

SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

SETH CRAVENS,

Defendant and Appellant.

Case No. S186661

Fourth Appellate District, Division One, Case No. D054613
San Diego County Superior Court, Case No. SCD206917
The Honorable John S. Einhorn, Judge

**SUPREME COURT
FILED**

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RESPONDENT'S BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

This case presents the following issue:

Did the appellate court abuse its limited authority to review for sufficiency of the evidence where it found “no evidence” to support the jury’s implied malice murder verdict and then fashioned an “expanded” version of voluntary manslaughter to affix liability?

INTRODUCTION

This case involves one of the most common issues regularly presented to appellate courts: Whether there was sufficient evidence to sustain a jury’s verdict. In this case, the Court of Appeal ignored long-established principles of and limitations on appellate review, overruled a jury’s determination, reweighed the evidence, and found insufficient evidence of second degree murder, based on implied malice, and then “expanded” the established law of voluntary manslaughter to form a wholly new doctrine for its application. Despite its apparent disquiet with the jury’s verdict, because there was both evidentiary and legal support for it, the Court of Appeal should have deferred to the jury’s determination that Cravens acted with conscious disregard of the danger of human life and sustained the jury’s verdict finding Cravens guilty of second-degree murder.

Appellant, Seth Cravens, and his close friends grew up in the San Diego beach suburb of La Jolla. They attended La Jolla High School and played on the football team. Over the years, Cravens and his friends developed a perverse sense of propriety about the La Jolla community. As a consequence, they felt they owned the town and the beaches and could do whatever they wanted with impunity. The 240-pound Cravens was the leader of the group and developed a history of violence. He repeatedly attacked men and women whenever he felt he or his friends had been directed, challenged, disrespected, or insulted. Along with these attacks

came words that indicated Cravens intended to do serious harm to people or even kill them. This was the way Cravens regularly conducted himself. In more than one instance, Cravens delivered powerful sucker punches to the heads of his victims that, given the circumstances, showed his conscious disregard for their lives.

One night in May 2007, at a crowded party in a La Jolla bar where drinks flowed freely, Cravens and his friends got into an altercation with professional surfer Emery Kauanui. Afterwards, Cravens directed his friends to Kauanui's nearby home and called him out. A fight ensued during which several of Cravens's friends attacked Kauanui in the street simultaneously while Cravens watched from the sidewalk. After Kauanui bested his attackers with the timely intervention of his girlfriend, Kauanui approached Cravens and, with his arms at his sides, berated him for coming to his house to challenge him. Without warning, Cravens suddenly leaned forward over the sidewalk curb and hit Kauanui in the head with all his might. The sucker punch instantly knocked Kauanui unconscious. Kauanui fell straight back, dropped to the concrete curb, and smashed in the back of his head making an audible crack. As he lay on the street and blood poured out of his head, a couple of Cravens's friends walked up to him and kicked him in the side to see if he was alive. Cravens and his friends then jumped back in an SUV and fled the scene before the police arrived seconds later. Kauanui was rushed to a hospital and looked initially like he might recover. The next day, Cravens laughed about Kauanui's situation and boasted that he had knocked him out with one punch and put him to sleep. Days later, Kauanui's condition worsened and he died from his head injury.

After being instructed on the general principles of homicide and murder with malice aforethought, voluntary manslaughter, and involuntary manslaughter, the jury found Cravens guilty of the second-degree implied-

malice murder of Kauanui and several other crimes. On appeal, Cravens contended the evidence was insufficient to sustain the second-degree murder conviction. He also argued, on the basis of *People v. Garcia* (2008) 162 Cal.App.4th 18, that the trial court erred by not, sua sponte, instructing the jury that an unintentional killing, without malice, during the course of an inherently dangerous assaultive felony, constituted voluntary manslaughter. Although noting well-settled principles of appellate review, and purporting to apply this Court's decision in *People v. Knoller* (2007) 41 Cal.4th 139, the Court of Appeal ignored them and held the facts of the case supported only voluntary manslaughter.

The Court of Appeal's decision should be called out for what it was – an improper review of the jury's factual determination and verdict. The People respectfully ask this Court to reverse the decision and conclude correctly that the evidence in this case fully justified the jury's verdict. The People also ask this Court to reemphasize the proper role for a reviewing court when considering a challenge to the sufficiency of the evidence supporting a jury's verdict.

STATEMENT OF THE CASE AND FACTS

Emery Kauanui, Cravens, Hank Hendricks, Eric House, Orlando Osuna, and Matt Yanke, grew up together in La Jolla and frequented Windansea beach. (9 RT 701.) Cravens and Hendricks, House, Osuna, and Yanke were close, had known each other for a long time, had attended La Jolla High School, and played on the football team together. Although they knew Kauanui, they were not friends with him because he was older, and had not attended La Jolla High School. (9 RT 700-701.) Cravens, Hendricks, House, Osuna, and Yanke were part of a larger group of close friends, which also included Erik Wright, Nino Nunzianta, Reed Decker, and Thomas House. (9 RT 822.)

A. Prior Incidents

For several years, Cravens and his friends regularly attacked various people in La Jolla. Because an important aspect of the proof supporting the jury's verdict of second-degree implied-malice murder in the death of Kauanui was Cravens's subjective knowledge that his habit of suddenly attacking people endangered their lives, the prior incidents must be recounted. The facts of those incidents are recounted in chronological order, culminating with the Kauanui's murder.

1. On July 8, 2005, Cravens and five or six other men were involved in a mob attack at the home of Eric Sorensen on Forward Street in La Jolla. The men "were pretty agitated" over an early incident. (9 RT 904, 907, 969.) Cravens's friend Eric Wright led the group. (10 RT 904, 907.) They wore hooded sweatshirts and one of them had a bat. (9 RT 769.) The men starting banging on the walls of Sorensen's house, hit the front door with a bat, and knocked over Sorensen's motorcycle, which was parked in front of his home. They screamed words to the effect of "we're going to get you." (9 RT 769.)

Suddenly, Wright and his friends charged Sorensen's house. Sorensen tried to close the metal screen front door and almost had it closed but Wright grabbed it out of his hand and pulled it open. He tried to grab Sorensen as he slammed the front wooden door. Sorensen was not able to close the door all the way so he could lock it; he had to hold it closed with his foot. (10 RT 905.) The men continued to bang on the house, kick things over, and yell that they were going to kill Sorensen. (10 RT 907.) Sorensen heard Wright say that "they were going to fucking kill me." (10 RT 907-908.) Sorensen armed himself with a pistol to use as a last resort and yelled through the door that he was calling the police. He felt his life was threatened as well as the lives of the women who were with him. (10

RT 909.) The police responded within two minutes and later took Sorensen's statement. (10 RT 905.)

After this incident, Sorensen had three weeks left in San Diego to complete his flight training. For most of that time, Sorensen worried that "these people who lived two blocks up the street are going to come bash our house in and kill us." (10 RT 910.) About two weeks after the incident, Sorensen saw Wright coming down the street in his pickup truck with Cravens as a passenger. (10 RT 913.)

2. At the beginning of August 2006, August Essner, Chris Jarrett, and Jarrett's girlfriend, Shannon O'Neill, went to Windansea beach in La Jolla "just to enjoy the beach." (10 RT 943, 945.) They went to the south end of the beach in an area locals called the Pink Wall. (11 RT 1057.) They brought towels, a cooler, and backpacks. (10 RT 944; 11 RT 1036, 1058.) Essner brought his skimboard and he and Jarrett took turns skimboarding on the shoreline. O'Neill just lounged on the beach. It was not too crowded but there was a good amount of people and it was very nice. (10 RT 944, 946; 11 RT 1036.)

Essner and Jarrett "were just kind of hanging out and minding our own business." (10 RT 947.) Suddenly, two young men came of nowhere near the cliffs and challenged Essner and Jarrett. The men were drinking from beer bottles and asked Essner and Jarrett what they were doing there. They told them they did not like skimboarding and ordered them to get off their beach. "Go home." (10 RT 947; 11 RT 1037.) The men used profanity and Essner and Jarrett wanted to just let it go. They responded, "This isn't your beach. We're not going anywhere." (10 RT 947.) Jarrett told them, "Well, what do you guys want to do about it? Do you guys have a problem with it? What's going on?" (11 RT 1037.)

All of a sudden, the men threw beer bottles at Essner and Jarrett. One of the bottles hit Jarrett on his shoulder, shattered, and cut him up. Jarrett

grabbed one of the men and Essner punched the other one. (10 RT 947; 11 RT 1037, 1049.) As Essner and Jarrett fought the other men, suddenly five to seven men rushed out from a rock outcropping and circled around them. Cravens was in this group. These men were bigger and two of them were bigger than Essner (6' tall, 175 pounds - 11 RT 1033), and Jarrett (6' tall, 160 pounds - 10 RT 948). One of these men threw a beer can at Essner's head. (10 RT 947.) Some of the men attacked Essner while the others attacked Jarrett. (10 RT 947-949; 11 RT 1038.) A couple of the men told Essner and Jarrett, "You ready to die. You ready to get served." (11 RT 1038.) The fighting became really intense. (11 RT 1038.) Essner and Jarrett were trying to fend off eight or nine men in a group attack. (11 RT 1039.)

Cravens squared off against Jarrett "just about every time one of the other people wasn't with me fighting me." (11 RT 1040.) Cravens punched Jarrett and got him in a headlock and rubbed sand in his face. (11 RT 1041.) Jarrett was taken to the ground and people started kicking him. (10 RT 949.) At the same time, someone (Jarrett was not sure if it was Cravens), poured beer on him. Jarrett was on the ground for 30-40 seconds. He could feel feet getting pushed into his back. As his head was on its side, Cravens "stomped him out." (11 RT 1041.) Jarrett's head was stomped so badly that it was pushed down into the sand. Sand got into Jarrett's eyes and then he could not see anything. (11 RT 1041.)

Essner tried to come to Jarrett's aid. He tried pulling the attackers off Jarrett. (10 RT 949-950.) Someone hit Essner in the back of his head. (10 RT 947.) At that point, O'Neill also tried to help Jarrett and may "have slapped someone or tried to rip somebody off." (10 RT 950.) O'Neill was very upset and pleaded with the attackers to get off Jarrett. (11 RT 1061-1062.) One of the attackers turned around and smacked her. (10 RT 950.)

As a result of Essner's and O'Neill's intervention, Jarrett was able to get to his feet and ended up in a one-on-one fight with Cravens. As they fought, O'Neill again tried to come to Jarrett's aid. When she tried to step in, Cravens hit her in the face and she fell to the sand. Jarrett was then able to get away and ran around some rocks on the beach. O'Neill kept on hitting Cravens and slapped him in the face. Cravens called out to his friends and said, "Get this bitch off of me or I'm going to hit her again." (11 RT 1043, 1063.)

In the mean time, people were trying to steal Essner's, Jarrett's, and O'Neill's possessions. They grabbed the cooler and dumped it out. (11 RT 1044, 1063.) They also took Jarrett's backpack. (11 RT 1063.) They took Essner's skimboard and threw it into the ocean. (11 RT 1064.)

As the fight broke up, someone from Cravens's group came up to O'Neill. He had blood coming out of his mouth and he spit the blood on O'Neil. (11 RT 1064.) Thereafter, Cravens got his group together and said, "Guys, let's go. We got to get out of here." (11 RT 1064.) They all started to leave and walked up the hill to the street. (11 RT 1064.) O'Neill found Essner and Jarrett and they gathered their possessions except for Jarrett's backpack which had been stolen. (11 RT 1044, 1064.) They then left the beach too. (11 RT 1064.) O'Neill was concerned about her car that was parked on the street. She thought something might happen to it. She walked after Cravens and his group and yelled at them. She asked, "Why did you guys do this? What was the point of this?" (11 RT 1064.) Cravens responded, "This is my town. This is La Jolla. You guy's don't belong here." (11 RT 1064.)

Essner had some scrapes and bruises after the attack. (11 RT 1065.) O'Neill suffered a bruise to her face as a result of being hit by Cravens. The bruise went from her cheekbone all the way up to her eye. It was all bruised and black and lasted about a week. (11 RT 1065.) Jarrett's lip was

split wide open and he bled a lot from his mouth. He also had lacerations and bruising on his shoulder from the impact of the beer bottle. (11 RT 1045.) Jarrett also had really badly bruised ribs caused by being hit and kicked when he was down on the sand. (11 RT 1045, 1065.) One of his ribs may have suffered a hairline fracture. (11 RT 1048-1049, 1052.) He literally had footprints with little toe prints on his back. (11 RT 1045.) The bruising lasted a few weeks but the pain to his ribs lasted for a couple of months. Jarrett could not do the things he liked doing like playing hockey and surfing because the pain was so bad. (11 RT 1053-1055.)

3. On an evening in October 2006, 17-year-old Elizabeth S. invited a female schoolmate to her house on Genter Street in La Jolla. Elizabeth was a junior at La Jolla High School who was between five foot seven and five foot eight inches tall. (12 RT 1230-1231.) Elizabeth's parents were not home at the time. Elizabeth's schoolmate invited many more people and by 9:30 p.m., about one hundred people were at the house some of whom were uninvited and strangers to her. At that time, Elizabeth was angry because some of the people were starting to misbehave by feeding her dogs beer and the like. She wanted everyone out of her house. (12 RT 1230-1232.)

Elizabeth was able to get everyone out of the living room and out onto the deck but then some people became angry and said they did not want to leave. They began throwing pots off the second story deck onto the sidewalk and cars. (12 RT 1232.) Elizabeth noticed a group of five to ten people, mostly males, who stayed by themselves. She yelled at them that they were not invited and that they needed to get out. They refused. Elizabeth persisted and was successful in getting most of the people out the back gate in her yard but two or three were left, one of whom was Cravens. Elizabeth screamed at these people to get out but they said no and affirmed that they were going to stay there. At that point, Cravens hit her in the

chest and then hit her again with a glancing blow to her chin, which caused a welt. (12 RT 1235.)

A neighbor came to Elizabeth's assistance and confronted Cravens and his friends telling them they were not welcome and that they needed to get out. Cravens and his friends were very hostile and were in the neighbor's face refusing to leave. (12 RT 1236-1237.) Ultimately they left. There was about \$500-\$600 in damage to the house. Later, Elizabeth's father, David Blende, contacted Cravens's father, told him about what had happened, and asked him to avoid Elizabeth in the future. (12 RT 1239-1242.)

4. On December 31, 2006, Lauren Kelly rented a party bus for a New Year's Eve party. (11 RT 1085-1086.) Several people met at Kelly's house, including Justin Parker, and the bus picked them all up. (11 RT 1085.) The bus then made a few stops to pick up other people. (11 RT 1086.) Eventually, 40-60 people were on the bus, evenly split between males and females. (11 RT 1085.) During the course of the evening, Cravens got on the bus as did Matt Yanke, Orlando Osuna, Erik Wright, Nino Nunzianta and Emery Kauanui and his brother Nigel Kauanui. (11 RT 1086.) It was Emery Kauanui's birthday. (11 RT 1100.) There was liquor on the bus, most of it in the back. (11 RT 1097.)

Meanwhile, there was a New Years Eve party going on at Romy Segall's parents' house in La Jolla. (11 RT 1108.) The attendees at the party were in their 20s and 30s and were nicely dressed in business-casual attire. (11 RT 1110, 1137.) The party was by invitation only and was for Segall's closest friends. (11 RT 1108-1109, 1170.) People starting leaving the party after midnight and by 12:45 a.m. on January 1, 2007, about 30-40 people were left. (11 RT 1138.)

At this time, Joseph Heinrich, Romy Segall's boyfriend, went outside to the front yard to say goodbye to someone. As he was saying goodbye,

he saw Lauren Kelly's big party bus pull up in front of the house. (11 RT 1110.) Heinrich was surprised by the party bus and did not know what was going on. (11 RT 1111.) He saw three guys get off the bus and they were rowdy. Because he did not know them but knew they were not invited to the party, Heinrich immediately went up to them and said, "You guys got to get the fuck out of here because the party's over." (11 RT 1111.) In response, the men acted very aggressively and were obviously looking for a fight. One of the men started to take off his shirt as he came up to Heinrich. (11 RT 1111.) Heinrich backed up and went inside the house. (11 RT 1111.)

Once inside, Heinrich bolted the front door. He could hear the handle of the door being shaken and thuds on the door as people tried to kick it in. (11 RT 1119.) Heinrich contacted Logan Henry in the back yard and told him what was going on. Heinrich wanted assistance in telling the people from the bus that they were not welcome at the party. (11 RT 1138.) Henry then left the back yard, came around the side of the yard, and came into the front yard by the front door. (11 RT 1138-1139.) Henry had a bottle in his hand because he was celebrating New Year's Eve. He encountered a very hostile crowd with lots of cursing. Henry did not have time to tell people to leave or anything as someone slapped the bottle out of his hand and socked him on the side of his face. (11 RT 1139.) Someone knocked Henry's glasses off of his face and he was tossed on top of someone. To defend himself, he immediately started hitting the person he was on top of in the face. That person said, "Get this F'ing person off of me." (11 RT 1140.) Thereafter, Henry received about four strong "pretty abrasive kicks" in his face, one of them landing on the bridge of his nose. (11 RT 1140.) Henry immediately tucked into the fetal position and may have been hit a couple of times in his body and his head. (11 RT 1141.)

At this point, Romy Segall and Henry's girlfriend stepped in and protected Henry. As a consequence, he was able to get up. When he did, Cravens "was in my face and yelled 'I'm going to kill you, you motherfucker'" (11 RT 1141; 12 RT 1315-1316.) Henry responded, "Do it, you know. Bring it." (11 RT 1141.)

In the meantime, Heinrich talked to several people inside the house and then five or six men walked outside followed by others including several women. People from the bus attacked them and there was a melee in the front yard. Cravens was fighting. (11 RT 1091.) So was Justin Parker next to him. (11 RT 1091-1092.) So was Orlando Osuna. (11 RT 1092.) Heinrich saw Romy Segall screaming at some guy and the guy appeared to be ready to throw a punch at her. Heinrich physically picked her up and brought her inside. (11 RT 1120.)

Heinrich heard fights and screaming. He heard people being thrown up against that garage door. The fighting stopped when Heinrich said, "I called the police," and others outside said, "The police have been called. The police have been called." (11 RT 1121.) Then people started to scatter and get back on the bus. The bus took off but several people were left behind such as Avi Wasserman, Hank Hendricks, and Matt Yanke. (11 RT 1121.)

Henry suffered lightly bruised eyes and his nose bled quite a bit but was not broken. His shirt was ripped and completely covered in blood. (11 RT 1141.) In the wake of the melee, the front yard was destroyed. The foliage was mangled, sprinkler heads were broken and the lawn looked like a rugby tournament had been played on it. (11 RT 1122.)

5. On SuperBowl Sunday in February 2007, John Hlavac attended a party at his friend Sam Wallace's house near the intersection of Westbourne and La Jolla Boulevard in La Jolla. (12 RT 1279-1280.) After the game, between 9:00-9:30 p.m., Hlavac left the party and started walking

back to his parents' house on Virginia Way. He was intoxicated. (12 RT 1280-1281.)

Hlavac walked north on La Jolla Boulevard past a bar called the Shack which was next to a 7-11 store. A Mexican restaurant called Los Dos was located across La Jolla Boulevard. Hlavac had just crossed the street so he could go into the 7-11 when a car pulled up abruptly next to him. Hlavac turned around and looked at the car. Ali Wasserman was the driver and Cravens and Orlando Osuna were his passengers. Hlavac knew all of them as they all had attended La Jolla High School together. Hlavac had played baseball with Wasserman and, although they were not friends, there was no dislike between them. Hlavac was not friends with Osuna or Cravens. In fact, he and Cravens did not like each other. (12 RT 1277-1279.)

Someone in the car yelled something. Hlavac said "Fuck you," in response. Cravens and Osuna got out of the vehicle quickly and approached Hlavac. Cravens threw a punch at Hlavac's head but Hlavac dodged it. Osuna raised his fist to his waist and was about to swing at Hlavac but Hlavac punched him first in the jaw. (12 RT 1285-1287.) Next, Hlavac was hit "pretty hard" and was knocked to the ground. (12 RT 1296.) Because he knew that Cravens and Osuna favored stomping on peoples' faces as a fighting technique, Hlavac covered his. (12 RT 1287.) Osuna was able to punch Hlavac in the face just above his right eyebrow. (12 RT 1288.) Hlavac may have been punched or kicked a couple of times while he was on the ground. (12 RT 1288-1289.) He was hit a total of five times. (12 RT 1295.) All the hits were hard. (12 RT 1296.)

At this point, someone from the taco shop came out and yelled something in Spanish. Cravens and Osuna jumped back in Wasserman's car and they drove off. (12 RT 1289.) Hlavac walked home. His parents

were home. When they noticed that his hand was bleeding and his eye was swollen, they insisted on calling the police. (12 RT 1290.)

6. On May 8, 2007, Michael Johnson and Christopher Horning had dinner and drinks at a restaurant in Pacific Beach and then drove to the Shack bar in La Jolla for some drinks. (13 RT 1350, 1362.) They rode in Horning's car. (13 RT 1360.) The pair arrived near the Shack about 11:00 p.m. and parked on Westbourne Street near the 7-11. (13 RT 1361-1362.) As they got out of the car, they saw a group of three or four males and two females walking across the street. They seemed to be associated with another car. (13 RT 1362-1363.) Cravens was in this group. (13 RT 1365-1366.) The males were relatively quiet but the girls were laughing and quoting a saying from the Borat movie, "Nice." (13 RT 1361-1364.) Horning was familiar with the quote and repeated it in same accent as used by the actor in the movie. It was meant to be funny and Horning said it with that intent and not to provoke any kind of confrontation. (13 RT 1365.)

In response to Horning's quote from the movie, Cravens turned around and said something to the effect of "This is none of your fucking business," and "Stay out of it." (13 RT 1365.) Cravens moved toward Johnson and his car and got within 10 feet. (13 RT 1366.) Horning said that he was not trying to start a fight and was just having fun. (13 RT 1366.) Johnson had just closed the door to the car and came around to the front. He approached Cravens and said, "Whoa. Whoa. Whoa," and put his hands in the air and moved them from side to side as if to indicate a halting or stopping motion. (13 RT 1367.) Johnson did not act aggressively and appeared only to be trying to stop any confrontation. (13 RT 1368.)

Without any warning, Cravens moved his left leg forward, stepped into Johnson, and sucker punched him squarely in the face with his right fist. (13 RT 1368, 1370, 1374.) The blow was delivered "with as much

force as you can possibly give a person.” (13 RT 1369.) Johnson was dazed and shocked and just stood back and “kind of wiggled” his head and arms around. (13 RT 1370.)

Horning said, “Whoa. Stop. No no. No fighting,” and tried to break up the confrontation peacefully. (13 RT 1370.) Horning said or indicated, “Done. You sucker punched him. Congratulations. I’ll take my buddy away and doctor up his nose [sic], and we’ll go about our way.” (13 RT 1371.) Cravens completely ignored him and taunted Johnson. The males who were with Cravens told Horning, “Stay out of it. You don’t want to get - - you don’t want to get hurt. Stay out of it.” (13 RT 1372.)

Cravens stood four to six feet away from Johnson and taunted him. He said, “Come on. What do you got, or something.” (13 RT 1373.) Cravens stepped back and then stepped in to Johnson again and delivered the same kind of punch: “Just full out him as hard as you can,” squarely in the face. (13 RT 1373.) Johnson fell to the ground. (13 RT 1373.)

Johnson sat on the ground with his legs bent at the knee in front of him. He used his arms to keep himself up with his palms on the ground instead of laying on the pavement. (13 RT 1373-1374.) Cravens continued to taunt him from about six feet away and then used his left leg to step into an underhand punch again squarely into Johnson’s face. (13 RT 1374.) Every punch Cravens threw was forceful. (13 RT 1375.)

From his position next to his car, Horning tried to think his way out of the situation. He yelled, “Stop. What - - what are you doing?” (13 RT 1374.) He could see that Johnson’s nose was broken and there was blood squirting out of his face. Johnson said nothing and was completely in shock and dazed. He had no idea what was going to happen to him and was at the mercy of the people around him. (13 RT 1375.) He was trying to remain conscious while blood came out of his mouth and nose. (13 RT 1375.)

Horning bluffed and yelled, "You're going to jail. I got your license plate number." (13 RT 1377.) One of the other males in Cravens's group said, "Let's get out of here," and they started running down the nearby alley. Cravens was the last male there. He told his women companions to get in the car and "get out of here." (13 RT 1377.) The girls did as they were told and drove off. Cravens ran away and followed his companions down the alley. (13 RT 1378.) On May 10, 2007, Cravens sent a MySpace message which read, "What the fuck. When are we going to chill. I can't go to the Shack for a while because I murdered someone. Ha, ha, ha, ha. No biggie. Call me up and let's get krunk."¹

After Cravens and his friends left, Horning tended to Johnson. A clerk from the 7-11 store came out and indicated that the police had been called. (13 RT 1378.) Within 10 minutes, the police arrived on the scene. (13 RT 1378.) Johnson was transported to the hospital and Horning rode with him in the ambulance. (13 RT 1380.) Horning remained with Johnson the rest of the night. (13 RT 1380.) At Scripps Hospital in La Jolla, doctors examined Johnson and determined that he had possible facial fractures including a broken nose with bleeding. (13 RT 1408.) The doctors recommended a CAT scan of Johnson's head and face for more definitive findings but Johnson left the hospital before the test could be conducted. (13 RT 1408.) Johnson's eyes, face, and ears were swollen, and he may have suffered an injury to his neck. He also had a slight bruise on his back from when he fell back and landed on the pavement after Cravens punched him. (13 RT 1412.) The swelling lasted for about two and a half weeks and it was definitely painful. The swelling disappeared after a month and Johnson's face returned to normal. His nose, however,

¹ As Cravens noted in his opening brief in the Court of Appeal, "krunk" likely means crazy drunk. (AOB 44, fn. 2.)

felt different and a little more deviated. (13 RT 1414.) Johnson had recurrent pain in his ear when he slept on his left side. He associated that pain with drainage from his nose and deviated septum. (13 RT 1415.)

B. Emery Kauanui Murder

Jennifer Grosso first met Cravens in the fourth grade after Cravens and his family moved to La Jolla from Hawaii. (6 RT 218.) They knew each other for about 10 years. (6 RT 218-219.) Grosso was Emery Kauanui's girlfriend for five and a half years. (6 RT 218.) She knew that his normal reaction to alcohol was to become lighthearted and "really goofy." (6 RT 238.) Marijuana never really affected his personality. It would just make him very calm and mellow. (6 RT 238-239.)

On May 23, 2007, Grosso and Kauanui talked on the telephone about their plans for the evening. Grosso had to work late at her flower shop and she told Kauanui that she could not meet with him until around 10:30 p.m. (6 RT 220.) They planned on meeting at a bar in La Jolla called the Brew House. (6 RT 221-222.) Grosso arrived at the Brew House between 11:00 and 11:30 p.m. and immediately met Kauanui. He was in a really friendly mood and they were excited to see each other. (6 RT 221.) Kauanui was drinking in the bar area with several friends including Dave Woods, Nur Kitmitto, and J.R. Greenly. (6 RT 223.) He was very cheerful and really happy. (6 RT 225.) As the evening progressed, Kauanui became intoxicated. Grosso bought mostly all the drinks for Kauanui and their mutual friends. (6 RT 225.)

About 20-30 minutes after Grosso arrived at the Brew House, Cravens and his friends, Eric House, Matt Yanke,² and Orlando Osuna walked into the bar. They came up to Grosso and she was excited to see Cravens and

² Matt Yanke was six feet two inches tall and weighed 200 pounds. (12 RT 1315.)

gave him a big hug. (6 RT 226-227.) The two groups - Kauanui and his friends at the bar and Cravens and his friends - intermingled and formed a big group. It was close quarters and everyone was elbow to elbow. Kauanui held a full drink in his hand as he and Grosso danced. (6 RT 228.) Eric House was close to them and Kauanui's drink spilled on him. (6 RT 228.) The spill was totally accidental and there was nothing aggressive about either Kauanui's or House's behavior. (6 RT 228.) However, that soon changed after House said "You better watch out, you know. I can knock you out in one punch." (6 RT 229.) Kauanui responded by repeatedly saying, "What are you saying to me? Like, what -- do you guys have like a problem?" (6 RT 229.) Suddenly, there was tension in the room, particularly between Kauanui and House. But others started making comments. Cravens told Kauanui, "You know Eric could beat your ass. Like don't say anything." (6 RT 229.) This incident attracted the attention of the manager of the Brew House, Ron Troyano. (6 RT 292, 301-302.) Troyano approached Kauanui and House and asked House what was going on. Kauanui's demeanor was calm. (6 RT 308.) House complained that somebody had spilled a drink on him but assured Troyano something to the effect that there was nothing to worry about because they were all friends. (6 RT 303.) Troyano was satisfied nothing was going on and just said, "That's it. Let's leave it alone." (6 RT 303.)

Later, there was another incident between Kauanui and Cravens and House and their friends. The situation escalated until it became aggressive to the point where Brew House employees intervened. (6 RT 229.) Troyano responded. He went into a back room and saw several people around a pool table. He saw one of the Brew House bartenders standing between Kauanui and Cravens. The bartender told Troyano that "these guys need to go." (6 RT 304.) Kauanui was calm and acted normally but was confused as to why he was being asked to leave. (6 RT 307-308.) He

told Troyano that he was concerned about getting jumped.³ (6 RT 309.) Grosso tried to calm the situation and grabbed Kauanui and said, "Let's go." (6 RT 230.) She then went to pay the drinking tab at the bar. While she did that, she heard more raised voices and saw more bouncers trying to get everyone out. This time the bouncers were grabbing people and forcing them to leave. Grosso grabbed Kauanui's arm and pulled him out of the Brew House. (6 RT 231.) Troyano and another Brew House employee escorted Kauanui out of the bar and across the parking lot and the street to his car. (6 RT 310.)

Grosso and Kauanui were first outside followed by Cravens, House, Yanke, and Osuna. House and Kauanui got in another verbal confrontation taunting each other with boasts about who could "beat each other's ass." (6 RT 231.) Grosso grabbed Kauanui's arm, took his keys, and said, "Let's go. We're leaving right now." (6 RT 232.) Kauanui followed Grosso's directive and got into his car which was parked on the street nearby. (6 RT 233.) Grosso drove to Kauanui's home at the corner of Genter and Draper Streets a couple of minutes away. (6 RT 235.) As they pulled up to the house, Kauanui used his cell phone and spoke in a confrontational manner to someone. He said, "If you want to fight me one on one, I'll fight you." (6 RT 235.) Grosso and Kauanui got out of Kauanui's car and she yelled at him to get off the phone as they entered the house together. (6 RT 236-237.)

Sometime after Grosso and Kauanui were outside the Brew House, Kauanui called his friend Dylan Eckardt. They had talked earlier in the evening about meeting at the Brew House. In fact, Eckardt was on his way there when he received the call from Kauanui saying that there had been a

³ Troyano later told a detective that Kauanui specifically said he was afraid of being jumped by Cravens and his friend. (6 RT 309.)

problem at the bar and that he was going home. Kauanui did not say there was going to be a problem at his house. The plan was for Kauanui and Eckardt to “just hang out” at the house with their girlfriends, as Kauanui’s mother was in Kauai, Hawaii. (8 RT 621.)

Once Grosso and Kauanui were in the house, Grosso chastised him for his behavior at the bar, saying it was dumb and really immature. She told him she did not like confrontational behavior at all and that she would not be around him if he acted in this manner. (6 RT 237.) Kauanui immediately became apologetic and really calm and asked Grosso to stay with him. (6 RT 237-238.) Grosso agreed and the subject was dropped. (6 RT 238.)

Kauanui lived in the house with other family members but they were out of town. Grosso was concerned about her car being parked in the Vons parking lot because she was worried about it being towed. She had to go back and get it. She knew Kauanui could not drive her so she decided to walk back. Kauanui begged her to come back and be with him and offered to drive her back. Grosso said “No way” to the driving and hugged Kauanui and assured him that she would be back. He told her to walk safe but come back. She repeated her assurance that she would be back and urged him to go to bed. She changed her high-heeled shoes and borrowed Kauanui’s mother’s sandals and started walking back for her car. (6 RT 239-240.)

It was cold as she walked, and Grosso realized that it was not really safe for her to be out by herself so she started jogging. (6 RT 241-242.) As she ran, she suddenly had a really bad feeling. She always felt very connected to Kauanui and now had a weird feeling that did not feel right. She wanted to get back to the Brew House and make sure everything was diffused and okay. (6 RT 242.)

In the meantime, Kauanui called Dylan Eckardt back about 1:31 a.m. This time he was frantic and screamed at Eckardt, "Hurry up and get over here. Hurry up and get over here." (8 RT 623.) Kauanui told Eckardt, "I got beef at my house," which made Eckardt think that there was an altercation at Kauanui's house. He figured other people were going to be there but was not really sure what was going on so he tried to get there as quickly as possible. (8 RT 623.) After Eckardt told Kauanui, "Okay. Okay. I'm on my way. I'm on my way," he heard Kauanui yelling at someone else and then, all of a sudden, Kauanui's phone went dead. (8 RT 624.)

Grosso took a short cut through an alley that ran behind the Brew House. She heard Cravens's voice and well as the voices of House, Yanke, and Osuna. Cravens said, "Let's go fuck him up," and "Don't call him. I know where he lives. Let's go fuck him up." (6 RT 242.) They were all rowdy and acting very aggressively. Grosso screamed at Cravens hoping he would stop because he knew her. (6 RT 242.) Cravens looked back at her and then got into a dark colored Ford Explorer with some other people. (6 RT 243, 245.) The Explorer quickly drove past her down the alley and as it did she saw that Osuna was driving. He ignored her and headed in the direction of Kauanui's home. (6 RT 243.)

Grosso panicked. She immediately used her phone to try to call Kauanui. It was now 1:36 a.m. As she was on the phone, Grosso looked inside the Brew House and saw Dave Woods and Nur Kitmitto. She told them she thought Kauanui was going to get jumped. She said, "Come now," but didn't wait for a response. She continued to try to call Kauanui but he did not answer. (6 RT 244.) Grosso ran to her car and got in as quickly as she could. She drove as quickly as possible back to Kauanui's house and was probably one to two minutes behind the Ford Explorer with Cravens and Osuna. (6 RT 244, 246.)

In the meantime, Kauanui called his friend Shane Niau and asked him to come to his house because "some people are coming to my house." (8 RT 605.) Niau received a second call from Kauanui. This time Kauanui sounded a little more desperate. (8 RT 605.) Niau was able to get a ride from a friend so he could go to Kauanui's house to check on him. (8 RT 610.)

About this time, Kauanui's neighbors were awakened by noise on the street. At 1:18 a.m., Phillip Baltazar woke up to hear Kauanui antagonistically yelling into his cell phone, "Motherfucker. You're acting like a fucking child." He looked out his bedroom window and saw Kauanui pacing on the sidewalk across the street in front of his house. He was shirtless but wearing shorts and was screaming into the phone. (7 RT 377-379.) Baltazar then heard a woman's voice calling to Kauanui to come or go inside. Baltazar thought it was Kauanui's mother pleading with him to get off the phone and come inside the house. (7 RT 378.) After he heard the woman's voice, Baltazar did not hear any loud or aggressive conversation from outside so he moved to a back bedroom to get more sleep. (7 RT 378.)

Baltazar's wife, Erica Wortham, heard Baltazar move to the back bedroom to continue sleeping and then went back to sleep. She woke up a few minutes later, either 1:40 a.m or 1:48 a.m, because there was noise out on the street. She heard loud voices. (6 RT 342.) Wortham got out of bed and went to the balcony window. She heard someone saying an aggressive kind of salutation. She looked out and saw about four people approaching down Genter Street toward Kauanui who was standing nearby. (6 RT 343-344.) The people who approached Kauanui moved in a way that indicated to Wortham they intended to fight. (6 RT 348.) At some point, she noticed that Jennifer Grosso was also there. (6 RT 347.)

Because of the body language of the people who approached Kauanui, Wortham could tell immediately it was not a good situation and moved away from the balcony window to call 911. Before she did so, she yelled out of the window, "I'm calling the cops," but her words did not have any effect on the people. After she got on the phone, she could hear the sounds of fighting, flesh hitting flesh, pounding and hitting. It sounded like a maul, like several people on top of each other hitting. (6 RT 348-349.)

Baltazar was awakened in the back room by the sound of Wortham using the touch-tone phone as she called the police. (7 RT 380.) He walked into his office and looked out over a porch into the street. (7 RT 380-381.) He saw what he described as a rugby scrum - four men were on top of someone beating him up. (7 RT 382.) The four men were on top of Kauanui and were either kicking or punching or elbowing or kneeing him. They were "just whaling" on him. (7 RT 384.) At some point the whole group moved near a palm tree and everyone fell down. Baltazar then saw Kauanui stand up. (7 RT 385.) Grosso was not there at this point; she was in her car. (7 RT 387.)

When Grosso got close to Kauanui's house, she could see the Ford Explorer parked on the side of the street and a confrontation going on outside the house. (6 RT 246.) As she turned the corner, the headlights of her car shined ahead and she saw Kauanui on the street with House standing over him. She also saw Cravens and Yanke and Osuna standing behind. As Grosso rounded the corner, she held down her car horn so she could wake up neighbors and get help immediately. She parked abruptly and at an angle but no one reacted. (6 RT 248, 250.)

House straddled Kauanui and punched him on both sides of Kauanui's stomach. Kauanui looked as if he was trying to get House in a headlock by wrapping one of his arms around House's upper shoulder but he was not successful. (6 RT 249.) Grosso got out of her car and was "screaming and

cussing and making a huge scene.” (6 RT 250.) She yelled out Cravens, House’s and Yanke’s names and said, “I’m calling the cops. You’re all going to jail.” (6 RT 253-254.) When House did not react, Grosso went up to him and started kicking him in his back, side, and head and yelled at him to get off Kauanui. House was five feet, eleven inches tall and weighed 171 pounds. (9 RT 725.) House repeatedly said, “Get her the fuck off me,” but did not stop his attack on Kauanui. Someone said, “What the fuck are you doing? You’re crazy, bitch. You’re crazy.” Then someone standing around, perhaps Yanke or another person named Hank, lifted her off House and put her to the side. (6 RT 251-252.)

By about this time, Dylan Eckardt had gotten a ride from his girlfriend and arrived on the scene. As they headed northbound on Draper, Eckardt could see into the intersection and saw a few men circled around someone he later recognized as Kauanui, one of the men kicking him. Eckardt also saw a man standing back from the group. He was bigger and taller than Eckardt. Before the car Eckardt was in even stopped, he jumped out and started cursing and yelling at the group. The men stopped and looked. He ran up to the group and yelled Kauanui’s name. The men stopped jumping on top of Kauanui and he got up. (8 RT 625-627.) Eckardt did not see Kauanui attack, hit, kick, or make any physical contact with any of the individuals around him. (8 RT 628.)

In the meantime, Grosso was undeterred and continued to yell and scream. She was in a complete panic. She yelled, “Get the fuck out of here. Leave him alone.” When she did not get any reaction, Grosso went up to the Ford Explorer and started kicking the headlights and hitting the top of the vehicle, and continued screaming. (6 RT 254.) She looked around and saw that Kauanui had somehow managed to stand up. There was nothing aggressive in his behavior or demeanor. He was talking to Cravens from about five or six feet away. (6 RT 255-256.) Cravens was

standing near the Ford Explorer. (6 RT 257.) Kauanui was five feet, ten inches tall and weighed 181 pounds. (9 RT 724.) Cravens was six feet tall and weighed 240 pounds. (9 RT 717.) Kauanui asked Cravens, “How the fuck are you going to jump me at my house?” Kauanui initially had his arms at his sides but then raised them with his palms up to about elbow level.⁴ (6 RT 256; 7 RT 459.) He made no aggressive moves; he was complacent. (7 RT 459, 461-462.) Without saying a word, Cravens walked up to Kauanui and gave him “one extremely hard punch, and Emery just fell back immediately. It was like the lights went out in Emery and he fell back.” (6 RT 257.) From his perspective, Baltazar saw Cravens come “flying out” and then “coldcocked” Kauanui. (7 RT 387, 393.) Eckardt saw Kauanui turn toward Cravens. Kauanui was standing on the lower curb and Cravens stood above him on the curb. Cravens delivered a punch - one of the hardest punches that Eckardt had ever seen thrown - to the side of Kauanui’s head. It was a knockout punch. Kauanui was unconscious. (8 RT 630-631.) Kauanui did nothing to break his fall and he fell straight back. Kauanui’s skull audibly cracked when it hit the pavement. [It was just like a thump.” (8 RT 631.) “[I]t sounded like something pinged off the concrete.” (6 RT 258.) “Like when he hit the ground, all you heard was like boom, like, from his head hitting the concrete.” (8 RT 631.) “[Y]ou could hear the doosh of his skull hitting the ground.” (7 RT 394.) Immediately thereafter, blood streamed out from the back of Kauanui’s head and formed a pool. (6 RT 258; 7 RT 388; 8 RT 629.) Grosso thought Kauanui was dead right there. (6 RT 258.) Then, a couple of people from

⁴ Karen Loftus testified Kauanui’s arms were down by his side and his hands were hanging. (7 RT 461.) Henri Hendricks testified that Kauanui was “talking with his hands,” and did not have his hands clenched on in a fist. He also testified that Kaunui “did not swing at [Cravens].” (14 RT 1635-1636.)

Cravens's group went up to Kauanui and kicked him in the side as he lay on the pavement with a pool of blood around his head. The kicks were medium in force and were interpreted by Grosso as a type of "we won" final kick; it was not really aggressive but it was more than a kick just to see if Kauanui was alive.⁵ (6 RT 259.)

Grosso went crazy and screamed at the top of her lungs. She said, "Fuck all of you guys. None of you are going to get away with this." (6 RT 258.) She looked at Cravens and repeatedly asked him, "Why? Why would you do this? Why would you do this to me? Why?" (6 RT 258.) Cravens just looked at Grosso and did not have any reaction. He just said, "Come on. Come on. Let's go," to his friends. (6 RT 258.)

A police unit arrived on the scene. (7 RT 391-392.) As soon as Cravens and his friends saw the police officer, they fled the scene quickly and drove away down Draper Street accelerating to at least 40 miles per hour. (6 RT 258-260; 7 RT 392.) House stayed at the scene and appeared to be searching for something on the ground, later determined to be one of his teeth. (6 RT 258-260.) While he was searching, the police arrived on the scene. Grosso was kneeling down next to Kauanui as some of his friends arrived having heard that he was going to get jumped. These friends, including Nur Kitmitto and Dave Woods, tried to calm Grosso down as she stayed at Kauanui's side. He was unconscious. (6 RT 260.) Shane knelt down and checked Kauanui's pulse to determine if he was alive. (6 RT 261.)

The police arrested House and an ambulance arrived and took Kauanui away. Grosso road in the ambulance with Kauanui to the hospital. (6 RT 261-262.)

⁵ Baltazar saw Cravens and House kicking Kauanui as he collapsed on the street. (7 RT 388-389.)

Kristin Link grew up with Kauanui and his brother Nigel and attended middle school and high school with Cravens. (9 RT 672-673.) She remained friends with both Kauanui and Cravens. (9 RT 673.) She moved to Los Angeles and saw Cravens a few times a year and would talk with him on the phone infrequently. (9 RT 673-674.) On the morning of May 24, 2007, about 10:00 a.m or 11:00 a.m., Link received a telephone call from her mother who told her the circumstances about Kauanui being in the hospital. (9 RT 674.) She was a bit confused as to why Kauanui and Cravens would get into a fight; she thought they were friends. (9 RT 674.) She then called Cravens right after, about 11:00 a.m., and Link asked Cravens if he had been in a fight with Kauanui. Cravens bragged, "I would hardly call it a fight. I punched him out." (9 RT 675.) Cravens was not remorseful at all. (9 RT 677.) Cravens said he had been with Eric House, Hank Hendricks, Matt Yanke, and Orlando Osuna and that Kauanui spilled a beer on House and they got into an argument. (9 RT 675-676.) Cravens told Link that he and his friends went over to Kauanui's house and Kauanui and House fought. Cravens said that the fight was just between Kauanui and House but when Kauanui started to win, Cravens pulled House away and punched Kauanui himself. When Link told Cravens that Kauanui was in the hospital, Cravens's tone changed and he cried. (9 RT 676.)

Nicole Sparks had dated Kauanui and was friends with Cravens and Hank Hendricks. On May 24, 2007, she was attending La Jolla High School. About 10:45 a.m. - 11:00 a.m., she heard that Kauanui had been in a fight with Cravens the night before. (9 RT 691.) She did not know that Kauanui had been admitted to the hospital. (9 RT 691.) Sparks saw Hank Hendricks as he drove past La Jolla High School on Nautilus Street between 11:00 a.m. - 11:30 a.m. Cravens was his passenger. (9 RT 692.) She called Hendricks on his cell phone and asked whether or not there had been a fight between Kauanui and Cravens the night before. In the

background she heard Cravens laugh and say “[W]e put him to sleep.” (9 RT 693-694.)

Police later contacted Cravens on May 29, 2007. They noted that Cravens was six feet tall and weighed 240 pounds. They also noted that the top of Cravens’s left hand appeared to be a little swollen. (9 RT 717.)

Kauanui was taken to the emergency room at Scripps Memorial Hospital in La Jolla. (12 RT 1324.) Because of the injury to the back of his head, doctors performed a craniotomy and a craniectomy where Kauanui’s skull was opened and a portion of his skull removed to combat life-threatening brain injuries. Despite these measures, along with various medications, the pressure in Kauanui’s brain increased and his brain function deteriorated. (12 RT 1333.) He went into a coma. (12 RT 1336.) On May 28, 2007, he was pronounced brain-dead wherein his brain ceased functioning. (12 RT 1335.)

Kauanui was pronounced dead at Scripps Hospital in La Jolla on May 29, 2007 at 11:55 hours. (9 RT 720.) An autopsy revealed that Kauanui had a severe fracture at the back of his head in one of the thickest areas of the skull. This type of fracture is caused by a fair amount of force usually associated with a car crash or from being caused by the impact of some sort of instrument such as a hammer, baseball bat, or tire iron. (13 RT 1445.) A toxicology screen taken at the time Kauanui was first admitted to the hospital revealed a blood alcohol level of 0.17 percent and metabolites of marijuana. (13 RT 1450, 1476.)

A jury found Cravens guilty of murdering Emery Kauanui (Pen. Code, § 187 - Count 12), and committing several other crimes: Making a criminal threat against Eric Sorensen (Pen. Code, § 422 - Court 1); assault by means of force likely to produce great bodily injury against Chris Jarrett (Pen. Code, § 245, subd. (a)(1) - Count 5), with personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a); battery against Libby S.

(Pen. Code, § 242 - Count 6); assault by means of force likely to produce great bodily injury against Logan Henry (Pen. Code, § 245, subd. (a)(1) - Count 7); assault by means of force likely to produce great bodily injury against John Hlavac (Pen. Code, § 245, subd. (a)(1) - Count 10); assault by means of force likely to produce great bodily injury against Michael Johnson (Pen. Code, § 245, subd. (a)(1) - Count 11), with personal infliction of great bodily injury (Pen. Code, § 12022.7, subd. (a)). The jury found Cravens not guilty of three other assaults and batteries (Counts 2, 8, and 9). (5 CT 1139-1148.)

The trial court sentenced Cravens to state prison for a term of 20 years to life consisting of a 15 years-to-life term on Count 12 for the murder of Kauanui, plus a consecutive 5 year determinate term (consisting of the 2 year lower term plus 3 years for the enhancement of the personal infliction of great bodily injury) on Count 11 for the assault on Michael Johnson. Terms for Cravens's other crimes were imposed but ordered to run concurrently. (4 CT 1001-1004; 5 CT 1151-1152.)

On appeal, Cravens contended the evidence was insufficient to sustain the second-degree murder conviction. He also argued, on the basis of *People v. Garcia, supra*, 162 Cal.App.4th 18, that the trial court erred by not, sua sponte, instructing the jury that an unintentional killing, without malice, during the course of an inherently dangerous assaultive felony, constituted voluntary manslaughter. Although noting the well-settled principles that, in determining whether a reasonable trier of fact could have found a defendant guilty beyond a reasonable doubt, an appellate court must view the evidence in a light most favorable to the prosecution, presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, and uphold a conviction unless it is clearly shown that on no hypothesis whatever is there sufficient substantial evidence to support the verdict, the Court of Appeal ruled that

the evidence was insufficient to support the second degree murder conviction. The court reviewed this Court's decision in *People v. Knoller, supra*, 41 Cal.4th 139, and recognized that the subjective component of implied malice is satisfied when a defendant appreciates that his action will endanger the life of another but goes ahead and does it anyway. However, the Court of Appeal re-examined the evidence and concluded that the single blow to the head delivered by Cravens did not involve a high probability of death simply because it occurred on a pavement, and that Cravens's realization that Kauanui would fall and hit his head on the cement curb, evidenced a mere awareness of a risk of serious bodily injury, not conscious disregard for life. The court dismissed the prior incidents of Cravens assaulting people as irrelevant to the question of whether Cravens knew his act of delivering a single punch to Kauanui's head endangered his life, and did not find that the gang attack on Kauanui demonstrated aggravating circumstances that supported a finding of implied malice.

Having found there was insufficient evidence of implied malice to support Cravens's second degree murder conviction, the Court of Appeal declared that it was expanding the holding in *Garcia* and concluded that an unintentional killing, without malice, resulting from the commission of a felony assault or battery constitutes voluntary manslaughter, regardless whether it satisfies the test for an inherently dangerous felony used in applying the second degree murder rule. The court then modified the judgment to reflect a conviction for voluntary manslaughter. In reaching this conclusion, the court reviewed the same evidence that the jury did, but concluded that it supported only the crime of voluntary manslaughter verdict.

This Court granted respondent's petition for review on November 23, 2010.

ARGUMENT

I. THE COURT OF APPEAL IGNORED LONG-STANDING RULES OF APPELLATE REVIEW, IMPROPERLY SUBSTITUTED ITS OWN JUDGMENT FOR THAT OF THE JURY, RULED THAT THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE SECOND DEGREE MURDER CONVICTION, AND FASHIONED A NEW LEGAL DOCTRINE TO JUSTIFY CRAVENS BEING HELD LIABLE FOR VOLUNTARY MANSLAUGHTER

In this case, the Court of Appeal ignored long-established principles of and limitations on appellate review, overruled a jury's determination, reweighed the evidence, and found insufficient evidence of second degree murder based on implied malice, and then "expanded" the established law of voluntary manslaughter to form a wholly new doctrine for its application. Despite its apparent disquiet with the jury's verdict, because there was both evidentiary and legal support for it, the Court of Appeal should have deferred to the jury's determination that Cravens acted with conscious disregard of the danger of human life when he hit Kauanui and sustained its verdict finding Cravens guilty of second-degree murder.

A. The Court of Appeal's Decision

The Court of Appeal ruled there was basically no evidence to support the jury's implied-malice second-degree murder verdict. (Slip Opn. at pp. 32-36.) The court discussed this Court's decision in *People v. Knoller, supra*, 41 Cal.4th 139, and recognized that the subjective component of implied malice is satisfied when a defendant appreciates that his action will endanger the life of another but goes ahead and does it anyway. (Slip Opn. at pp. 31-32.) However, the Court of Appeal reevaluated the evidence and concluded that the single blow to the head delivered by Cravens did not involve a high probability of death simply because it occurred on a pavement, and that Cravens's realization that Kauanui would fall and hit his head on the cement curb, evidenced a mere awareness of a risk of serious

bodily injury, not a conscious disregard for life. The court dismissed the prior incidents of Cravens assaulting people as irrelevant to the question of whether Cravens knew his act of delivering a single punch to Kauanui's head endangered his life, and did not find that the gang attack on Kauanui demonstrated aggravating circumstances that supported a finding of implied malice. (Slip Opn. at 32-36.)

The Court of Appeal found there was insufficient evidence of implied malice to support Cravens's second-degree murder conviction. The court then expanded the holding of *People v. Garcia, supra*, and ruled that an unintentional killing, without malice, resulting from the commission of a felony assault or battery, was another circumstance to support voluntary manslaughter and reduced Cravens's crime to that offense. In making this decision, the court reviewed the same evidence that the jury did but concluded that it supported only a voluntary manslaughter verdict. (Slip Opn. at pp. 36-49.)

B. Law

To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 200; *People v. Jurado* (2006) 38 Cal.4th 72, 118; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on "isolated bits of evidence." (*People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.)

Further, the test on appeal is not whether the evidence proves guilt beyond a reasonable doubt, but whether any rational trier of fact could have

found the essential elements of the charged offenses beyond a reasonable doubt. (*People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Rich* (1988) 45 Cal.3d 1036, 1081.) Moreover, the conviction will be upheld unless it is clearly shown that “on no hypothesis whatever is there sufficient substantial evidence to support the verdict.” (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Hicks* (1982) 128 Cal.App.3d 423, 429.)

The same standard of review applies if the verdict is supported by circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Stanley* (1995) 10 Cal.4th 764, 792-793; *People v. Hodgson* (2003) 111 Cal.App.4th 566, 574.) A jury may infer a defendant’s specific intent to commit a crime from all of the facts and circumstances shown by the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27, citing *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 [“Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.”].) In a case based on circumstantial evidence, it is the jury, not the appellate court, that must be convinced of the defendant’s guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of facts’ findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. (*People v. Holt* (1997) 15 Cal.4th 619, 668, citing *People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

It is the exclusive function of the trier of fact to assess the credibility of witnesses and draw reasonable inferences from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303.) Therefore, the appellate court must accept any and all logical inferences that the jury might have drawn from the circumstantial evidence in support of the verdict and presume the existence of every fact the jury could reasonable deduce from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Murder is the unlawful killing of a human being or a fetus “with malice aforethought.” (Pen. Code, § 187, subd. (a); *People v. Knoller, supra*, 41 Cal.4th at p. 151; *People v. Blakeley* (2000) 23 Cal.4th 82, 87.) Second-degree murder “is the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.” (*People v. Knoller, supra*, 41 Cal.4th at p. 151.) “Express malice” is an unlawful intent to kill. (Pen. Code, § 188; *Blakeley*, at p. 87 [malice is express “when the defendant manifests ‘a deliberate intention unlawfully to take away the life of a fellow creature’”].) “Implied malice” requires a defendant’s awareness of engaging in conduct that endangers the life of another. (*Knoller*, at p. 143.) “Malice is implied when the killing is proximately caused by “an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.” (*Ibid.*; see *Blakeley*, at p. 87 [“juries should be instructed that malice is implied ‘when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life’”].)

Manslaughter is the “unlawful killing of a human being without malice.” (Pen. Code, § 192; *People v. Blakeley, supra*, 23 Cal.4th at p. 87.) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. (See *People v. Breverman* (1998) 19 Cal.4th 142, 153 154; *People v. Rios* (2000) 23 Cal.4th 450, 460.) However, a specific intent to kill is not a necessary element of manslaughter. (*Blakeley*, at pp. 88-89 [when defendant, acting with conscious disregard for life, unintentionally kills in unreasonable self

defense, killing is voluntary, not involuntary, manslaughter]; *People v. Lasko* (2000) 23 Cal.4th 101, 108 [when defendant, acting with conscious disregard for life, unintentionally but unlawfully kills in sudden quarrel or heat of passion, killing is voluntary manslaughter].)

C. Analysis

In this case, the trial court fully and properly instructed the jury and the jury reasonably concluded that the evidence supported second-degree murder based on implied-malice. On the basis of the same evidence, the Court of Appeal determined that Cravens did indeed commit a felony assault on Kauanui but second-guessed the jury's assessment that the circumstances showed Cravens was aware that his assault on Kauanui would put his life in jeopardy. By substituting its judgment for that of the jury, the Court of Appeal overstepped its role.

The trial court instructed the jury on the general principles of homicide (CALCRIM No. 500; 3 CT 651), justifiable homicide: self-defense or defense of another (CALCRIM No. 505; 3 CT 652-653), excusable homicide: accident in the heat of passion (CALCRIM No. 511; 3 CT 654-655), murder with malice aforethought (CALCRIM No. 520; 3 CT 656), voluntary manslaughter: heat of passion – lesser included offense (CALCRIM No. 570; 3 CT 657-658), voluntary manslaughter: imperfect self-defense – lesser included offense (CALCRIM No. 571; 3 CT 659-660), and involuntary manslaughter (CALCRIM No. 580; 3 CT 661-662).

The prosecution argued the evidence showed second degree murder because Cravens, who had demonstrated his aggressiveness and combativeness by assaulting numerous people over the years he lived in La Jolla, deliberately hit Kauanui as part of a group attack with such great force and under such dangerous circumstances that Cravens surely knew his conduct endangered Kauanui's life, but did so anyway. (See 15 RT 1839-1842.) The defense argued that Kauanui was the aggressor and that

Cravens hit him in self-defense, and used no more force than was necessary to fend off Kauanui's imminent attack. The defense also argued that Cravens did not act with conscious disregard for human life because he struck Kauanui with his non-dominant hand and did not realize that his one punch could be life threatening. (16 RT 1861-1862.)

The jury deliberated on this case for several days and sent out numerous questions and readback requests. It then announced that it could not reach a unanimous verdict on the murder charge. The trial court ordered the jury to continue deliberations, more jury questions were asked and answered, and the jury returned a second-degree murder guilty verdict the next day, along with a majority of guilty verdicts for the remaining charges. Thus, the jury thoroughly considered the evidence and was properly instructed. The jury decided unanimously that Cravens subjectively appreciated that, when he delivered the sucker punch haymaker to Kauanui's head over a concrete sidewalk after Kauanui had just suffered a gang beating by Cravens's friends, he risked killing him.

There was both evidentiary and legal support for the jury's second-degree murder verdict. While normally, hitting a person with hands or feet does not constitute murder in any degree, murder does occur when there is either an intent to kill or such wanton and brutal use of the hands without provocation as to indicate it would cause death. (See *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205; *People v. Teixeira* (1955) 136 Cal.App.2d 136, 150.) Where there are aggravating circumstances, there can be implied malice if the blows causing death are inflicted by a fist. (See *People v. Munn* (1884) 65 Cal. 211, 213.) A single punch delivered upon a concrete wall is sufficient to warrant a murder charge due to the obvious fact that a fall on the concrete can bear deadly consequences if known by the defendant under the circumstances. (See *People v. Efsthathiou* (1941) 47 Cal.App.2d 441, 443.) A jury's finding of implied-malice based

on fist blows can be supported by group-attack evidence. (See, e.g., *People v. Beyea* (1974) 38 Cal.App.3d 176, 189 [prolonged beating lasting 15 to 20 minutes]; *People v. Ogg* (1958) 159 Cal.App.2d 38, 50-52 [defendant, a professional boxer, severely beat his wife inflicting numerous injuries including a fatal skull fracture]; *People v. Mears* (1956) 142 Cal.App.2d 198, 200-203 [severe beating during which defendant knocked the victim down three times with blows to the head and face and viciously kicked him when he was down].)

As this Court has held, the linchpin of implied malice murder is that before a defendant can be convicted of that crime, there must be evidence that the defendant appreciated that his deliberate conduct endangered the life of another and that the defendant acted with conscious disregard for life. (See *People v. Knoller, supra*, 41 Cal.4th at p. 151; *People v. Blakeley, supra*, 23 Cal.4th at p. 87.) In nearly all cases, implied malice is determined based on circumstantial evidence and inferences the trier of fact draws from those circumstances. It is unnecessary that implied malice be proven by an admission or other direct evidence of the defendant's mental state; like all other elements of a crime, implied malice may be proven by circumstantial evidence. (*People v. James* (1998) 62 Cal.App.4th 244, 277.) "[A] conviction for second degree murder, based on a theory of implied malice, requires proof that a defendant acted with conscious disregard of the danger to human life." (*People v. Knoller, supra*, 41 Cal.4th at p. 156.) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another – no more, and no less." (*Id.* at p. 143.)

In the instant case, there was evidence from witnesses and victims to Cravens's numerous other assaults in the preceding years which demonstrated that Cravens acted with increasing disregard for the consequences of his devastating blows.

The evidence from multiple percipient witnesses to Cravens's assault on Kauanui showed that it was part of a group attack orchestrated and promoted by Cravens that occurred during circumstances showing Cravens's disregard for the consequences of his beatings finally became so cavalier that it clearly indicated a conscious disregard for Kauanui's life.

The Court of Appeal decided provocatively in two ways. It ran roughshod over principles of appellate review to achieve what the court believed was an appropriate verdict. It did not follow the mandates of *Jackson v. Virginia, supra*, 443 U.S. at page 319 and *People v. Johnson, supra*, 26 Cal.3d at page 576, because it substituted its own evaluation of the evidence for that of the jury. It did not accept any and all logical inferences that the jury might have drawn from the circumstantial evidence in support of the verdict and did not presume the existence of every fact the jury could have reasonably deduced from the evidence (*People v. Maury, supra*, 30 Cal.4th at p. 396). The Court of Appeal concluded that the evidence clearly showed that "on no hypothesis whatever is there sufficient substantial evidence to support the verdict." (*People v. Bolin, supra*, 18 Cal.4th at p. 331; *People v. Hicks, supra*, 128 Cal.App.3d at p. 429.) The Court of Appeal's own voluntary manslaughter finding shows otherwise.

Whereas the jury determined that the evidence indicated Cravens harbored implied malice when he decided to deliver the knockout punch to Kauanui, the Court of Appeal accepted the exact same evidence but came to a different conclusion:

The evidence in this case supports the finding that Cravens unintentionally killed Kauanui, without malice, by committing a *felony* assault by means of force likely to cause great bodily injury. There was testimony that Cravens, who outweighed Kauanui by 60 pounds, was standing on the curb above Kauanui when he delivered an "extremely hard" knockout punch, and that Kauanui was not acting aggressively toward Cravens just before the punch, but was talking to him with his

arms at his sides. There was evidence that Kauanui confronted Cravens right after fending off a group attack that could have left him in a weakened state and more likely to suffer great bodily injury if violently punched in the face without warning. Testimony regarding Cravens's boasting the day after the incident shows the fatal blow he delivered to Kauanui was more than a simple misdemeanor battery. A friend asked if he had been in a fight with Kauanui and Cravens responded, "I would hardly call it a fight. I punched him out." When another friend asked if Cravens and Kauanui had fought, Cravens laughed and said, "We put him to sleep." It is undisputed that Cravens's blow to Kauanui caused great bodily injury and death. Because the evidence supports the finding that Cravens unintentionally killed Kauanui, without malice, by committing a felony assault by means of force likely to cause great bodily injury, we will reduce the conviction of second degree murder to voluntary manslaughter.

(Slip opn. at pp. 47-49, emphasis in original, footnotes omitted.)

In the light of the ample evidence that Cravens organized a group-attack on an alcohol-impaired Kauanui, and then decided to deliver a surprise punch to Kauanui's head that was so powerful it knocked him out cold and dropped his head to smash on the curb of a concrete sidewalk, the Court of Appeal should have deferred to the jury's conclusion that Cravens deliberately engaged in behavior that was dangerous to human life, knew that his conduct was dangerous to human life, and acted in conscious disregard for human life. (*People v. Knoller, supra*, 41 Cal.4th at p. 143.) As it stands, the Court of Appeal's decision represents a de novo review of the evidence and does not give proper deference to the factual determinations made by the jury.

The very determination that Cravens harbored implied malice – a conscious disregard for human life – was entirely dependent on inferences the jury drew from the circumstantial evidence. To conclude, as did the Court of Appeal, that there is no evidence of implied malice, is the equivalent of arguing that gravity does not exist because it cannot be seen.

Whereas reasonable minds could disagree as to whether the evidence showed implied malice, the jury decided that it did. It is difficult to see how the Court of Appeal, which purported to be faithful to the precepts that guide its review of the sufficiency of the evidence, could conclude the jury found implied malice without sufficient evidence. The Court of Appeal's disquiet over the jury's verdict was not a legal basis to revoke and reduce it.

The Court of Appeal's betrayal of its duty to view the evidence in the light most favorable to the verdict is further evidenced by its overreach in expanding the law of voluntary manslaughter in order to reach a level of conviction the appellate court thought proper. The Court of Appeal, by its own characterization, "expanded" the law of voluntary manslaughter to form a wholly new doctrine for its application. This Court has always confined voluntary manslaughter to "limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' ([Pen. Code,] § 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense' – the unreasonable but good faith belief in having to act in self-defense (see *In re Christian S.* (1994) 7 Cal.4th 768; *People v. Flannel, supra*, [(1979)] 25 Cal.3d 668)." (*People v. Barton* (1995) 12 Cal.4th 186, 199.) But the Court of Appeal expanded "the holding in *Garcia* by concluding that an unintentional killing, without malice, resulting from the commission of a felony assault or battery constitutes voluntary manslaughter, regardless of whether it satisfies the test for an inherently dangerous felony used in applying the second degree felony murder rule." (Slip Opn. at p. 42.) Thus, the Court of Appeal, on the one hand, ignored the conclusions of the finder of fact and then, on the other, found a situation for the *Garcia* specie of voluntary manslaughter, that fixes liability based on an objective assessment that the criminal conduct could be dangerous to human life, as contrasted with implied malice murder, which differs only in requiring a subjective appreciation of

danger to human life. The difference between these two theories of criminal liability is so razor thin, and is based on little more than inferences to be drawn from the self same circumstances, which is precisely what the jury did here, that for the Court of Appeal to say there was “no evidence” of implied malice, but enough for an objective determination of danger to human life, is intellectually disingenuous and legally erroneous. Once again, the jury heard the evidence and was properly instructed. The jury unanimously decided that Cravens subjectively appreciated that when he sucker punched the inebriated Kauanui over a concrete sidewalk, after Kauanui had suffered a group beating at Cravens’s direction, there was a danger to Kauanui’s life. Any discomfort by the Court of Appeal with the jury’s verdict based on the facts and circumstances of this case does not provide a legal basis to reduce the jury’s verdict and create what essentially amounts to a new crime not sanctioned by this Court or the Legislature. This is precisely what the Court of Appeal did in this case and its decision cannot stand, especially in light of its admitted expansion of voluntary manslaughter.

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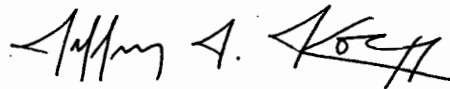
CONCLUSION

The evidence justified the jury's verdict that Cravens committed second-degree murder when he sucker punched Emery Kauanui over a concrete sidewalk because it showed that Cravens deliberately acted with a conscious disregard for human life. The Court of Appeal's decision should be reversed and the rules of appellate review should be reemphasized. It should also be established that the implied malice element of second-degree murder can be satisfied by a single punch to the head if there is evidence that a defendant appreciated the deadly potential of his blow and went ahead and threw it anyway.

Dated: January 19, 2011

Respectfully submitted,

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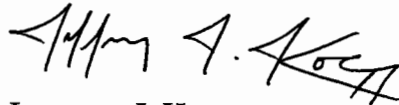
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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,454 words.

Dated: January 19, 2011

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read "Jeffrey J. Koch". The signature is stylized with a large initial "J" and a long horizontal stroke at the end.

JEFFREY J. KOCH
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

Case Name: **People v. Cravens**
Case No.: **S186661**

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 20, 2011, I served the attached **RESPONDENT'S 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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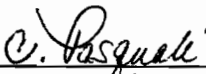
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on January 20, 2011 to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 20, 2011, at San Diego, California.

C. Pasquali
Declarant


Signature

