SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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THE PEOPLE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
JORGE GONZALEZ et al.,
Defendants and Appellants.

No. S234377

Second Appellate District, Division Four, No. B255375
Los Angeles County Superior Court No. YA076269
Honorable Scott T. Millington, Judge

GONZALEZ'S REPLY BRIEF ON THE MERITS

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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF CALIFORNIA, Plaintiff and Respondent, vs. JORGE GONZALEZ, ERICA MICHELLE ESTRADA, AND ALFONSO GARCIA, Defendants and Appellants.	No. S234377

INTRODUCTION

This Court granted the petitions for review filed by each of the appellants/defendants, limited to the following issue:

> Was the trial court's failure to instruct on murder with malice aforethought, lesser included offenses of murder with malice aforethought, and defenses to murder with malice aforethought rendered harmless by the jury's finding of a felony murder special circumstance?

Gonzalez argued in his Opening Merits Brief that the trial court's error was not subject to harmless error analysis but instead was reversible *per se*, so that the jury's finding on the special circumstances allegation was irrelevant. (Gonzalez's Opening Merit's Brief, hereinafter cited as GOMB, at pp. 41-47.) Although the Attorney

ARGUMENT

I.

THE FINDING ON THE SPECIAL CIRCUMSTANCES ALLEGATION IS NOT RELEVANT TO THE ISSUE OF PREJUDICE BECAUSE THE TRIAL COURT'S REFUSAL TO INSTRUCT ON MALICE MURDER AND ITS LESSER INCLUDED OFFENSES WAS STRUCTURAL ERROR.

In his Opening Brief, Mr. Gonzales asserted that the trial court's refusal to instruct on malice murder was structural error, so that reversal is required without consideration of prejudice. Gonzalez cited and relied upon numerous cases, including *People v. Cummings* (1993) 4 Cal.4th 1233, in which this Court held that a trial court's failure to instruct on 4 of the 5 elements of the charged robbery constituted structural error.

Since Mr. Gonzalez's Opening Brief On The Merits was filed, this Court addressed the question whether the failure to instruct on the elements of a charged crime "can *ever* be found harmless." (Slip opn. at p. 1; italics added.) This Court in *Merritt* concluded that, because the omitted instructions in that particular case pertained only to elements of the crime which were not only undisputed but also expressly conceded by defense counsel, the error was not structural because the error "did not vitiate the finding on the only *contested* issue at trial: defendant's

identity as the perpetrator." (Slip opn. at p. 12; italics in the original.)

It is extremely important to recognize and iterate that this Court in *Merritt* did not hold that a failure to instruct on the elements of a charged crime could categorically never be found to constitute structural error. (Slip opn. at p. 13; italics in the original):

> We agree with the dissent that an instructional error or omission that amounts to the *total* deprivation of a jury trial would be structural error, that is, reversible per se. (Dis. opn., *post* at p. 5.) That is not remotely what occurred here. Both attorneys described the elements of robbery to the jury, and did no accurately and completely. (See discussion, *post*, at p. 15.) The error did not vitiate three of the jury's findings: (1) that defendant acted with the mental state required for robbery, (2) that he used a firearm, and (3) that he was the perpetrator. Defendant received a full and fair jury trial, with complete and correct instructions, on the question of identity, the only contested issue at trial.

The *Merritt* case thus suggests that the determination whether an instructional error is "structural" is a determination that must be made not by identifying the generic type of error involved, but instead by determining the impact of the error on the result, on a case-by-case basis. There are several problems with this approach.

The first theoretical problem raised by *Merritt* is that, a matter of history and precedent, appellate courts prior to *Merritt* treated the determination whether an error is "structural" *not* by determining the impact which it had on the particular case, but by assessing whether it

was the type of error which belongs to the general category or "limited class" of errors which affect the "framework within which the trial proceeds." (*Johnson v. United States* (1997) 520 U.S. 461, 468, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 310) so that it is often "difficult" to "assess the effect of the error." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4; see *Johnson, supra*, 520 U.S. at 468-469 (citing cases in which the United States Supreme Court has determined a type of error falls into that "limited class," including *Gideon v. Wainwright* (1963) 372 U.S. 335 [deprivation of counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [lack of impartial trial judge]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [right of self-representation at trial]; *Waller v. Georgia* (1984) 4676 U.S. 39 [right to public trial]; and *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

As this Court recently recognized in *People v. Mendoza* (2016) 62 Cal.4th 856, 900: "The [United States Supreme Court] traditionally takes a categorical rather than a case-by-case approach to defining constitutional error it designates as structural. (Citation omitted.)" When an error falls within one of these "categories," the United States Supreme Court holds the error to be "structural" without first conducting an assessment of the prejudicial effect of the particular error, but

instead by merely determining that it is type of error which "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder v. United States* (1999) 527 U.S. 1, 9; see *Rose v. Clark* (1986) 478 U.S. 570.)

In this context, an error which deprives the accused of his Sixth Amendment right to have a jury determine his guilt or innocence of the charged offense makes the trial "fundamentally unfair[1]," and in such a case the question of harmlessness is "irrelevant" to the determination whether the error is structural. (*Gonzalez-Lopez, supra*, 548 U.S. 140, 148, fn. 4; see *Sullivan v. Louisiana, supra*, 508 U.S. 275, 281 ["the jury trial guarantee [is] a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function]; *People v. Blackburn* (2015) 61 Cal.4th 1113 [trial court's failure to obtain a jury trial waiver is reversible *per se*]; *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 543 [denial of jury trial is

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[1] In a series of cases decided since *Neder*, the United States Supreme Court has consistently emphasized that the Sixth Amendment right of trial by jury is an important part of the structure of all criminal trials. (See *Jones v. United States* (1999) 526 U.S. 227, 245 [discussion of historical roles of judge and jury]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [jury and not judge must adjudicate elements of charged crime]; *Ring v. Arizona* (2002) 536 U.S. 584, 608 [jury and not judge must weigh and determine death penalty factors]; *Crawford v. Washington* (2004) 541 U.S. 36 [barring use of testimonial hearsay under Confrontation Clause]; *Blakely v. Washington* (2004) 542 U.S. 296 [judge may not impose sentence based on facts not found by jury].)

reversible *per se*]; Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States* (2001) 21 Am.J.Crim.L. 229, 239 ["A fundamentally fair trial includes the right to a jury verdict on all elements of the crime"]; Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury* (2008) 76 Fordham L.Rev. 2027, 2030-2031 [failure to instruct on elements of crime "works a different and more profound constitutional injury to the jury and to the very structure of the Constitution"].)

Gonzalez submits that under this traditional "class designation" approach, the failure of a trial court to instruct on <u>any</u> of the elements of malice murder -- (a) in a case in which both the malice murder theory and the felony murder are pleaded; and (b) in which there is conflicting evidence which might support juror findings on either theory, but not on both; and (c) in which only one of the two theories is submitted for the jury's consideration and decision, constitutes "structural error." It was certainly "unfair" to submit only the felony murder theory in this case, since it deprived Gonzalez of his Sixth Amendment right to jury trial, and abridged his Fourteenth Amendment right to proof of each element of the charged crime of malice murder beyond a reasonable doubt.

Furthermore, the error made the trial "an unreliable vehicle for determining guilt or innocence" since it precluded the jury from returning a verdict of only second degree murder, or of lesser offenses to the charged crime of malice murder, and stripped the jurors of their power to consider whether Gonzalez's complete defenses of self-defense and accident might apply so as to produce an acquittal.

A related problem with *Merritt's* case-by-case approach is that under it the reviewing court examines the prejudicial effect of the error, and if the court concludes that it can determine whether the error did or did not actually prejudice the defendant, then the error will not be deemed "structural" so that the harmless error analysis in which it has already just already engaged is considered to be the appropriate standard to be applied. In other words, and in more colloquial terms, the *Merritt* approach is analogous to the fluffy tail wagging the dog to which it is attached -- it requires a reviewing court to use an unsettled standard of review to engage in harmless error analysis on a case-by-case basis, at least in the instructional error cases, for the purpose of determining whether a harmless error standard of review should even be employed. The *Merritt* case-by-case approach to determining whether the structural error standard applies is merely a circular

application of harmless error analysis, masquerading as a determination of the standard of appellate review.

In any event, even if the type of case-by-case analysis approved and applied in *Merritt* is also applied to Mr. Gonzalez's case, the refusal to instruct must nevertheless be deemed to constitute "structural error."

The *Merritt* case bears no resemblance to the legal and factual situation presented by this case, in which the trial court not only failed to instruct on <u>any</u> of the elements of malice murder, the crime with which Mr. Gonzalez was expressly charged, but also failed even to instruct the jurors that they had the option of convicting of other homicide-related offenses, even if they should conclude that no robbery or attempted robbery had occurred, and further failed to instruct on complete and partial defenses which the jury could have found to be proven, had it been given the opportunity to do so.

As Mr. Gonzalez discussed at length in his Opening Merits Brief, a charge under section 187 alleges malice murder, although by judicial decision the prosecution is permitted under such an allegation to proceed in addition under the alternate theory of felony murder, so long as the felony is one of those set forth in section 189. (GOMB at pp. 29-40.) But a conviction of first degree murder based on malice murder

requires jury findings of premeditation, deliberation, and malice, whereas none of those findings are necessary for a conviction under a felony murder theory. Conversely, a finding of first degree murder under a felony murder theory requires only a finding that the homicide occurred during the commission of a qualifying felony (see § 189), which is a determination that is unnecessary for conviction under a malice murder theory. See CALCRIM Nos. 520, 521, 540A.

The jury in Mr. Gonzalez's case, however, was never informed (by jury instruction, argument of counsel, or otherwise) that it had the option of weighing the evidence according to a malice murder theory. It was given no hint that it could reject a finding of robbery and yet convict appellant of some variant of criminal homicide other than felony murder, such as malice murder or one of its several lesser-included offenses. The jury was also never advised that it could consider the defenses of self-defense and accident, or the partial defenses of imperfect self defense, or heat of passion on sufficient provocation.

The jury was instead given instructions under which, in order to return *any* criminal conviction, it was compelled to find that the homicide occurred during the course of a robbery.

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A. The Existence Of A Plan Or Attempt To Rob Was Not Uncontested Or Expressly Conceded In This Case.

This is not a case, as was the critical situation in *Merritt*, in which the facts of the crime were conceded, or undisputed, so that the omission of instructions bore only on immaterial matters and could be jettisoned or regarded as being legal surplusage. As Mr. Gonzalez reported in his Opening Merits Brief (at pp. 6-28.), in this case there were three disputed and irreconcilable versions of fact, and the selection by a jury was critical since it would produce starkly different legal consequences, as explained below. The wholesale failure to give instructions under which the jurors could consider the charged crime of malice murder, as well as its lesser included offenses and the complete and partial defenses supported by the trial evidence, made the trial a sham and a mockery of justice, and perforce was "structural."

The jurors could have returned guilty verdicts of malice murder, or of voluntary or involuntary manslaughter, or could have acquitted based on self-defense or the doctrine of accident, had it been given the appropriate jury instructions. Because each of these verdicts would have been supported by at least one of the following versions of the evidence, and because the felony murder theory was not conceded or established without evidentiary conflict, the omitted jury instructions

cannot be deemed to be mere surplusage for purposes of determining whether the error was structural, under *Merritt.*

1. Theory One: *Murder By Ambush - No Robbery.*

The first factual scenario was presented solely through the unsworn, out-of-court testimony of Alejandro Ruiz, who was Rosales's driver and bodyguard. Although this evidence was adduced by the prosecution, *in this version, there was no robbery or attempted robbery.* Instead, Ruiz claimed that at the request of Victor Rosales, he picked up Rosales and drove him to the corner of Prairie Avenue and 112th Street so that Rosales could meet his girlfriend, Michelle Estrada. (3RT 2792.) According to Ruiz, he was parking his car at the curb when Estrada and two males emerged from behind some palm trees, and one of the men walked up and shot Rosales. (3RT 2793; 4RT 3030.)

Under Ruiz's account, there was no averment or mention of Rosales having any drugs, or of any plan to sell drugs, to anyone. Under Ruiz's account, the shooting was an ambush, and nothing more.

2. Theory Two: *Murder In The Course Of Robbery.*

The prosecution's second, and inconsistent theory was that the shooting and homicide was carried out for the purpose of robbing Rosales of drugs. This theory was supported only by the inconsistent

testimony of a single witness, admitted drug addict Anthony Kalac.

Kalac testified that he was in a nearby hotel room with Gonzalez, Estrada and Alfonso Garcia a few hours prior to the shooting, and heard them discuss how they could obtain drugs. Kalac testified that everyone in the room was talking and watching television, when Kalac thought that he heard them discussing something "along the lines of finding someone that they could get dope from, basically," but Kalac did not know "exactly what was said."[2] (6RT 4257, 4258.)

Kalac left the hotel room for a short time in an unsuccessful attempt to meet with his customary heroin dealer, but when his dealer failed to appear he returned to the motel room, where he thought that there was conversation to the effect that no one had any money, and they were trying to figure out how to borrow money or to get someone to "front" them some drugs. (6RT 4261, 4372; 7RT 4875.)

Kalac testified that he heard Estrada say that she knew someone "that they could come up on," although he admitted that he was not sure exactly what she said. (6RT 4262, 4373, 4374.) Kalac

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[2] Kalac testified that he was "high" on heroin during the entire time he was at the Crystal Inn. (6RT 4370, 4433.)

understood that the phrase "come up on" meant "to rob basically."[3] (6RT 4262.) Gonzalez, Gomez, and Estrada were primarily speaking Spanish, which Kalac did not understand, and he was continuing to watch television, and so did not participate in their discussions.[4] (6RT 4374-4375, 4416.) Kalac admitted that he was a "drug addict" and that at the time, his "one and only concern was to get high." (6RT 4422; see 6RT 4428-4429.)

Kalac reported that Gonzalez was talking on his own cell phone when Estrada used the phrase "come up on,"[5] and although Kalac did not hear "specifically what they were saying," he thought that the

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[3] Kalac testified that he heard the phrase "come up on" hundreds of times in the past when other people were talking about robbery. (6RT 4263; 7RT 4863.) Kalac did not report that anyone used the phrase "come up on" during an extensive police interview conducted prior to trial. (7RT 5188.) Kalac claimed that the phrase was one which he used to describe his own prior robberies of drug dealers, although the words "never physically came out of [his] mouth." (7RT 4864, 4870, 4874.) Kalac had "no clue" how many drug dealers he had robbed, and refused to identify even the calendar years in which those robberies occurred. (7RT 4871-4872.)

[4] A homicide detective later interviewed Kalac and asked him: "In reality, you don't know what they were actually planning at the time?" Kalac responded: "I don't know what they were doing." (6RT 4375.) Kalac conceded that he did not see a gun prior to the shooting, and did not hear anyone mention one. (6RT 4413, 4414.)

[5] Kalac testified that the only words which were used that indicated to him that there was going to be a robbery was Estrada's statement that they were going to "come up" on somebody. (6RT 4375.) In an interview conducted by a homicide detective later, Kalac reported that appellant "was on the phone almost the entire time" until he left the motel room to meet Rosales. (7RT 5212.)

"general subject" of the conversations was "robbing this gentleman that [Estrada] spoke of."[6] (6RT 4264.)

Estrada asked Kalac to give her money, and promised him that they would give him heroin in exchange. (6RT 4266-4267.) Kalac gave her what he had, which was about $28 or $29. (6RT 4267.)

Estrada talked on the telephone in both English and Spanish. (6RT 4268.) Although Kalac did not understand Spanish, he thought he heard Estrada say "30 minutes" and "across the street at the laundromat," and also state that she would be the person who met with the drug dealer. (6RT 4270, 4271-4272; 7RT 4890.)

Kalac testified that Garcia said that he would go along and be the "lookout for the robbery."[7] (6RT 4273, 4411; 7RT 4882, 4883.)

There was *no* other evidence that anyone planned a robbery of anyone, or stated any intention to rob Rosales.

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[6] Kalac thought that Estrada said something "along the lines of it being an ex-boyfriend who had been physical with her." (6RT 4265.) Kalac did not know "exactly what she was saying," but concluded that she must be talking about robbing her assailant because she mentioned "the physical abuse, the black eye." (6RT 4266.) There was no evidence that Rosales had ever abused Estrada, or was the person to whom she was referring.

[7] At the preliminary hearing, Kalac testified that Garcia had agreed to be the lookout, *not* for a shooting but for "the drug transaction." (6RT 4412.)

3. <u>Theory Three</u>: *Shooting During Drug Purchase.*

The third alternative, and inconsistent set of facts presented to the jurors was that the shooting was not planned or intended by any defendant, but instead occurred when victim Rosales was surprised when he arrived at the laundromat and saw Gonzalez instead of Estrada approach the car. Rosales pulled out a gun, which surprised Gonzalez in turn, who grabbed the gun to defend himself, and it was accidentally fired in the struggle over control of it. This scenario was supported not only by the trial testimony of Gonzalez, but also by all of the available physical evidence:

Kalac testified that he heard Estrada tell Rosales on the telephone that she would come down from the hotel room and meet Rosales at the laundromat. (6RT 4270, 4271-4272; 7RT 4890.) At trial, Gonzalez testified that the plan changed because the hotel manager told them to leave because there were too many people in the room, so Estrada had to pack their bags and put them in her car, and drive down the street to a different hotel. (8RT 5494-5495, 5536, 5539; see also 6RT 4277; 7RT 4359, 4377-4378.)

Gonzalez explained that he had purchased drugs from Rosales in the past, so he did not expect that there would be any problems if

he - instead of Estrada - met Rosales to complete the drug purchase. (8RT 5476, 5479, 5522-5530, 5535.)

When Gonzalez approached the car at the curb, however, he noticed that Rosales was staring angrily at him ("mad-dogging"). (8RT 5500, 5545, 5547, 5712.) Gonzalez crouched down and leaned against the car to talk to Rosales, who was reclined in his seat and leaning to his right. (8RT 5501, 5502) But Rosales did not respond, and instead continued to "mad-dog" appellant. (8RT 5501.)

When Gonzalez asked if he should go get Estrada, Rosales responded by raising a gun in his right hand. (8RT 5501, 5504, 5550-5551, 5713-5714.) Gonzalez reacted from fear and immediately grabbed the gun, which unexpectedly fired in the course of the struggle over it. (8RT 5501, 5551-5554, 5715-5724, 5735, 5739-5740, 5751.)

Gonzalez did not know that Rosales had been shot, so he turned and ran away, because he was afraid and wanted to escape from Rosales and the driver of the car. (8RT 5506, 5511.)

Gonzalez's testimony was corroborated by all of the available physical evidence. An autopsy surgeon found "stippling," which is an abrasion caused by the discharge of gunshot residue, on Rosales's

right hand and wrist. (5RT 3649, 3655, 3959-3961, 3973.) A bullet taken from Rosales's body was "most consistent with a .22 long rifle caliber." (5RT 3954, 3955; see 5RT 3985.) An expended cartridge case found inside Ruiz's car, on the passenger-side floorboard, was "consistent with the bullet recovered at the autopsy." (4RT 3088, 3112-3114; 5RT 3955; 7RT 4930-4934.)

Gonzalez testified that he did not take drugs or money from Rosales, and that he had not intended to kill him. (8RT 5516.)

B. These Three Inconsistent Factual Scenarios Support Different Legal Theories Which Produce Significantly Different Consequences.

There were, thus, three different and inconsistent factual scenarios presented to the jurors, and they would produce three different legal conclusions concerning Mr. Gonzalez's culpability, depending upon which evidence the jurors believed:

1. Ambush but no robbery or attempted robbery.

Ruiz testified that he and Rosales were ambushed by someone who approached the car and opened fire, without any prior discussion or feigned attempt to purchase or sell drugs. If Ruiz's unsworn, out-of-court account were believed by the jurors, then it could have

returned a verdict of first degree, malice murder, but it could not have logically returned a verdict of felony murder.

2. Felony murder based on attempted robbery.

The felony murder theory, supported by the inconsistent and dubious testimony of Anthony Kalac, was the only theory of murder submitted to the jury. Thus, if the jurors desired to punish the defendants for any crime, they logically had to return a true finding on the special circumstances-robbery allegation, which they did. However, they also rejected all of the gun-use and gun-arming allegations, and those findings are consistent only with Gonzalez's testimony that it was Rosales who brought and raised a gun, and initiated the confrontation that led to his death.

3. Homicide resulting from accident or self-defense.

This third theory is inconsistent with Ruiz's account, since it is premised on Gonzalez's testimony that he did not ambush anyone and that it was Rosales who brought the gun into play. This third theory is also inconsistent with that of Kalac, since Gonzalez testified that he had not planned or attempted to rob anyone, and that instead all that anyone planned was a drug purchase.

The third theory is also the only one which is consistent with, and corroborated by, the physical evidence recovered from Ruiz's vehicle and at the autopsy.

This third factual scenario, i.e. that it was Rosales who brought the gun to the site and that the shooting occurred when a struggle over it ensued, is also the only scenario which is consistent with the jury's rejection of the prosecution's gun arming and use allegations.

It is therefore highly probable that the jury returned its special circumstances finding only because it had no other option if it wished to make logical and consistent fact findings, and punish the three drug-using defendants for the killing that indisputably did occur.

The omitted instructions were therefore essential in order for Mr. Gonzalez to receive a jury determination of the charged offense, of the legal partial defenses, and of the full defenses supported by his own testimony. The denial to Mr. Gonzalez of his Sixth Amendment right to jury trial must be considered to be as "structural error," if a jury is still to be considered a part of the "structure" of a criminal trial.

The "true" finding on the special circumstances allegation is therefore irrelevant, and the error requires reversal.

II.

THE FINDING ON THE SPECIAL CIRCUMSTANCES ALLEGATION DID NOT MAKE THE FAILURE TO INSTRUCT HARMLESS.

Mr. Gonzalez also argued in his Opening Merits Brief that the finding on the robbery special circumstances allegation did not make the failure to instruct "harmless" because: (a) the jury was presented with the stark choice of either acquitting appellant of all liability for a homicide which he testified that he committed, or returning the "true finding" on that allegation; (b) analysis of the entire record shows that there was evidence to support lesser verdicts and defenses, so that it cannot be concluded beyond a reasonable doubt that the error did not contribute to the murder conviction.

Respondent's Brief is almost entirely devoted to an attempt to persuade this Court to disinter, rehabilitate, and apply the outdated, disapproved, and inapplicable test of *People v. Sedeno* (1974) 10 Cal.3d 703. (See ROBM at pp. 21-27, 30-37.)

More than 40 years ago, a much earlier incarnation of this Court held in *Sedeno* that the trial court had erred by failing to instruct the jury on involuntary manslaughter, a lesser-included offense to first degree murder. The *Sedeno* Court, in rejecting an earlier standard for

assessing harmless error, concluded that "in some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously admitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*Sedeno, supra*, 10 Cal.3d at p. 721.)

As noted above, the Attorney General repeatedly urges this Court to apply this standard and to rule that the finding on the special circumstances allegation both begins and ends the harmless error inquiry in this case, to its advantage, even while also acknowledging that this Court overruled *Sedeno* on this point in *People v. Breverman* (1998) 19 Cal.4th 142, 149.[8] There are numerous glaring and fatal errors in the Attorney General's argument.

First, Respondent fails to apprehend that the rule which it champions applies only to an error in instructing on a *lesser-included offense*, which is an error which is *not* of federal constitutional dimension, and so even if it were to be applied this case it would, at

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[8] Ironically, it was the Attorney General who in *Breverman* urged this Court tp abandon the *Sedeno* rule on the grounds that it was "too stringent a test ..." (19 Cal.4th at p. 165.) In *Breverman*, the Attorney General argued that the correct standard should entail an evaluation of the "entire record" to determine whether an error "was actually harmless." (19 Cal.4th at p. 165.)

best, have severely limited application.

As Gonzalez explained at length in his Opening Merits Brief (at pp. 30-41), a charging allegation under section 187 includes both malice murder and felony murder theories. Neither "theory" is a lesser-included offense of the other, and the failure to instruct on either where the evidence would support a conviction is therefore error of federal constitutional dimension. (*People v. Mil* (2012) 53 Cal.4th 400, 409.) The Fourteenth Amendment's guarantee of due process requires the prosecution to prove each element of the offense beyond a reasonable doubt, which means that any instruction which omits, misstates, or otherwise removes an element of the charge violates the defendant's rights under the Fourteenth Amendment, and also abridges his Sixth Amendment right to jury trial. (See *United States v. Gaudin* (1995) 515 U.S. 506.)

Because the allegation of malice murder under section 187 charged both first degree, premeditated murder and second degree murder (*People v. Taylor* (2010) 48 Cal.4th 574, 625, citing earlier authorities), the failure to instruct on them was federal constitutional error, and requires reversal only if this Court determines -- beyond any reasonable doubt -- that it did not contribute to or affect the jury's

verdict and ancillary findings. (*Chapman v. California* (1967) 386 U.S. 18, 26.) The inquiry in such a case is "whether the record contains evidence that could rationally lead to a contrary finding ..." (*Neder, supra*, 527 U.S. at p. 19.)

Appellate review under *Chapman* and *Neder* is thus the converse of the ordinarily deferential appellate review accorded to errors which are not of federal constitutional dimension, "Although we agree that this evidence would be sufficient to sustain a finding ... on appellate review ... our task in analyzing the prejudice from the instruction error [is determining] whether any rational fact finder could have come to the opposite conclusion." (*Mil, supra*, at p. 418.)

A. The Evidence Was Sufficient To Support The Omitted Jury Instructions.

The failure to instruct was prejudicial because, based on the evidence in this case, a rational fact finder could have found that the shooting amounted only to malice murder, or to any one of the lesser-included offenses to malice murder including voluntary manslaughter due to heat of passion or to imperfect self-defense, or that the jury should acquit because the shooting it was a justifiable homicide due to self-defense, or because it was the solely the result of accident and misfortune. (*Ante* at pp. 12-20; see GOMB at pp. 6-28.)

1. Felony Murder.

The prosecution presented evidence to support a "felony murder" theory under which the homicide was the result of an attempt by appellant to rob Ruiz, with Garcia acting as a lookout and Estrada aiding by helping to plan the robbery and then luring Rosales to ostensibly meet her under the pretext of completing a drug deal. As already noted, this scenario was presented exclusively through the pre-trial statements and trial testimony of Kalac. (*Ante* at pp. 12-15.)

Mr. Gonzalez does not contend that this evidence was insufficient as a matter of law to support a conviction for felony murder, but submits that it was the weakest and least persuasive of the three different and inconsistent factual scenarios presented at trial.

2. Premeditated Malice Murder.

Al alternative factual scenario, but one which is inconsistent with that described above, is supported solely by the unsworn, out-of-court statements of Ruiz, who claimed that Rosales telephoned him and asked for a ride to meet Estrada for lunch. Ruiz never mentioned anything about a drug deal, and did not claim that Gonzalez either took or attempted to take anything of value from himself or Rosales.

Ruiz claimed that, instead, as he pulled his car to the curb,

Estrada and two unknown males ran out from behind some palm trees, Estrada pointed at Rosales, and one of her two companions opened fire with a handgun. If believed, this second scenario would support a finding of malice. (See summary *ante*, at p. 12.)

3. Second Degree Murder.

"Second degree murder is the unlawful killing of a human being with malice, but without the additional elements ... that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.) Malice may be 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." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215; see *People v. Knoller* (2007) 41 Cal.4th 139, 152.)

The evidence was sufficient to warrant instructions on this lesser-included offense, and consisted of yet a third factual scenario, which was inconsistent with each of the first two, and which was adduced principally through Gonzalez's testimony, to the effect that the shooting occurred when he met Rosales to make a drug purchase (not robbery), and Rosales unexpectedly produced a pistol and a fight over it ensued,

resulting in Rosales being unexpectedly shot in the course of the striggle. (See factual summary *ante* at pp. 16-18.) Gonzalez's account was corroborated by physical evidence, consisting of stippling on Rosales's right hand and wrist (5RT 3649, 3960-3961, 3973), and the police discovery of an expended bullet cartridge on the floor beneath the front passenger seat of Ruiz's car. (See 4RT 3088, 3112-3114.)

Moreover, the jury appears to have concluded that it was Rosales who brought the gun to the shooting scene, since it made findings that no "principal" was armed with a firearm during the homicide. (See 3CT 644-647 [findings that the firearm personal use allegations under §§ 12022.53, subds. (b) (c) (d), but also the vicarious "principal armed" allegation under § 12022, subd. (a)), were not true, and also acquitting appellant on count two, the charge of shooting at an occupied motor vehicle (§ 246).)

If the jury concluded that appellant shot Rosales in anger after taking the gun away from him, and intended to do so, then it could reasonably have returned a verdict of second degree murder, since the element of premeditation would be lacking.

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4. Voluntary Manslaughter -- Provocation.

The third factual scenario, presented through Gonzalez's testimony, also provided ample evidence to support a jury verdict of voluntary manslaughter based on heat of passion due to adequate provocation. If the evidence of a plan to rob Rosales (consisting entirely of the testimony of Kalac) is discarded, the altercation would furnish a solid evidentiary basis for a finding of provocation. An accused is guilty of only voluntary manslaughter where the killing is committed "upon a sudden quarrel or heat of passion." (§192, subd. (a).) "The 'passion' may be rage, anger, or any other intense emotion (except a desire for revenge)." (1 Witkin & Epstein, *Cal. Crim. Law* (2d ed. 1988) § 515, p. 582; see *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [Federal Constitution "requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case"].)

5. Voluntary Manslaughter -- Imperfect Self-Defense.

The third factual scenario (Gonzalez's testimony) also provided substantial evidence to support jury instructions on the basis that malice was absent due to Gonzalez's actual but unreasonable belief in the necessity to use deadly force in self-defense. (*People v. De*

Leon (1992) 10 Cal.App.4th 815, 824 ["[i]f there was substantial evidence of imperfect self-defense not inconsistent with the defense theory of the case, the trial court had a *sua sponte* duty to give such an instruction"].)

A killing that would otherwise constitute murder is reduced to voluntary manslaughter if the defendant killed a person while acting in imperfect self-defense. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1354-1355.) The difference between the defense of self-defense and the lesser included offense of voluntary manslaughter by means of imperfect self-defense is that, in the latter, the defendant's belief in the need to use deadly force is unreasonable. (CALCRIM 571.)

There was evidence that Rosales was angry at Gonzalez and suddenly and unexpectedly pointed a handgun at him, and from this evidence the jury could have reasonably returned a verdict of voluntary manslaughter based on "imperfect" self-defense, i.e., it could have concluded that the homicide was the result of an actual but unreasonable belief by Gonzalez that it was necessary to use deadly force because Rosales intended to shoot him.

Gonzalez's testimony that he feared for his life when Rosales raised the handgun, could reasonably be found by the jury to not have

stirred passion in the "reasonable person" but was sufficient to warrant a verdict based on imperfect self-defense due to an actually and subjectively perceived -- even if objectively unreasonable -- perception of lethal conduct and imminent harm threatened by Rosales. (See *People v. Barton* (1995) 12 Cal.4th 186, 201-203; *People v. Steele* (1981) 27 Cal.4th 1230, 1253-1254; *People v. Breverman, supra,* 19 Cal.4th 142, 162-163.)

6. Involuntary Manslaughter.

Involuntary manslaughter is the unlawful killing of a human being without malice (1) "in the commission of an unlawful act, not amounting to felony" (the so-called "misdemeanor manslaughter" theory), or (2) "in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b); see also *People v. Lee, supra,* 20 Cal.4th at p. 61.)

In this case, Gonzalez testified that he did not intend to fire the handgun, which went off during a struggle with Rosales while Gonzalez was merely trying to defend himself. (See factual summary ante at pp. 16-18.) This evidence supported a finding of involuntary manslaughter due to the "commission of a lawful act ... without due

caution and circumspection." (§ 192; see *People v. Carmen* (1951) 36 Cal.2d 768, 772-775; *People v. Lee, supra*, 20 Cal.4th 47, 53; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 55, fn. 12 [when a person lawfully brandishes a weapon in self-defense, but does so in a criminally negligent manner, an accidental killing is involuntary manslaughter].)

7. Reasonable Self-Defense.

A defendant is entitled to acquittal where his use of lethal force was reasonably necessary in order to defend himself. "Where from the nature of an attack a person, as a reasonable person, is justified in believing that his assailant intends to commit a felony upon him, he has a right in defense of his person to use all force necessary to repel the assault; he is not bound to retreat but may stand his ground; and he has a right in defense of his person to repel the assault upon him even to taking the life of his adversary" (*People v. Clark* (1982) 130 Cal.App.3d 371, 380, disapproved on another ground in *People v. Blakeley, supra*, 23 Cal.4th at p. 92.)

If the jury believed the third scenario (appellant's testimony), then it could have reasonably found that the shooting was an act of self-defense. The use of lethal force is legally excused when reasonably

used in self-defense. "Where from the nature of an attack ... a reasonable person is justified in believing that his assailant intends to commit a felony upon him, he has a right in defense of his person to use all force necessary to repel the assault; he is not bound to retreat but may stand his ground; and he has a right in defense of his person to repel the assault upon him even to taking the life of his adversary" (*People v. Clark, supra,* 130 Cal.App.3d 371, 380, disapproved on another ground in *People v. Blakeley, supra*, 23 Cal.4th at p. 92; accord, *People v. Humphrey* (1996) 13 Cal.4th 1073, 1082-1083.) One may kill or use deadly force "[w]hen resisting any attempt to murder any person ... or to do some great bodily injury upon any person.." (§ 197, subd. (1); accord *People v. Ceballos* (1974) 12 Cal.3d 470, 477; *People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262; *People v. Michaels* (2002) 28 Cal.4th 486, 530.)

8. Accident And Misfortune.

The defense of accident and misfortune is described in CALCRIM 3404, as follows: "The defendant is not guilty of the crimes charged if he acted without the intent required for that crime, but acted instead accidentally. You may not find the defendant guilty of

the crimes charged unless you are convinced beyond a reasonable doubt that he acted with the required intent."

Gonzalez testified that the shooting was accidental, when the gun unexpectedly discharged during his attempt to merely take the weapon away from Rosales. (8RT 5501, 5551-5552, 5715-5724, 5735, 5739-5740.)

Gonzalez's testimony did not foreclose jury instructions on the doctrines of reasonable self-defense or imperfect self-defense, since the jury could have believed some portions of his testimony (i.e., that there was a struggle over the gun) and rejected others (i.e., that he did not intend to fire the gun). (*People v. Barton, supra,* 12 Cal.4th 186, 202-203 [finding sufficient evidence of intentional shooting in imperfect self-defense despite the defendant's assertion that the shooting was accidental]; *People v. Elize* (1999) 71 Cal.App.4th 605, 610, 615-616 ["A jury ... could disbelieve defendant's testimony that the firing was accidental, and decide instead that he had fired intentionally, either actually attempting to hit one of the [assailants] or to shock them into breaking off their attack."]; *People v. Mayweather* (1968) 259 Cal.App.2d 752, 756 [jury could have found a volitional shooting in self-defense despite defendant's assertion of accident].)

B. There Was No Meaningful Third Option.

Respondent proffers the hyper-technical and unconvincing argument that the jurors had a third option, and were not forced to return a true finding on the special circumstances allegation, because they could have concluded that the homicide occurred during the course of a robbery and convicted Gonzalez of felony murder, but were legally free nonetheless to conclude that no robbery occurred for purposes of returning a negative finding on the robbery-felony murder special circumstances allegation. (ROMB at pp. 34-40.) Respondent reasons from this assertion that the jury was therefore not faced with the dreaded "all or nothing choice." (Ibid.)

This claim falls only within the realm of theoretical possibility, and is completely eviscerated once logic and common sense are brought to bear. The jurors were not instructed or advised by anyone that they had such an option. Instead, the verdict forms required the jurors to find that a robbery had occurred, as a necessary predicate to any finding that the homicide was criminal. And once the jurors made that finding, they had no logical option but to make a consistent, identical finding on the special circumstances allegation. The latter finding does not "cure" the former, but instead was compelled by it.

The jurors could not logically conclude that a robbery *had* occurred in order to return a guilty verdict on the murder count, while simultaneously determining that a robbery *had not* occurred, which would have been necessary for them to do in order to reject the special circumstances allegation. While such inconsistent verdicts may be excused by appellate court justices, the lay jurors were not advised that *they* were permitted, even as a matter of lenity or compromise, to ignore common sense and intellectual honesty and return both a guilty verdict and a negative special circumstances finding by making flatly contradictory fact findings.

C. The Jury's Not Guilty Verdict On The Charge Of Shooting Into A Motor Vehicle, And Their Rejection Of The Sentencing Enhancements, Demonstrate That The Failure To Instruct Was Prejudicial.

One must also entirely discard common sense and every day experience in order to embrace the preposterous chimera that Gonzalez, while bare-handed and acting alone, decided to rob a gun-toting methamphetamine dealer and his glowering nearby bodyguard. The jurors instead clearly believed the factual scenario described by Mr. Gonzalez,[9] as demonstrated by their "n ot guilty" verdict on the

[9] While juries frequently reject exculpatory, testimonial claims of criminal defendants, in this case the testimony of Mr. Gonzalez bore unusual and objective

charge of shooting into a motor vehicle, and their rejection of the gun-use and gun-arming enhancements, as Mr. Gonzalez pointed out in his Opening Brief on the Merits. (GOMB at pp. 51-52.)

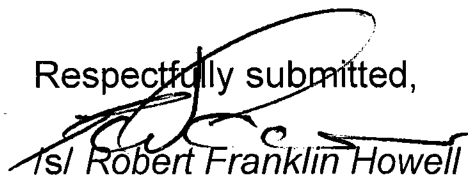
The special circumstances finding thus does not stand alone as an indicia of the jurors' factual determinations, and cannot be invoked to prove, beyond any reasonable doubt, that the error in failing to instruct on other options and results was harmless. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1203-1204.)

CONCLUSION

The Judgment of the Court of Appeal should be reversed.

Dated: April 12, 2017.

Respectfully submitted,



/s/ Robert Franklin Howell

Attorney for Jorge Gonzalez

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indicia of its' reliability and of his veracity. Mr. Gonzalez, although not required to testify, elected to do so even though he was the <u>only</u> person who identified himself at trial as being the shooter, or even as being at the shooting scene. Ruiz did not know Gonzalez prior to the shooting and therefore could not possibly identify him by name, and his only description of the shooter was that he was male. Ruiz absconded and did not appear at trial, and thus did not provide an in-court identification of anyone. Kalac testified that he was not present when the shooting occurred, and did not see it. Mr. Gonzalez was the only percipient witness to the shooting who appeared at trial, and thus if he had elected to not testify, there would have been literally no evidence that he was directly involved in the shooting, or that he personally participated in any interaction with Rosales. Moreover, as explained above, Gonzalez provided the only account which was not only consistent with, but was also directly corroborated by, all of the available physical evidence.

CERTIFICATE OF COMPLIANCE

I certify that I am the attorney for Jorge Gonzalez under appointment by the California Supreme Court in No. S234377, and that the attached Appellant's Reply Brief on the Merits contains a total of 8,099 words, as determined by the Microsoft Word word-processing program which was used to prepare it.

Dated: April 12, 2017.

/s/ Robert Franklin Howell

PROOF OF SERVICE BY MAIL

CASE: *People v. Gonzalez et al,* S234377

I, Robert Franklin Howell, declare: I am the attorney for Jorge Gonzalez in the above-referenced case. My business address is Post Office Box 71318, Las Vegas NV 89170. On April 13, 2017, I served the attached *Gonzalez's Reply Brief On The Merits* in the above-entitled action by placing a true copies thereof, enclosed in sealed envelopes, with first class postage affixed and prepaid, in the United States mail at Las Vegas, Nevada, addressed as follows:

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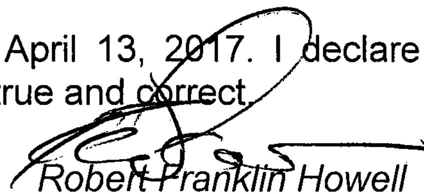
Executed at Las Vegas, Nevada, on April 13, 2017. I declare under penalty of perjury that the foregoing is true and correct.



Robert Franklin Howell

PROOF OF ELECTRONIC SERVICE

CASE: *People v. Gonzalez et al*, S234377.

I, Robert Franklin Howell, declare: I am the attorney appointed by the California Supreme Court to represent Jorge Gonzalez in the above-referenced case. My business address is P. O. Box 71318, Las Vegas NV 89170.

On April 13, 2017, I served the attached *Gonzalez's Reply Brief On The Merits* by transmitting a true copy via electronic mail to each of these e-mail addresses:

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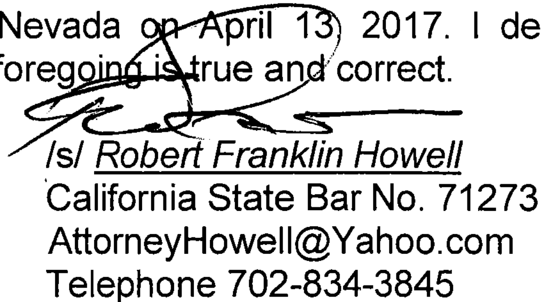

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