

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,
Plaintiff and Respondent,
v.
RONALD LEON BROCK,
Defendant and Appellant.

A108062
(San Mateo County
Super. Ct. No. SC 054904)
ORDER MODIFYING OPINION
AND DENYING REHEARING
[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed hereon on October 11, 2006, be modified as follows:

At the end of the first paragraph under part VI. (*Harmless Error*), which starts on page 16 with the phrase “The nature of this harmless error analysis” and ends on page 17 with the language “the conviction cannot stand,” following the citation “(*People v. Green* (1980) 27 Cal.3d 1, 69.),” add as footnote 13 the following footnote, which will require renumbering of all subsequent footnotes:

¹³ In a petition for rehearing, the People argue that the *Green* analysis may no longer be valid and rely on *People v. Harris* (1994) 9 Cal.4th 407, 424, fn 11, where the court said the *Green* analysis “could be questioned.” The People contend that when the jury is given both a legally correct and a legally incorrect instruction on the elements of the crime, the proper harmless error test is: If the jury had been given only the proper instruction, is it clear beyond a reasonable doubt that the same conviction(s) would have resulted. As an intermediate appellate court, we are not free to anticipate a future change of direction by our Supreme Court. (*Auto*

Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) In any event, based on the evidence presented and the prosecutor's closing argument, we would find the instructional error reversible under any standard. (*People v. Perez, supra*, 35 Cal.4th at pp. 1236-1237 (conc. opn. of Brown, J.))

This modification changes the judgment.

Respondent's petition for rehearing is denied.