guilt, and the prosecution bears the burden of proving a defendant guilty beyond a reasonable doubt. Because the jury was properly instructed as to these issues, and because *the jury could have acquitted defendant had it believed that a third party was responsible* for Nakatani's death, no third party culpability instruction was necessary.

(*Ibid.*, emphasis added, citing *People v. Saille, supra*, 54 Cal.3d at p. 1119.)

Although this specific issue has not been addressed by this Court, the dissent authored by Justice Spence in *People v. Acosta, supra*, 45 Cal.2d 538, is instructive. There, the Court concluded that the trial court prejudicially erred by refusing to grant the defendant's request that the jury be instructed as to accident and misfortune. (*Id.* at p. 544.) Consequently, the majority concluded that it was "unnecessary to consider defendant's contention that the trial court of its own motion should have instructed as to accident and misfortune." (*Id.* at p. 544.) In his dissent, Justice Spence wrote that the defense evidence regarding accident constituted a challenge to the "intent" element of the charged crime. (*Id.* at p. 545.) And, as the intent element of the crime had been "amply covered by the instructions given[,]" it was "entirely clear that defendant could not be convicted unless the jury found beyond a reasonable doubt that he [possessed the requisite criminal intent]." (*Ibid.*)

The reasoning employed by Justice Spence applies here, as evidence of accident was relevant only to the extent that it bore on the question of whether appellant in fact possessed a requisite mental state. Appellant testified that, while he was indeed stealing the victim's car, his act of running her over and killing her was purely accidental as he was unaware of her presence until there remained too little time to avoid her. The Court of Appeal below determined that "robbery also requires a secondary mental state" demanding that the defendant harbor a "general intent" to commit the robbery using force or fear. (Slip. Opn. 16.) Therefore, according to the Court of Appeal, evidence of accident was relevant to attack this "secondary" general intent element of robbery. (Slip Opn. 16.) Even as formulated by the Court of Appeal below, then, the proffered defense necessarily "attempt[ed] to negate or rebut the prosecution's proof of an element of the offense." (*People v. Saille, supra*, 54 Cal.3d at p. 1117.) Specifically, the evidence of accident attacked the force element of robbery. Hence, appellant's testimony, relevant to his requisite mental state at the time of the offense, did not present a special defense invoking sua sponte instructional duties. (Compare *People v. Saille, supra*, 54 Cal.3d at p. 1117.) Just as in *Gutierrez*, "the jury could have acquitted defendant had it believed" appellant's claim that his killing of the victim was purely accidental. (*People v. Gutierrez, supra*, 45 Cal.4th at p. 824.)

Finally, it is noteworthy that the Court of Appeal's interpretation of Penal Code section 26 suggests that section 26 may constitute a partial defense to a defendant's criminal activity. Specifically, the court concluded that, pursuant to section 26, evidence of a defendant's "accidental" application of force against his or her victim, during that defendant's flight with the stolen property, is relevant to erode proof that the defendant harbored the "secondary mental state equivalent to a general intent to commit the act of using force or fear against the victim to accomplish the

initial taking of the property or retaining it during the defendant's escape or asportation of the property." (Slip Opn. 16.) If the Court of Appeal is correct, then Penal Code section 26 offers the aforementioned robber a partial defense because while the evidence of "accident" may prove the defendant not guilty of robbery, it leaves the defendant guilty of the lesser included offense of theft. (Pen. Code, § 484.)

**C. The Jury Was Properly Instructed As to the Mens Rea Element Of Robbery, and Any Additional Instruction As to That Element's Existence Or Non-Existence Constituted A Pinpoint Instruction That Was Not required in the Absence of a Defense Request**

The trial court properly instructed the jury that, in order to find appellant guilty of robbery, it was required to determine whether, when appellant used force or fear to take the victim's car, he intended to deprive the victim of the her car. (3 CT 300 [instructing with CALCRIM 1600].) The standard CALCRIM 1600 instruction for robbery, based on one approved by this Court, "adequately explain[s]" the crime of robbery. (See *People v. Bolden* (2002) 29 Cal.4th 515, 556 [citing CALJIC No. 9.40, the predecessor to CALCRIM 1600].) Accordingly, the jury was adequately instructed as to the mens rea element of robbery.

If appellant wished a clarifying or amplifying instruction as to this element, the burden was on him to request it, as a "defendant [bears] the burden of requesting a pinpoint instruction[.]" (*People v. Gutierrez, supra*, 45 Cal.4th at p. 824, citing *People v. San Nicolas* (2004) 34 Cal.4th 614, 669.) Failure to request such a clarifying or amplifying instruction forfeits the issue on appeal. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778-779 [discussing defendant's failure to request clarifying instructions as to provocation].) Here, appellant did not make such a request.

**III. EVEN IF INSTRUCTIONAL ERROR OCCURRED, IT WAS HARMLESS**

Even if the trial court was required to instruct the jury sua sponte as to Penal Code section 26 "accident" incapacity, or as to any other relevant use of accident evidence, its failure to do so was harmless. As discussed above, the trial court properly instructed the jury that, in order to find appellant guilty of robbery, it was required to determine whether, when appellant used force or fear to take the victim's car, he intended to deprive the victim of the her car. Therefore, because appellant's testimony that he accidentally struck and killed Thompson was relevant to his requisite mental state at the time of the offense, there was no misdescription of the elements of the offense or the Constitutional burden of proof. As such, any error did not offend the federal Constitution.

The test to be employed is therefore the reasonable probability test embodied in article VI, section 13, of the California Constitution. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.) Confronted with a similar situation in *People v. Wilson* (1967) 66 Cal.2d 749, this Court noted the well-established *People v. Watson* standard of review applies, that is, whether it is "reasonably probable" that the defendant would have obtained a more favorable result if the error had not occurred. (*People v. Wilson, supra*, at pp. 763-764, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.) In *Wilson*, it was error for the trial court to have refused defendant's requested instruction on "unconsciousness" (Penal Code section 26) where his defense suggested that he had been unconscious when he had committed the homicides. (*People v. Wilson, supra*, at pp. 760-762.) By failing to so instruct, the trial court "effectively removed from the jury's consideration the principal defenses presented." (*Id.* at p. 763.) Given the state of the evidence, this Court concluded that, but for the error, there was a ". . . a reasonable probability that a result more favorable to defendant would have been reached." (*Ibid.*)

When the *Watson* standard is applied to the present case, it is evident that any error was harmless. It is not reasonably probable that, but for the error, a result more favorable to appellant would have been reached. It was uncontested that appellant ran over Pamela Thompson with her own car, killing her. (5 RT 868.) While appellant disputed that he was aware of Thompson's presence when he used the fatal force against her -- testifying that he did not hear or see Thompson until it was too late -- the prosecution evidence proved otherwise. The testimony of percipient witnesses Rudy Espinoza and Anya Gonzalez cogently established that the victim, Thompson, had caught appellant as he sat inside her car waiting to escape and that a verbal confrontation ensued. Espinoza testified that, before hearing an impact, he heard a heated argument that he described as similar to "a quarrel between a couple." (2 RT 157-158.) Gonzalez testified that she heard a female "yelling being argumentative and talking." (2 RT 199.) Gonzalez believed that the "argument" originated inside the complex and moved towards the gate. (2 RT 182.) The testimony of these witnesses circumstantially established that Thompson and appellant were actively engaged in a verbal confrontation inside the parking lot before appellant ran Thompson over. This evidence was therefore inconsistent with the defense position, as based solely on the testimony of appellant, that appellant was unaware of Thompson's presence until that point in time when he was accelerating the car through the gate and over Thompson.

Gonzalez further testified that, moments before hearing "a real loud thump," she heard a woman yelling, "stop, stop, stop." (2 RT 185-187.) Gonzalez reported to investigating officers that she had heard the gate opening as the female voice was yelling "stop." (2 RT 190.) As stated above, Gonzalez's testimony further established that a woman was yelling inside the complex. (2 RT 182.) Significantly, Gonzalez's account cast doubt on appellant's assertion that "he never heard" Thompson as he sat in

the idling car with the car's stereo turned off. (5 RT 877, 884.) Further, appellant's accident claim was premised on his testimony that he was unable to see outside the gate, such that Thompson must have jumped in front of the stolen car from a position outside the gate. (5 RT 870, 904.) This claim was contradicted by appellant's acknowledgment that as he sat in the idling car he was able to see an incoming car as it approached from the street and activated the security gate. (5 RT 857 [waiting, appellant observed a "car pull[] up to the outside of the gate and the gate started opening"].) Of even greater significance, on cross-examination appellant conceded that he provided to an investigating officer that, as he waited to escape, he had been concerned with "what looked like a cop car" passing outside the gate. (5 RT 882.)

Indeed, the only evidence offered to support his contention that he was unaware of Thompson was his own self-serving testimony. Appellant claimed at trial that he did not mean to hit Thompson. (5 RT 859.) He said he would "never do that." (5 RT 866.) However, given the evidence, any reasonable jury would have rejected appellant's testimony. On cross-examination, appellant conceded that he had reported to an investigating officer that, before running the victim over, he observed the victim holding her hand up and with a cell phone in her hand. (5 RT 880.) Appellant further offered that the victim caused her own death as she "must have jumped in front" of the car. (5 RT 904.) Given these circumstances, the jury would have been reasonably entitled to reject appellant's assertion. (See *People v. Beck* (1961) 188 Cal.App.2d 549, 553-554 [self-serving testimony may be properly rejected].)

Appellant's testimony was further inconsistent with the scientific evidence. Appellant claimed that, when he swerved the car, he "felt something" like he "might have hit her." But the pathologist's testimony conclusively established that the car traveled directly over Thompson's

body "from toe to head." (4 RT 791.) Accordingly, appellant's claim that he may have innocently clipped Thompson, was entirely inconsistent with physical evidence that the car had traveled directly over Thompson's body.

Further, although appellant conceded that he "thought" he saw and heard Thompson before the fatal act occurred (5 RT 881-882), he did not attempt to stop the car before or after he ran Thompson over. (5 RT 913, 993-994.) Although appellant testified that although he would "never do that," apparently referring to his moral objection to running Thompson over, he agreed that, after running Thompson over, he "deliberately chose not to do anything " to help her. (5 RT 993-994.) Rather, he fled, leaving Thompson's broken body in the street. (5 RT 866, 993-994.) The jury was entitled to consider that appellant's flight, evidenced his guilt and was entirely inconsistent with his "accident" claim. (See *People v. Turner* (1990) 50 Cal.3d 668, 694, fn. 10.)

Indeed, the inconsistencies in appellant's testimony, coupled with his callousness and knowingly leaving Thompson's crushed body behind, would cause any reasonable jury to abjure appellant's moral character<sup>4</sup>, such that it would approach his testimony, especially self-serving testimony, with great skepticism. Given the prosecution witnesses testimony regarding events immediately prior to Thompson being run over by appellant, it is not reasonably probable that the jury would have accepted appellant's self-serving testimony that he, swerving to escape with Thompson's car, accidentally ran her over, killing her. Give this evidence, even under the more stringent federal standard expressed in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], the error could properly be deemed harmless.

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<sup>4</sup>As to his moral character, appellant testified, generally, that he was a thief and a drug addict.

**CONCLUSION**

For the reasons stated above, respondent respectfully requests that this Court affirm the judgment below.

Dated: January 7, 2010

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Opening Brief on the Merits uses a 13 point Times New Roman font and contains 8,978 words.

Dated: January 7, 2010

EDMUND G. BROWN JR.  
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A handwritten signature in black ink, appearing to read 'J.H. Flaherty III', with a long horizontal stroke extending to the right.

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: ***People v. Anderson***

No.: **S175351**

I declare:

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

On January 7, 2010, I served the attached **respondent's opening brief on the merits** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Fourth Appellate District, Division One  
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San Diego, CA 92101

Executive Officer  
The Honorable Richard Couzens, Judge  
4100 Main Street  
Riverside CA 92501

Riverside County District Attorney's Office  
4075 Main Street  
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 7, 2010, at San Diego, California.

\_\_\_\_\_  
Kimberly Wickenhagen

Declarant

  
\_\_\_\_\_  
Signature



