IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **JORGE GONZALES et al.,** Defendants and Appellants.	No. S234377

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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

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?

INTRODUCTION

Appellants were charged with malice murder and a robbery-murder special circumstance. The only theory of murder on which the jury was instructed was first degree felony-murder. Appellants were convicted of first-degree felony murder with a robbery-murder special circumstance. Because the trial court erroneously failed to instruct the jury on first degree premeditated murder and the lesser included offenses supported by the evidence, the true finding on the only charged felony-murder special circumstance does not render harmless the trial court's instructional error.

The critical question at trial was whether appellants intended to commit a robbery, and there was substantial evidence that warranted instructing the jury on the lesser included offenses of second degree implied malice murder and involuntary manslaughter based on the commission of a felony not inherently dangerous to human life. If the jury had been instructed on the lesser included offenses it would have learned the difference between robbery and theft, and been required to determine whether appellants specifically intended to commit robbery or a lesser offense that is not a predicate offense for felony murder. Due to the absence of instructions on first degree premeditated murder and the lesser included offenses of malice murder, the jury was left with an unwarranted all-or-nothing choice between acquittal and convicting appellants of felony murder. Since the jury was not presented

with the factual questions posed by the omitted lesser included offense instructions, the trial court's erroneous failure to instruct on the lesser included offenses of malice murder was not rendered harmless by the true finding on the felony-murder special circumstance.

STATEMENT OF THE CASE

Appellant Erica Michelle Estrada and coappellants Alfonso Garcia and Jorge Gonzalez were each charged with one count of malice murder (Count 1 - Pen. Code § 187, subd. (a)), with a special circumstance that the murder was committed during the commission of a robbery (Pen. Code § 190.2, subd. (a)(17)).[1] It was further alleged that a principal was armed with a firearm during the commission of the murder (§ 12022, subd. (a)(1)). Gonzalez was also charged with shooting at an occupied motor vehicle (Count 2 - § 246), and with various personal firearm use enhancements as to both counts (§ 12022.53, subds. (b), (c) and (d)). (3CT 456-459; 3SCT 456-459.)

Appellants were tried jointly by a single jury, and the prosecution proceeded solely on a theory of felony murder committing during the commission or attempted commission of a robbery. (See 8RT 5766.) On October 4, 2013, appellants were each found guilty of first degree felony murder committed in the perpetration of a robbery or attempted robbery, with a true finding on the robbery special circumstance. The jury returned a not true finding on the allegation that a principal was armed with a firearm. (4CT 644-645, 646-649; 9RT 7202-7205.) As to Gonzalez, the jury found all of the personal firearm use allegations to be not true as to Count 1, and it acquitted him of Count 2. (3SCT 644-647; 9RT 7203-7204.)

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[1] All further statutory references are to the Penal Code.

On March 18, 2014, appellants were each sentenced to life without the possibility of parole. (4CT 698-705; 3SCT 673-676; 9RT 7546.) They appealed. (4CT 706-708; 3SCT 677.) In a published opinion filed on March 30, 2016, the judgment was affirmed by the Court of Appeal, Second Appellate District, Division Four.[2] On April 28, 2016, the Court of Appeal filed an order modifying the opinion with no change in the judgment. All appellants filed petitions for review. On July 13, 2016, this court granted review.

[2] The court also modified the abstracts of judgment to delete the parole revocation fines. (Slip opn. p. 33.)

STATEMENT OF FACTS

Prosecution Case

Erica Estrada ("appellant") and Victor Rosales were friends with a casual nonexclusive sexual relationship. (3RT 2477, 2520-2523.) Rosales was a drug dealer who sold drugs to appellant at a discount and sometimes gave them to her. (3RT 2514, 2724; 8RT 5466-5467.) He resided with various family members including his mother Maria Murillo, and his sisters Mayra Gomez and Liliana Rosales ("Liliana"), in the rear house located at 3947 110th Street in Inglewood. (3RT 2475, 2501, 2517, 2746.)

Testimony of Anthony Kalac[3]

On October 6, 2009, Anthony Kalac went to the Inglewood home of Alfonso Garcia, aka Alf, to get high. (5RT 4010.) There he met Jennifer Araujo for the first time. (5RT 4012; 7RT 4936; 8RT 4552.) Kalac had used heroin before going to visit Garcia, and he used more heroin at Garcia's house. (5RT 4013-4014; 6RT 4366.) Kalac was a heroin addict, and Garcia was a methamphetamine user. (5RT 4011, 4015; 6RT 4361.)

Garcia said they were going to a hotel down the street to hang out with someone and get high. Kalac hid his heroin at Garcia's house, and between

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[3] Kalac asserted his Fifth Amendment privilege against self-incrimination, and he was granted use immunity for his trial testimony. (5RT 3934-3935, 4003-4004.) He had previously been granted immunity for his preliminary hearing testimony. (6RT 4361.)

10:00 and 11:00 a.m. Garcia, Araujo, and Kalac walked to the Crystal Inn. Garcia knocked on the door of a second floor room. (5RT 4016-4017; 7RT 4815.) Jorge Gonzales, aka Sharkie, answered the door, and the trio entered the room. Appellant was also in the room. Kalac had not previously met Gonzalez or appellant, and Garcia told him appellant was Gonzalez's girlfriend. (5RT 4018; 6RT 4251-4524.)

Kalac sat down on the couch and overheard Garcia tell Gonzalez, "Let's pack a bolt," which refers to putting meth in a pipe to smoke. (6RT 4254-4256.) Gonzalez replied, "We don't have any." (6RT 4256.) The group sat around and watched television. Kalac heard Garcia, Gonzalez and appellant talking and trying to figure out how they could obtain some methamphetamine. (6RT 4257-4258.)

After about 15 minutes Kalac used his cell phone to call his drug dealer, and Garcia spoke to the dealer in Spanish and arranged for Kalac to meet his dealer at a gas station to buy some heroin. (6RT 4259-4260.) Kalac had $35. He went to the gas station and waited a couple of minutes. His dealer did not show up so he got a drink and snack and returned to the hotel room. (6RT 4260.) There was conversation about money, and Kalac believed "there was no money in the room." (6RT 4261; 7RT 4866, 4875-4876.)

Appellant said she had someone they could "come up on," which according to Kalac, means "to rob." (6RT 4261-4262.) Gonzalez was talking

on the phone, and when he ended his call he began talking to Garcia about "going ahead with the come up," and they talked about robbing the man referred to by appellant. Kalac could not recall the details of the conversation. (6RT 4264; 7RT 4834, 4841-4842.) He did not understand the portion of the conversation that was in Spanish. (6RT 4268, 4270.) Appellant said the man was a drug dealer and an ex-boyfriend who had physically abused her, and Gonzalez seemed to be a bit agitated. (6RT 4265-4266.) Garcia, Gonzalez and appellant agreed to order $150 of meth and $50 of heroin. Appellant asked Kalac for the money he had because she needed it for a room at a nearby hotel. Gonzalez and appellant told Kalac the dealer also sold heroin, and they would give him whatever heroin they got from the robbery. Kalac gave appellant about $28 or $29. (6RT 4266-4267, 4377; 7RT 4822, 4835, 4843, 4866.)

After telling everyone to be quiet, appellant made a phone call and spoke primarily in Spanish. The only portions of the phone conversation Kalac understood were "30 minutes," "across the street at the laundromat" or "corner of 112th and Prairie," and that appellant was going to be meeting the guy. (6RT 4270-4272; 7RT 4823-4824, 4840.) Kalac heard Garcia say he was going to be a lookout for the robbery, and Gonzalez and Garcia walked out of

the room.[4] (6RT 4272-4273, 4411-4412; 7RT 4844, 4882-4883.)

Appellant immediately started packing up the room because they were going to move to a cheaper hotel. (6RT 4275.) She made a phone call to find out the "dealer's" arrival time, then said he would be there in 10 to 15 minutes. (6RT 4275-4276.) Kalac and Araujo helped appellant bring her bags down to her older black Cadillac. (6RT 4277.) A friend of Garcia's came by on his bike, looking to give Garcia money for some meth. (6RT 4372-4374.) Appellant, Kalac and Araujo got in the car, and appellant drove for eight to 10 minutes in a circular route before arriving at the American Inn, which was four to five buildings south of the Crystal Inn. (6RT 4277-4278, 4378-4379.)

Araujo and Kalac waited in the car while appellant registered for a room, and when appellant returned three to five minutes later the trio brought all of the bags into a hotel room. (6RT 4278, 4378-4379.) Appellant received a phone call and told her caller she would be there in two minutes. Three to eight minutes after entering the room appellant and Araujo left. (6RT 4278-4279, 4402-4403.)

Kalac went to look for Gonzalez and Garcia. (6RT 4279, 4379.) He did not see the Cadillac at that time. (6RT 4279.) Kalac walked out of the hotel driveway, headed south on the west side of the sidewalk on Prairie, and

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[4] During the preliminary hearing Kalac testified Garcia said he was going to be a look-out for a drug transaction. (See 6RT 4412-4413; 7RT 4845.)

saw Gonzalez and Garcia walking quickly on the east sidewalk of Prairie by the laundromat. (6RT 4280-4281, 4379-4380.) He did not see appellant. (6RT 4381.) Garcia split off from Gonzalez and crossed the street directly towards Kalac, while Gonzalez proceeded north. (6RT 4281.) Garcia told Kalac to hurry up so he could get back to the American Inn. Kalac asked what happened, and Garcia, who appeared to be very nervous, replied, "Shit went bad." (6RT 4282.) Kalac and Garcia walked back to the hotel room, Garcia quickly changed his clothes, and the two men left and began walking to Garcia's house. (*Ibid.*) As they walked down 112th and Prairie there was a lot of police activity. Garcia did not talk about the incident. (6RT 4283.) Kalac retrieved his heroin at Garcia's house and then he left to go home. (6RT 4283, 4420.)

Other Testimony About The Events of October 6, 2009

On October 6, 2009, following a one night stay, appellant checked out of room 232 at the Crystal Inn located at 11163 South Prairie Avenue in Inglewood. (4RT 3322-3325, 3341; Exh. 38.) She then registered for a room at the American Inn and Suites located at 11025 South Prairie. (5RT 3987-3990; Exh. 63.) Records show that $51 of the $58 room charge was paid. (7RT 5139.)

Around 1:00 p.m. Rosales called Alejandro Ruiz and asked for a ride. Ruiz picked up Rosales around 2:16 p.m., and Rosales said he had received a

call from his girlfriend - appellant - who wanted to meet him for lunch, and they agreed to meet at the laundromat at the corner of Prairie and 112th Street. As Ruiz was driving westbound on 112th Street approaching Prairie, Rosales told him to park along the curb. He began to park and noticed a gray Nissan Altima traveling westbound. It passed him, then parked in front of him, and a small collision occurred between the two cars. Ruiz saw appellant accompanied by two male Hispanics walk from behind two large palm trees. When appellant was on the sidewalk she pointed out Rosales, and one of the male Hispanics walked up to the passenger door of Ruiz's vehicle, produced a small chrome semi-automatic handgun, and from a distance of three feet fired a single shot. (3RT 2792-2793; 4RT 3032, 3054.) The shooter then walked around the car and attempted to pull Ruiz out of the driver's seat, but Ruiz accelerated and drove westbound on 112th Street. (3RT 2793.)

Liliana was at home that afternoon, and after she got into her van to drive to work a car driven by Ruiz pulled into the driveway directly behind her van. (3RT 2479-2482, 2493.) Ruiz turned off his car, exited, and told Liliana her brother had been shot. (3RT 2482-2483.) Liliana ran over to Ruiz's car, saw Rosales was hurt, and asked who had hurt him. Ruiz responded, "Erica, Erica." (3RT 2484.) Liliana yelled out for her neighbors to call 9-1-1. She ran into the house to find her mother, told her Rosales had been hurt, then they both ran towards Rosales. (3RT 2485, 2507.) Gomez also ran outside. (3RT

2527, 2705.) With the help of some neighbors they were able to get Rosales out of the passenger side of the car. (3RT 2489, 2507, 2509, 2526-2527, 2708-2709.) Liliana saw Rosales had been shot in his stomach area. (3RT 2490.) Murillo heard people asking, "Who was it?" Ruiz, who was "in despair" responded in Spanish, "the girlfriend, the girlfriend." (3RT 2508-2509, 2512-2514, 2707.) Gomez heard Ruiz say in Spanish, "It was Erica." (3RT 2706.)

Around 2:37 p.m. Inglewood police officers received a radio call about a shooting victim in the area of 110th and Doty. Officers began arriving at 2:40 p.m. (3RT 2738-2739, 2743-2744.) Rosales was laying on his back in the driveway of 3749 West 110th Street next to a Oldsmobile Alero, with some people around him. He was gasping for air, his breathing was shallow, and he had a single gunshot wound to his upper right chest. (3RT 2749-2751, 2788-2789; 4RT 3061-3062.) Paramedics arrived, treated Rosales, and transported him to the trauma center at Harbor-UCLA. (3RT 2490-2491, 2510-2511, 2753-2754, 2789.) Rosales later died at the hospital. (3RT 2754-2755.)

Once the paramedics took over at the scene, Ruiz, who appeared to be in shock, told Officer Fernando Vasquez he had witnessed the shooting. (3RT 2789.) After obtaining Ruiz's statement Vasquez conducted a patdown search of Ruiz, but found no weapons. He then took Ruiz to the corner of Prairie and 112th. (4RT 3016-3017.)

Gomez volunteered to take the police to appellant's residence because she did not know appellant's exact address. (3RT 2711.) She rode with the officers and directed them to 12536 Truro in Hawthorne. (3RT 2712-2713, 2774-4777, 2780, 2782.)

The Apprehension of Appellants

At 7:14 p.m. on the day of the shooting, appellant and Gonzalez were arrested outside appellant's home. (3RT 2797-2798, 2799; 4RT 3018, 3064-3065.) Gonzalez had 25 cents on his person at the time he was booked. (5RT 3912-3913.) A gunshot residue test was performed on Gonzalez, and the sample was positive. (3RT 2800-2802; 4RT 3018-3022, 3044-3045, 3048-3049; 5RT 3623-3624, 3627.) Appellant was also given a gunshot residue test, but no particles were detected. (4RT 3023-3026, 3065, 3067, 3070; 5RT 3613, 3619-3623.)

On December 17, 2009, Garcia was arrested at a residence in Inglewood after he attempted to flee from officers when they arrived with an arrest warrant. (5RT 3992, 3996.)

Investigation of the Shooting

Police recovered Rosales's cell phone between the center console and passenger side seat of Ruiz's vehicle, and a .22 caliber shell casing was recovered from the passenger floorboard. (4RT 3123-3114, 3122; 5RT 3955, 3968; 7RT 4930-4934, 5112.)

An autopsy of Rosales was conducted on October 8, 2009. The medical examiner concluded the cause of death was a gunshot wound to the right side of the chest. (5RT 3648-3648, 3653.) A .22 caliber bullet was recovered from Rosales's left back. (5RT 3659, 3954-3955.) Rosales had stippling on his right hand and wrist which indicate the firearm was discharged within two feet the victim. (5RT 3649, 3655.) Toxicology tests were positive for methamphetamine and amphetamine. (5RT 3656.) The handgun used in the shooting was not recovered. (8RT 5431.)

Homicide Detective Kevin Lane saw Gonzalez on the day of the shooting and did not notice any injuries or stippling on him. (7RT 4927-4928.) During his investigation of the case Lane drove in a circular route from the Crystal Inn to the American Inn, and at 2:00 p.m. the drive took 3 minutes, 44 seconds. (7RT 5104, 5106.) At 8:00 a.m. the same route took him five minutes and five seconds. (7RT 5127.) According to Lane it takes about 30 seconds to drive from the American Inn to corner of 112th and Prairie, and two to three minutes to walk that distance. (7RT 5105.) A drive from Rosales's home to the location where the shooting occurred takes about two minutes. (7RT 5140.)

Lane obtained surveillance video footage of the Crystal Inn from October 6, 2009. (Exh. 39; 4RT 3320, 3325-3330; 7RT 5110.) For the period on the video time-stamped 14:06:27 to 14:07:08, an individual is seen walking

towards Prairie. Around 14:07:08, an individual is seen walking across the walkway of the motel. (4RT 3336.) From 14:17:11 to 14:21:28, multiple individuals are shown entering a vehicle and then leaving a parking stall of the hotel. (4RT 3338.)

According to records from Verizon Wireless, between 2:12:12 and 2:28 p.m. on October, 6, 2009, two phone calls were made from Garcia's phone to Rosales's phone, and three calls were made from Garcia's phone to Araujo's phone. Garcia's phone also received one call from Rosales's phone and two calls from appellant's phone. The cell towers that picked up the signal from Garcia's phone were located approximately within one mile of 112th Street and Prairie Avenue, with a range between half a mile to a mile and a half. (4RT 3353, 3355, 3357, 3359, 3364-3371, 3374, 3378-3380; 5RT 3928; 7RT 4930-4940, 5102-5105; Exhs. 40, 41.) No calls were made to or from Garcia's phone from 2:28 p.m. to 2:37 p.m. (4RT 3371-3372.)

On October 22, 2009, appellant telephoned her aunt, and the call was recorded by the jail inmate telephone monitoring system. (6RT 4290; 7RT 5109, 5127.) During the call appellant said she had used Jennifer's [Araujo's] cell phone to call Rosales, but said she "called private." (Exh. 69 - 4CT 540-541.)

Testimony of Stephanie San Angelo

Stephanie San Angelo previously dated Kalac for several years and

they lived together intermittently, but she could not recall if they were dating in 2009. (7RT 4891-4892, 4910.) Within a week after the shooting San Angelo heard things about the incident. (7RT 4892-4893, 4904.) After speaking to Kalac's friend "Kevin," she spoke to Kalac about the incident. (7RT 4893-4894.)

On February 1, 2010, San Angelo went to the Inglewood Police Department and reported to Detective Michael Han what she had learned. (7RT 4892-4894, 4913-4914, 4920.) She told Han the following: Kalac said he had gone to buy dope with "Alf" and another male and female were present; they intended to jack somebody - the girl's boyfriend or ex-boyfriend or father of her child; they contacted him, he came out, they went down to meet him while Kalac stayed in the room, and either the two guys or the two guys and the female "went down tried to jack him," but the guy was not giving up and either tried to run or drive away, and they shot at him and hit him. (7RT 4895-4896, 4911-4912.) She also said the driver of the vehicle was shot and the passenger tried to drive away. (7RT 4911.) San Angelo did not know how Kalac found out about the shooting. She asked Kalac if he had walked past the dead body and not said anything, and Kalac replied, "Yeah, I didn't care about it. I cared about my dope." (7RT 4896.) Kalac's response bothered her so much she went to the police. (7RT 4909.)

San Angelo did not recall Kalac telling her anything about getting a

gun. She heard someone had given Kalac the gun to dispose of, but she had no idea regarding the identity of that individual. (7RT 4906.)

Han's Testimony About His Conversation With San Angelo

On February 1, 2010, Han spoke to an "anonymous informant" regarding the Rosales homicide. Han was not a homicide detective, so he sent an e-mail to several homicide detectives about his conversation. (7RT 4914-4916, 4919.) The e-mail stated the informant learned about the incident from Kalac; Kalac talked about a robbery of a drug dealer; "Alf" or "Ralph" was the mastermind of the robbery; around October of 2009 that individual, Kalac, another male, and a female executed the drug dealer who was in a car in the area of Prairie and 113th Street; and afterwards "Ralph" gave the gun to Kalac for disposal purposes. (7RT 4920-4921.)

After sending the e-mail Han made some handwritten notes. (7RT 4921-4922.) He had taken down the name "Stephanie" and a 310 phone number with an address of 4475 141st Street in Hawthorne, but he had not included that information in his e-mail. (7RT 4923-4924.)

Additional Testimony of Kalac

Kalac denied seeing a gun any time on the day of the shooting. (6RT 4357, 4408, 4413; 7RT 4833-4834.) He also denied hearing anyone mention a gun when he was at the Crystal Inn. (6RT 4414; 7RT 4834.)

On March 3, 2010, Kalac met with Detective Lane at the station and

gave a statement about the incident. (6RT 4284.) He may have made some assumptions when giving his statement. (7RT 4836.) Kalac had learned from Araujo that Gonzalez and appellant were under arrest and charged in the case. (7RT 4866-4867.) He had stopped using drugs a couple of months after the shooting. (7RT 4867, 4876.)

Kalac said appellant told him she knew some guy they could rob for meth, but those were not the exact words spoken. He used the word "gist" a lot during the interview. Kalac could not remember exactly what appellant said. (6RT 4373.) Garcia, Gonzalez and appellant were talking to each other in Spanish, which Kalac could not understand. (6RT 4374-4375.) When Lane asked Kalac, "In reality you don't know what they were actually planning at the time," Kalac responded, "I don't know what they were doing." He claimed he would not have wanted any part of a robbery. (6RT 4375.)

The only details Kalac could give to evidence a robbery had been planned were that appellant and coappellants were talking about not having any money, and they were trying to figure out someone they could call and "come up on." (7RT 4886.) To Kalac, "come up" is robbing someone, which it is what he used to do. (7RT 4886.) A long time ago when he was using drugs, Kalac had "come up" on someone to rob them. He did so alone, without a gun or other weapon, and he never used physical violence. Kalac simply grabbed the drugs from the dealer and ran. (7RT 4864, 4872.)

Kalac told Lane he did not know a gun was involved and did not find out until after the fact when he spoke to Araujo. (6RT 4377.) He said that two and a half weeks before the interview he learned from Araujo that the drug dealer who was shot during the incident had died. (6RT 4365.) During the interview Kalac asked Lane, "What are you gonna charge me with, accessory?" (7RT 4812.)

Testimony of Detective Lane Regarding His Interview of Kalac

During Kalac's interview with Lane, Kalac did not use the phrases "come up" or "jack this fool." (7RT 5122, 5188-5189.) He said appellant set up the robbery by calling her ex-boyfriend and arranging the meeting at 112th and Prairie, and Gonzalez told him the person bringing the drugs would have heroin, and whatever heroin they got they would give to Kalac. (8RT 5438-5439.) After appellant's phone call they moved from the Crystal Inn to the American Inn. (8RT 5439.) Kalac heard the reason they were going to rob Rosales was because he had beaten up appellant. (7RT 5213.) Lane asked Kalac how he knew they were going to rob the man, and Kalac replied, "I have no idea." (8RT 5456.) Lane did not get any specifics about the planning of the so-called robbery or anything that would evidence a robbery. (7RT 5214.)

Lane was aware the "anonymous informant" had provided information that Garcia gave Kalac the gun and told him to hide it. (8RT 5453.) He asked if Kalac had a conversation with Garcia about disposing of the gun, but Kalac

said he never saw or heard a gun, and did not know anything about it. (8RT 5437, 5453-5455.) Kalac told Lane that Araujo told him [the shooter said], "If you drive off, I'm going to shoot. Give me your dope." (8RT 5451.)

During the interview Kalac gave inconsistent statements about when he learned the victim died. At one point Kalac said he found out a couple of days after the incident, and at another point he said he found out two or three weeks before March 3rd. (8RT 5445-5446.)

Defense Case[5]

A defense investigator interviewed Liliana in March of 2012. Liliana said she was aware Rosales sold drugs, and he sold drugs to appellant at a discount or gave them to her for free. (8RT 5466-5467.)

Gonzalez testified on his own behalf. He worked as a machinist from 1989 to the beginning of 2009, when he stopped due to his health. (8RT 5469-5470.) He began living off his savings of $46,000, and in February 2009 he began working part-time as a care giver for a paralyzed man, Ernesto Corral. (8RT 5469-5470, 5757, 5759.) Corral testified and confirmed that appellant worked for him. (8RT 5756-5757.)

On October 6, 2009, Gonzalez had money, as Corral paid him at least $200 at the beginning of each month. (8RT 5471, 5757, 5761.) Gonzalez had

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[5] Appellant and Garcia did not call any witnesses or present any evidence in their defense.

about $165 on his person at the Crystal Inn. He denied planning to rob anyone that day, and testified there was no discussion at the Crystal Inn about robbing anyone. (8RT 5472.)

Gonzalez met appellant in August or September of 2009 through Araujo. (8RT 5480.) They became friends, hung out together at bars, and socialized. About a week before October 6, 2009, they became intimate but did not have a serious or exclusive relationship. (8RT 5481.) Gonzalez was aware appellant had some type of relationship with Rosales. (8RT 5482.)

Prior to the shooting Gonzalez met Rosales on two occasions. They first met when Rosales and appellant stopped by a hotel where Gonzalez was staying, and Rosales sold him drugs at a discount because he knew appellant. (8RT 5478, 5522.) The second time occurred about two weeks before October 6, 2009, when appellant was hanging out with Gonzalez at a hotel. Rosales pulled into the hotel, Gonzalez and appellant walked downstairs, Rosales sold them some drugs, and after Gonzalez went back to the room appellant stayed downstairs with Gonzalez. (8RT 5478.) Although Rosales was not talkative with Gonzalez, he did not appear to have any problems with Gonzalez. (8RT 5479.)

On October 5, 2009, Gonzalez spent the night at the Crystal Inn in a room paid for by appellant. She had given Gonzalez a surprise birthday party in the room that night. (8RT 5473.) At one point appellant left to be with

Rosales, and she did not return until close to midnight. (8RT 5482-5483.) Around 1:00 a.m. Gonzalez and appellant fell asleep while Araujo was in the room. At 3:00 or 4:00 a.m. Garcia, Araujo, and another person woke up Gonzalez and asked if he wanted to get high. Gonzalez declined and went back to sleep. (8RT 5484, 5488.)

Sometime before 1:00 p.m. Garcia returned to the room with Kalac and Araujo. Gonzalez was introduced to Kalac. (8RT 5474-5475, 5484.) Kalac sat down on the couch. He appeared to be high and at times looked like he was falling asleep. (8RT 5475, 5486, 5711.) Garcia asked Gonzalez to "pack a bowl." Gonzalez said they did not have any, and he asked appellant if she wanted to "call Rosales to order a teena, a 16th" of crystal meth.[6] (8RT 5475-5476.) Nobody talked about being broke or coming up with a plan to try and raise money to buy drugs. (8RT 5476-5477.) There was no talk about robbing Rosales or anyone. (8RT 5487, 5711.)

While in the room Gonzalez was on the phone speaking Spanish to his friend Pato. (8RT 5484.) Appellant called Rosales because Gonzalez told her to call him "to get a teena," and Kalac wanted some heroin. At first Kalac said he wanted 50, that he had 50, then he changed it and said he only had $30. Appellant told Kalac she would "get him a 50 for 30." (8RT 5485.) Gonzalez

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[6] Gonzalez had been using meth on and off for about three years. He last used it about 8:00 p.m. on October 5, 2009. (8RT 5476-5477.)

only heard the first part of appellant's conversation with Rosales, which was in English. (8RT 5486.) He did not talk to Kalac. (8RT 5486.)

Gonzalez denied having a gun on October 5 and 6, 2009. (8RT 5489.) He did not see a gun at the Crystal Inn and there was no discussion about a gun. He never saw appellant, Garcia, or Kalac with a gun. (8RT 5491.) Gonzalez never heard appellant say Rosales hit her. He recalled that on October 6th, appellant, in the presence of Kalac, said her "baby daddy," who is not Rosales, beats her up. (8RT 5489.)

The manager of the Crystal Inn called the room and said there were too many people going in and out of the room, so they had to move hotels. (8RT 5535-5536.) Appellant told Gonzalez to go meet Rosales across the street at a laundromat to get some dope while she moved their things to another hotel room. He was not told to go rob Rosales. Gonzalez left the room to meet Rosales at the laundromat across the street. (8RT 5494-5495.) Garcia went with Gonzalez to keep him company, leaving the room a little after Gonzalez. Nobody asked Garcia or anyone to be a look-out for anything. (8RT 5496-5497.) Appellant did not say she would meet Gonzales on the street, and Gonzalez never saw appellant there. (8RT 5495.)

Garcia and Gonzalez waited for Rosales in front of the laundromat. (8RT 5497, 5544.) Pato drove up and wanted Gonzalez to go somewhere with him, but Gonzalez told him to come back later. (8RT 5499.) After waiting for

quite awhile Gonzalez became a bit frustrated, so he walked towards the corner of 112th and Prairie, looked down the street, and saw Rosales sitting in a car by a light pole with another car in front of him. (8RT 5499-5500.)

Gonzalez started walking towards Rosales who was leaning to the side of the car, angrily staring at Gonzalez or "maddogging" him. (8RT 5501, 5546-5547, 5712.) Gonzalez lost track of Garcia. (8RT 5712.) When Gonzalez reached the open car window he said, "What's up, Victor." (8RT 5500-5501.) Rosales did not respond, so Gonzalez leaned in, repeated his statement, and again received no response. Gonzalez did not know the driver who appeared "spooked out, nervous," and acted like he was high on meth. Gonzalez asked Rosales if he wanted him to get appellant. Rosales was leaning back in his fully reclined seat, and he lifted a small gun. Gonzalez was surprised and in fear of his life so he "kind of went inside the car" and pulled the gun out of Rosales's hands. (8RT 5501-5502, 5506, 5549-5550, 5725.) He did not want Rosales to aim the gun at him so he grabbed the gun with both hands and twisted it inward. Gonzalez was somewhat off balance. The two men struggled over the gun. (8RT 5504, 5551.) The driver was "feeling under the seat." (8RT 5504.) Gonzalez tried to completely turn around to get out of the line of fire, and when he had a grip on the gun and pulled his arm back the gun went off. (8RT 5504-5506, 5722, 5724.)

Gonzalez ran towards Doty away from Prairie. (8RT 5506.) He did

not know Rosales had been shot. (8RT 5511.) When Gonzalez turned around he saw the car reverse a bit, then go forward and hit the car in front of it, then reverse and pull out. (8RT 5506, 5742.) Gonzalez had the gun in his pocket. (8RT 5747.) He started walking fast towards Prairie, walked through a side door of the laundromat, and saw the car in traffic. He walked out the other side of the laundromat, Garcia was there, and Gonzalez told him to "come on" as he kept walking. (8RT 5506-5507, 5742.) Gonzalez did not tell Garcia what had happened. (8RT 5743.) Gonzalez continued to walk down Prairie at a fast pace and he subsequently saw Kalac walking towards them. Kalac said they had gotten a room at the American Inn. Gonzalez was scared and without saying anything he gave Kalac the gun and kept walking. (8RT 5508-5509, 5746, 5747, 5749.) Pato pulled up and picked up Gonzalez and Garcia, and Gonzales directed Pato to take him to 105th Street. (8RT 5509-5510.)

Gonzalez did not know where Garcia was at the time of the shooting. He had last seen him at the corner of 112th and Prairie when they were waiting for Rosales. (8RT 5507-5508.) When Pato dropped of Gonzalez at 105th Street, Gonzalez gave him $70 and told him to go tell appellant to get his things out of the room and get him another room. Gonzalez walked to Century Boulevard. He crossed the street where several people were standing in front of a shop. Gonzalez stood there a few minutes, and when he started hearing sirens he thought Rosales might have been hit. (8RT 5511.)

After calling several people Gonzalez finally found someone to pick him up. He then called Pato, learned appellant was at the Deluxe Inn, so he went there and found appellant and Araujo in a room. (8RT 5513.) Appellant asked Gonzalez what happened, and he told her he thought Rosales had been shot. Appellant responded, "Oh, my God. What happened," and she started crying. Gonzalez walked out of the room for a while. When he returned he slept for a bit. (8RT 5514.) He woke up as appellant was stepping outside, and he saw Araujo in the room. Gonzalez subsequently drove with appellant to her house and stayed in the car while she went inside. Once she returned Gonzalez started driving, but they were stopped by the police and arrested. (8RT 5514-5515.) Gonzalez did not have his phone or any money at that time because his belongings were in the room at the Deluxe Inn. (8RT 5515.)

When Gonzalez left after the gun went off he did not know if Rosales or the driver had another weapon, or if they were going to look for him, so that was part of the reason he left the area. He thought if Rosales had been shot he might be blamed and have to go to jail. (8RT 5512.) Gonzalez did not intend to fire the gun, and he did not intentionally pull the trigger or try to kill Rosales. He denied obtaining any drugs or money during the incident. Gonzalez and Rosales did not discuss buying drugs, and Rosales did not speak to him at all during their encounter. (8RT 5516-5517.)

ARGUMENT

I.

THE TRIAL COURT'S FAILURE TO INSTRUCT ON MALICE MURDER AND LESSER INCLUDED OFFENSES AND DEFENSES TO MALICE MURDER WAS NOT RENDERED HARMLESS BY THE JURY'S TRUE FINDING ON THE FELONY-MURDER SPECIAL CIRCUMSTANCE BECAUSE THE JURY WAS LEFT WITH AN "ALL OR NOTHING" CHOICE BETWEEN ACQUITTAL AND CONVICTING APPELLANTS OF FIRST DEGREE MURDER ON A THEORY OF FELONY MURDER AND IT DID NOT CONFRONT AND RESOLVE FACTUAL ISSUES POSED BY THE OMITTED INSTRUCTIONS

A. Introduction & Procedural Background

The second amended information alleged that appellants "did unlawfully, and with malice aforethought murder Victor Rosales." (3CT 457.) It was further alleged pursuant to section 190.2, subdivision (a)(17), that the murder was committed by appellants while they "were engaged in the commission of the crime of robbery." (*Ibid.*) After the close of evidence the prosecutor elected to proceed solely on a theory of first degree felony murder. (See 8RT 5766.)

The jury was instructed on felony murder with CALCRIM No. 540A and on felony murder as an aider and abettor with CALCRIM No. 540B. (4CT 614-616; 8RT 5793-5796.) These instructions set forth the prosecution's theory that Gonzalez caused the death of Rosales during the commission of a

robbery or attempted robbery that was aided and abetted by appellant and Garcia. No instructions were given on malice murder or any lesser included offenses of murder. Appellants were each convicted of first degree felony-murder "committed in the perpetration of, or attempt to perpetrate robbery," with a robbery-murder special circumstance. (4CT 644-645; 3SCT 644.)

On appeal appellants argued the trial court committed reversible error by failing to instruct the jury on lesser included offenses of malice murder and on the defenses of accident and self-defense. In an opinion filed on March 30, 2016, the Court of Appeal disagreed and affirmed the judgment. The court noted that under the accusatory pleading test, appellants were entitled to instructions on the lesser included offenses of malice murder "if warranted by substantial evidence." (Slip opn. pp. 26-27.) But it declined to address whether substantial evidence supported such instructions, and instead concluded any error in failing to so instruct was necessarily harmless. (Slip opn. pp. 26-29.)

The Court of Appeal found the jury's verdicts on felony murder and the robbery special circumstance "necessarily resolved factual issues related to lesser included offenses of malice murder against appellants." (Slip opn. p. 28.) In so doing it explicitly disagreed with *People v. Campbell* (2015) 233 Cal.App.4th 148, review denied April 22, 2015, insofar as *Campbell* "suggests that the jury's guilty verdicts on felony murder and its true findings on a

robbery special circumstance allegation do not render the failure to instruct on lesser included offenses of malice murder harmless . . ." (Slip opn. p. 29.)

As illustrated below, a finding by the jury that appellants intended to commit a robbery instead of a theft or another felony not inherently dangerous to human life was necessary to properly convict appellants of felony murder. Because the jury's finding on the felony-murder special circumstance was based on an incomplete understanding of what the prosecution was required to prove, it does not render harmless the trial court's error in failing to instruct on first degree malice murder and the lesser included offenses of second degree implied malice murder and involuntary manslaughter based on the commission of a noninherently dangerous felony.

B. The Trial Court's Sua Sponte Duty to Instruct on Lesser Included Offenses Supported by Substantial Evidence Prevents a Jury From Being Forced Into an All-Or-Nothing Choice and Protects the Parties From a Verdict Contrary to the Evidence

It is well established that trial courts are required to instruct, sua sponte, on all necessarily lesser included offenses "when the evidence raises a question as to whether all of the elements of the charged offense were present" and there is evidence that would justify a conviction on those lesser offenses. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323, 325, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 201.) In other

words, a trial court must instruct on a lesser included offense, even absent a request, "if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser." (*People v. Blair* (2005) 36 Cal.4th 686, 745, citing *People v. Memro* (1995) 11 Cal.4th 786, 871; see also *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.)

By allowing the jury to "consider all supportable crimes necessarily included within the charge itself," this instructional rule encourages "the most accurate verdict permitted by the pleadings and the evidence." (*People v. Birks* (1998) 19 Cal.4th 108, 112.) "'[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Thus the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits." [Citations.]'" (*People v. Smith* (2013) 57 Cal.4th 232, 239-240, citing *People v. Birks, supra*, 19 Cal.4th at p. 119.)

The rationale for the rule requiring instructions on lesser included offenses appears premised on a concern that litigants might otherwise gamble on a trial's outcome in the belief that juries facing an "all-or-nothing" choice and not provided with an acceptable alternative between those two extremes may reach a verdict not necessarily dictated by a strict adherence to the court's instructions. As articulated by the United States Supreme Court more than 40

years ago in *Keeble v. United States* (1973) 412 U.S. 205, 212-213 [36 L.Ed.2d 844, 93 S.Ct. 1993]:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

(412 U.S. at pp. 212-213.)

This Court has long recognized the same concerns. In *People v. St. Martin* (1970) 1 Cal.3d 524, 533, this Court noted that neither party has an interest in compelling an "all-or-nothing" choice because "[o]ur courts are not gambling halls but forums for the discovery of truth"].) And more recently in *People v. Eid* (2014) 59 Cal.4th 650, this Court explained:

> The reason for instructing the jury on lesser included offenses is to protect the jury's "'truth-ascertainment function.'" ([*People v.*] *Breverman* [1998] 19 Cal.4th [142] at p. 155.) A jury instructed on only the charged offense might be tempted to convict the defendant "'of a greater offense than that established by the evidence'" rather than acquit the defendant altogether, or it may be forced to acquit the defendant because the charged crime is not proven even though the "'evidence is sufficient to establish a lesser included offense.'" (*Ibid.*) Instructing the jury on lesser included offenses avoids presenting the jury with "an 'unwarranted all-or-nothing choice'" (*ibid.*), thereby "protect[ing] both the defendant and the prosecution against

a verdict contrary to the evidence" (*id.* at p. 161).

(59 Cal.4th at p. 657.)

These concerns strongly suggest that a reviewing court should proceed with caution when interpreting verdicts returned by juries deprived of an adequate range of choices because of a trial court's erroneous failure to instruct on lesser included offenses. Because a jury without a full range of options and confined to an "all-or-nothing" choice may act unpredictably, such verdicts may not be a reliable indicator of the result that would have occurred absent such error.

C. In Determining Whether a Trial Court's Error in Failing to Instruct on a Lesser Included Offense is Harmless the Entire Record Must Be Examined and a True Finding on a Felony-Murder Special Circumstance Is Only One Factor to Be Considered

In *People v. Sedeno* (1974) 10 Cal.3d 703, overruled on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12, and in *People v. Breverman, supra*, 19 Cal.4th at p. 149, this Court stated, "[I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been

resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." (10 Cal.3d at p. 721.)

More than 24 years later, in *People v. Breverman, supra*, 19 Cal.4th 142, this Court held that a trial court's failure to instruct on a required lesser included offense "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (*Id.* at p. 165, citing Cal. Const., art. VI, § 13, and *People v. Watson* (1956) 46 Cal.2d 818, 836.)

In *People v. Campbell, supra*, 233 Cal.App.4th 148 ("*Campbell*"), the Court of Appeal addressed the relevance of a jury's finding on a special circumstance in determining whether a trial court's failure to instruct on a lesser included offense was harmless error. The defendants in *Campbell* were charged with malice murder committed with premeditation and deliberation, a robbery-murder special circumstance, and two counts of robbery. (*Id.* at p. 158.) As to the murder charge the prosecutor pursued only a theory of felony murder, and the jury was instructed on first degree felony murder but not on malice murder or any lesser included offenses. (*Id.* at pp. 157-158.) Both defendants were convicted of first degree murder with a robbery special circumstance, and two counts of robbery. On appeal defendant Xavier Fort argued that under the accusatory pleading test the trial court had a sua sponte

duty to instruct on three lesser included offenses of first degree murder: second degree murder, voluntary manslaughter based on imperfect self-defense, and involuntary manslaughter. (*Id.* at pp. 151, 157.) The Court of Appeal held that the trial court erred by failing to instruct on second degree murder and voluntary manslaughter because there was substantial evidence from which a jury could have found that Fort - who was the shooter - did not aid and abet the robbery that led to the shooting. (*Id.* at pp. 163-165.)

As recognized by the *Campbell* court, in view of this Court's decisions in *People v. Flood* (1998) 18 Cal.4th 470, and *People v. Breverman, supra*, 19 Cal.4th 142, "it is clear that while a jury's determination on a factual issue under other instructions is relevant to determining whether an instructional error is harmless, it does not *categorically* establish that the error was harmless; the court must still determine whether, based on an examination of the entire record, it is reasonably probable that the error affected the outcome." (233 Cal.App.4th at p. 167, emphasis in original, citing *People v. Breverman, supra*, at pp. 174-176, and referencing *People v. Flood, supra*, at p. 490.) In *Campbell* the court held that the true finding on the robbery special circumstance did not render the instructional error harmless because:

> [W]hen, as here, the jurors are not given the choice of convicting the defendant of premeditated murder, and are erroneously given only the choice of felony murder or acquittal, the decision to convict the defendant of murder essentially compels them, even if they harbor doubt as to guilt of the underlying felony, to further find the special

> circumstance allegation true. In this situation, the special circumstance finding may indicate nothing more than that the jury did not want to acquit the defendant of murder, not that they found the killing was first degree felony murder]

(233 Cal.App.4th at p. 168.)

In *Campbell*, the court examined several cases where the jury was instructed on felony murder, and this Court found the trial court's failure to instruct on lesser offenses of murder constituted harmless error. (233 Cal.App.4th at pp. 167-172.) It discerned therefrom that "the [*Sedeno*] rule ... cannot be applied without consideration of the factual context and the other instructions given to the jury." (*Id.* at p. 172.) The court noted that in each of the cases it examined, the jury had been offered an alternative for finding first degree murder and "it was patently clear from the facts in each case that an underlying felony had been committed by the perpetrator of the murder," and "in three of the cases the only defense raised was that it was not the defendant who committed the crimes." (*Ibid.*)

The *Campbell* court found "[t]here was substantial evidence that Fort did not intend to aid and abet a robbery when he fired the shots" which would have allowed the jury to find Fort guilty of second degree murder or voluntary manslaughter. (*Id.* at p. 172.) It reversed Fort's conviction for first degree felony murder because "it is reasonably probable the jury would have convicted him of the lesser offense of second degree murder or voluntary

manslaughter based on unreasonable self-defense if given those options." (*Id.* at p. 174 .) The court also reversed Fort's robbery convictions "because they too may have resulted from the 'all-or-nothing' choice the instructions gave the jury." (*Ibid.*) The analysis in *Campbell* is strong and logical, and establishes that a true finding on a murder special circumstance does not, in and of itself, render harmless a trial court's error in failing to instruct on lesser included offenses of murder. If this Court holds otherwise, in special circumstance murder cases a trial court would be able to entirely circumvent its duty to instruct on necessarily lesser included offenses of murder supported by the evidence because it would be aware that omitting instructions on the lesser included offenses would always constitute harmless error if the jury found the special circumstance to be true.

D. There Was Substantial Evidence to Support Instructions on Second Degree Implied Malice Murder and Involuntary Manslaughter Based On the Commission of a Felony Not Inherently Dangerous to Human Life

This Court's order granting limited review impliedly assumes that the trial court erred by failing to instruct the jury on first degree premeditated murder, lesser included offenses of murder, and defenses to murder. In order to determine whether the true finding on the murder special circumstance rendered the instructional error harmless, it is imperative to establish what lesser offenses were warranted by substantial evidence. This is based on the

Sedeno rule that when a jury necessarily decides factual questions posed by the omitted instructions adversely to defendant under other properly given instructions, any error in failing to instruct on a lesser included offense is harmless. (*People v. Sedeno, supra*, 10 Cal.3d at p. 721.)

Here the evidence to support appellant's conviction on a theory of felony murder is far from overwhelming. The prosecution's theory of the case was that appellants planned to commit a robbery of Rosales in order to obtain methamphetamine and possibly heroin, Gonzalez was the direct perpetrator of the attempted robbery during which the homicide occurred, and appellant and Garcia aided and abetted Gonzalez in the attempted robbery of Rosales. The prosecution presented testimony and witness statements in support of its theory that appellants devised a plan to rob Rosales. There was evidence appellant phoned Rosales under the guise of wanting to purchase drugs from him, she set up a time and place to meet him, all three appellants went to that location, appellant pointed out Rosales, and Gonzales then approached the passenger side of the vehicle where Rosales was seated and shot him at close range. (3RT 2792-2793; 4RT 3032, 3054; 6RT 4261-4270.) The prosecutor argued appellant aided and abetted the attempted robbery by making the telephone call to Rosales and by subsequently pointing out Rosales to Gonzalez, and Garcia aided and abetted the attempted robbery by agreeing to be and acting as a look-out. (9RT 6009-6010.)

The key issue at trial was whether appellants planned to commit a robbery of Rosales in their efforts to obtain drugs from him. As acknowledged by the trial court, the prosecution's entire case as to the alleged murder and special circumstance rested on Kalac's pre-trial statements and testimony. (7RT 5147.) Kalac, who was given use immunity for his trial testimony, preliminary hearing testimony, and statements to the police, was clearly an accomplice and there was little evidence to corroborate his testimony that appellants planned a robbery. He also gave inconsistent accounts of what transpired on the day of the shooting.

The prosecution presented evidence that when Kalac and appellants were at the Crystal Inn, appellants planned to try and obtain drugs from Rosales, appellant called Rosales and arranged a meeting, shortly thereafter Ruiz drove Rosales to the agreed upon location, and after Gonzalez approached Rosales in the vehicle Rosales was shot once, which ultimately caused his death. Kalac testified he was the only person in the hotel room who had any money, he heard appellants planning "to come up on" Rosales to obtain drugs, and he claimed that "to come up on" means "to rob." (6RT 4261-4268, 4270-4272; 7RT 4866.)

Gonzalez however, testified that while appellants were at the Crystal Inn along with Kalac and Araujo, appellant called Rosales to set up a meeting for the purpose of purchasing some crystal meth for appellants and some

heroin for Kalac; he had approximately $165 on his person and intended to pay for the drugs; and appellants never planned or discussed a robbery. (8RT 5471-5474, 5476-5477, 5485-5486, 8RT 5711.) Gonzalez also testified that after he approached Rosales and spoke to him, Rosales unexpectedly raised a gun, a struggle ensued, and the gun accidentally fired as he tried to get it away from Rosales. (8RT 5499-5505.)

Kalac's testimony that he heard appellants plan "to come up on" Rosales fails to establish that appellants planned or intended to commit a robbery as defined by California law. Several definitions of "come up" are included in The Urban Dictionary, and one is, "Steal, Jack, Find." (http://www.urbandictionary.com/define.php?term=come+up (last visited on 11-2-16.) Kalac admitted that in the past he had "robbed" drugs dealers by snatching drugs out of their hands and taking the drugs without paying for them. (7RT 4872-4875.) The "come up" plan Kalac allegedly heard may have constituted only a grand theft (§ 484, subd. (a), 487, subd. (c)), rather than a robbery, which requires the taking to have been accomplished through the use of force or fear (§ 211). (*People v. Morales* (1975) 49 Cal.App.3d 134, 139; *People v. Church* (1897) 116 Cal. 300, 303; *People v. Lescallett* (1981) 123 Cal.App.3d 487, 491.) And unlike robbery, grand theft, possession of a controlled substance, and conspiracy are not predicate offenses for first degree felony murder. (§ 189.)

There was also evidence that Rosales, who had a casual intimate relationship with appellant, sometimes sold drugs to appellant at a discount, and on occasion he simply gave them to her. (3RT 2530; 8RT 5466-5467, 5477.) Gonzalez testified that on two prior occasions he purchased drugs from Rosales and received a good deal because he knew appellant. (8RT 5478.)

No evidence was admitted that even suggested appellant and Garcia were armed with a firearm or other weapon. The only evidence presented by the prosecution in an attempt to establish Gonzalez was armed with a firearm was the statement of Ruiz, admitted into evidence as a spontaneous declaration through the testimony of Officer Vasquez, that as Gonzalez approached Ruiz's vehicle, Gonzalez pulled out a gun and fired a shot that struck and killed Rosales. (3RT 2792-2793.) It is important to note that this evidence was necessarily rejected by the jury, as it found the principal armed firearm enhancements alleged as to all appellants and the personal firearm use allegations alleged as to Gonzalez not true, and it found Gonzalez not guilty of shooting at an occupied motor vehicle.

Based upon a consideration of all the evidence, a reasonable jury could have found that appellant called Rosales to arrange a meeting so appellants could obtain drugs from Rosales by purchasing them - perhaps at a discount, or by committing a grand theft instead of a robbery, or by convincing Rosales to "front" them the drugs. Under any of these scenarios, appellant lacked the

specific intent to commit a robbery or to aid and abet Gonzalez and/or Garcia in the commission of a robbery.

Implied malice murder is a killing that results from an intentional act, the natural consequences of which are dangerous to life, deliberately performed by a person who knows his conduct endangers the life of another and who acts with conscious disregard for life. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 106; *People v. Swain* (1996) 12 Cal.4th 593, 601.) Here there was clearly substantial evidence to warrant instructions on second degree implied malice murder. A reasonable jury could have found that appellant planned the meeting with Rosales to obtain drugs, she went with Gonzalez and Garcia to meet Rosales for the purpose of obtaining drugs, by doing so she participated in an activity whose natural consequences were dangerous to life, she was aware of the danger, and she acted with conscious disregard for life.

The evidence also would have allowed a jury, if given the option, to find appellant guilty of something less than first degree felony murder - attempted grand theft, attempted possession of a controlled substance, or a conspiracy to commit grand theft or possess a controlled substance. These offenses are not designated predicate offenses for first degree felony murder listed in section 189, or inherently dangerous felonies that would form the basis for a second degree felony-murder conviction. (See e.g. *People v. Phillips* (1966) 64 Cal.2d 574, 581 [grand theft is not an inherently dangerous

felony], overruled on other grounds in *People v. Flood, supra*, 18 Cal.4th 470, 490; *People v. Williams* (1965) 63 Cal.2d 452, 458 [conspiracy to possess methedrine is not inherently dangerous]; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1099 [mere possession of a drug (PCP) is not inherently dangerous]; and *People v. Morales, supra*, 49 Cal.App.3d 131, 143 [grand theft from person is not inherently dangerous to life].)

A killing without malice that occurs during the commission of a noninherently dangerous felony constitutes involuntary manslaughter if "it was committed without due caution and circumspection." (*People v. Bryant* (2013) 56 Cal.4th 959, 966, citing *People v. Burroughs* (1984) 35 Cal.3d 824, 835.) Because there was substantial evidence appellant acted only with the intent to commit a theft or possess a controlled substance, and that she aided and abetted the attempt to commit either offense, or engaged in a conspiracy to commit either offense, a reasonable jury could have found that appellant was guilty of involuntary manslaughter and not guilty of the greater offense of felony murder.

Based on the foregoing discussion, there was clearly substantial evidence to warrant instructions on the lesser included offenses of second degree implied malice murder and involuntary manslaughter based on the

commission of a noninherently dangerous felony.[7]

E. The Court of Appeal's Rejection of *Campbell* and Its Conclusion That the True Finding on the Felony-Murder Special Circumstance Rendered the Trial Court's Failure to Instruct on Lesser Included Offenses of Malice Murder Harmless Is Based on a Faulty Analysis Which Ignores and Misinterprets Precedent of This Court

1. The Lower Court's Opinion

The Court of Appeal held that any error of the trial court in failing to instruct on malice murder, various lesser included offenses of malice murder, and the defenses of accident and self-defense, was harmless. (Slip opn. p. 27.) It found it was not reasonably probable that an outcome more favorable to appellants would have been obtained if the jury had received the omitted instructions because appellants had been found guilty "beyond a reasonable doubt" of first degree murder for a death that resulted "during the perpetration or attempted perpetration of a robbery." (*Ibid.*) The court concluded that the

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[7] In the Court of Appeal, coappellant Gonzalez contended the trial court erred by failing to instruct the jury on the charged statutory offense of premeditated malice murder, on the lesser included offenses of second degree murder, voluntary manslaughter based on provocation, voluntary manslaughter based on imperfect self-defense, and statutory involuntary manslaughter, and on accident/mistake and self-defense. Although some of the additional instructions may have been of benefit to appellant if they had been given, appellant specifically contends herein that in her case, at a minimum, the evidence warranted instructions on the lesser included offenses of implied malice second degree murder and involuntary manslaughter based on the commission of a noninherently dangerous felony.

trial court's "failure to instruct on first degree murder was not prejudicial, as that instruction would merely have provided the jury with another theory on which to convict appellants of first degree murder." (*Ibid.*) It also found that the absence of instructions on accident and self-defense was not prejudicial because neither is a defense to felony murder. (*Ibid.*)

According to the Court of Appeal, the jury's guilty verdicts on felony murder and its true finding on the robbery special circumstance allegations "necessarily resolved factual issues related to lesser included offenses of malice murder against appellants." (Slip opn. p. 28.) The court reasoned that in reaching its verdicts "the jury was required to determine first whether appellants committed or attempted to commit robbery, and only thereafter whether a death occurred during the commission of the robbery or attempted robbery." (*Ibid.*) Based thereon, the court held "it is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on the lesser included offenses of murder." (Slip opn. pp. 28-29, relying on *People v. Elliot* (2005) 37 Cal.4th 453, 476; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087; *People v. Earp* (1999) 20 Cal.4th 826; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328; and *People v. Horning* (2004) 34 Cal.4th 871, 906.)

The Court of Appeal expressly disagreed with *People v. Campbell, supra*, 233 Cal.App.4th 148, to the extent it "suggests that the jury's guilty

verdicts on felony murder and its true findings on a robbery special circumstance allegation do not render the failure to instruct on lesser included offenses of malice murder harmless under *Watson*." (Slip opn. p. 29.)

2. The Authority Cited in the Opinion Does Not Support the Court's Finding of Harmless Error

None of the above-cited cases relied on by the Court of Appeal support its conclusion. In *People v. Castaneda, supra*, 51 Cal.4th 1292 ("*Castaneda*"), the defendant, who was the direct perpetrator of the murder, was convicted of first degree murder, kidnapping, sodomy, commercial burglary and robbery, with special circumstances that the murder was committed while the defendant was engaged in the commission or attempted commission of burglary, kidnapping, sodomy, and robbery. (*Id.* at pp. 1301-1302.) The jury was instructed on both premeditated murder and felony murder in the commission of the specified felonies. The defendant was found guilty of murder, but the jury's verdict did not reflect whether its finding was based on premeditated murder or felony murder. (*Id.* at p. 1328.) On appeal the defendant argued the trial court should have instructed on the lesser included offense of second degree murder. (*Id.* at p. 1327.) This Court reasoned that due to the congruence between the elements of felony murder and the felony- murder special circumstances, the jury's true findings on multiple felony- murder

special circumstances necessarily showed the jury would have found the defendant guilty of first degree murder under a felony-murder theory. (*Id.* at p. 1328.)

Appellant's case is distinguishable from *Castaneda* because she was prosecuted for murder solely on a theory of felony murder based on her role as an aider and abettor to the predicate felony of robbery, and the jury was instructed only on felony murder and one felony-murder special circumstance. Because the jury in *Castaneda* was instructed on two different theories of first degree murder and multiple felony-murder special circumstances, its special circumstance findings reliably showed that the jurors found the killing was committed during the commission of a felony. Further, if the jurors had any doubt about that result, they could have convicted the defendant of first degree premeditated murder without relying on the felony-murder doctrine or finding the special circumstances true. This Court, therefore, could properly find any error in failing to instruct on second degree murder harmless because even a jury instructed on second degree murder which doubted the sufficiency of evidence to prove premeditation or deliberation would have returned a first degree verdict based on a theory of felony murder.

Unlike the jury in *Castaneda*, appellant's jury only had two options - to acquit appellant or convict her of felony murder. Under the factual posture of this case, even a jury that doubted appellant intended to aid and abet a robbery

would have felt reluctant to acquit her because of the fact she arranged the meeting between Gonzalez and Rosales, and Rosales was shot and killed by Gonzalez during that meeting.

In *People v. Elliot, supra*, 37 Cal.4th 453 ("*Elliot*"), the court instructed the jury "as to the elements of murder, that murder was classified into two degrees," and any doubt it had regarding the degree of the murder should be resolved by giving the defendant the benefit of the doubt and fixing the offense as second degree murder. (*Id.* at p. 474.) The jury was not given any additional instructions on second degree murder. On appeal the defendant complained that the court's failure to give an instruction on the elements of second degree murder was tantamount to not giving an instruction on the offense. (*Ibid.*) This Court held that any assumed error was harmless because the jury not only found the defendant guilty of first degree robbery, but also returned true findings on torture-murder and attempted robbery-murder special circumstances. (*Id.* at 475.) Although the instructions given may not have provided the jury with a distinctive choice between first degree murder on a felony-murder theory and second degree murder, the availability of a second degree murder verdict lends some significance to the special circumstance findings in terms of assessing the likely harmlessness of the instructional error. It unquestionably provides greater support to the analysis therein than can logically be given to the true finding returned in the subject case.

Of even greater importance, for comparative purposes, is the factual posture of *Elliot* which necessarily left reasonable jurors with little reason to question the defendant's culpability for the underlying felonies. The victim, a female bartender, was found lying by the safe at the bar with 83 stab wounds and the contents of her purse spread across the floor. (37 Cal.4th at pp. 457-460.) Thus there was strong circumstantial evidence that the killer also committed the underlying felonies of torture- murder and attempted robbery which allowed this Court to reason with confidence that the jurors did not force themselves to overcome reasonable doubts about the defendant's guilt in order to rationalize reaching a felony- murder verdict they felt obligated to return in order to avoid setting free a killer they would not otherwise convict. Similar confidence is not possible in the subject case because appellant's culpability for the underlying felony of robbery or attempted robbery is much less clear.

The defendant in *People v. Koontz*, *supra*, 27 Cal.4th 1041, was convicted of first degree murder with a robbery-murder special circumstance as well as a number of other charges not pertinent here. (*Id.* at 1053.) Although not expressly stated in the opinion, it can be inferred that the jury was instructed on both first degree premeditated murder and first degree felony murder because the defendant challenged the sufficiency of the evidence to support his conviction under either theory. (*Id.* at 1078-1082.) He also

claimed the trial court erred by failing to instruct on the lesser offense of voluntary manslaughter. (*Id.* at 1085.) This Court concluded that any such instructional error was harmless because the robbery-murder special circumstance showed "the jury necessarily rejected the unreasonable self-defense theory" and "signified the jury's unanimous conclusion that the killing occurred during the commission of a robbery and that defendant committed the murder in order to carry out or advance the commission of the crime of robbery." (*Id.* at 1086-1087.) As in *Castaneda*, the instruction on premeditated murder as an alternative route to a first degree murder verdict allowed this Court to view the special circumstance finding as a reliable indicator of the jury's rejection of the defense theory. Absent that option, the case arguably would have presented the same "all-or-nothing" conundrum as this one.

Similarly in *People v. Earp*, *supra*, 20 Cal.4th 826, the jury was instructed on first degree premeditated murder and felony murder, as well as on express malice second degree murder. (*Id.* at 884-885.) In rejecting a contention that prejudicial error resulted from the trial court's refusal to instruct on implied malice second degree murder and involuntary manslaughter, this Court pointed to the jury's true findings on felony-murder special circumstance allegations premised on the underlying felonies of rape and lewd conduct with a child. (*Id.* at 885.) Based on those findings this

Court concluded any error was harmless since the jury had "necessarily determined that the killing was first degree murder[.]" (*Ibid.*) Here again, one cannot separate the harmless error conclusion from the significance of the court having provided the jury with the option of reaching a first degree murder verdict from a path other than the felony murder theory which the jury necessarily adopted below.

In *People v. Horning, supra*, 34 Cal.4th 871 ("*Horning*"), the jury was instructed on both first degree premeditated and deliberate murder and first degree felony murder, and there was evidence to support both theories. (*Id.* at p. 902.) The defendant contended that the trial court's failure to instruct on second degree murder was erroneous, but this Court viewed any error harmless in light of the jury's true findings on robbery and burglary special circumstances in addition to its first degree murder guilty verdict. (*Id.* at pp. 904-906.) After noting the jury was instructed on both first degree murder theories, this Court made the following observation: "If the jury had had any doubt that this was a felony murder, it did not have to acquit but could have simply convicted defendant of first degree murder without special circumstances. Instead, it found that defendant killed the victim in the perpetration of robbery and burglary, which means it necessarily found the killing was first degree felony murder." (*Id.* at p. 906.)

In appellant's case, if the jury had any doubt that the killing of Rosales

was felony murder it would have had no choice other than to acquit, but for reasons previously discussed, jurors may have found that option extremely difficult under the facts of the case. Unlike the cases previously discussed where the jury was instructed on both theories of first degree murder, the jury in appellant's case did not have the option of convicting appellant of first degree premeditated murder. In cases where the jury was instructed on both felony murder and first degree premeditated murder, the felony-murder special circumstance finding has significance for purposes of harmless error analysis, because the jury was not required to acquit if it doubted the defendant committed felony murder. Instead, it could have convicted the defendant of first degree murder on the alternative theory of premeditation.

The reasoning of this Court in *Horning* impliedly accepts the premise of appellant's contention as to this case: if the jury had doubts about felony murder as the basis for the verdict but loathed the thought of acquitting appellant altogether, it might very well have decided to convict appellant of first degree murder with a true finding on the felony-murder special circumstance consistent with a felony murder theory because outright acquittal was its only alternative to felony murder. The results obtained under such circumstances therefore do not reliably establish the adverse resolution of issues which lesser offense instructions would have raised. The Court of Appeal's opinion in this case ignores the critical fact that the absence of

instructions on first degree premeditated murder and lesser included offenses of malice murder left the jury was an unwarranted "all-or-nothing" choice between acquittal and convicting appellants of first degree felony murder. And by holding that a guilty verdict on felony murder with a true finding on a felony-murder special circumstance categorically establishes the error was harmless, the opinion disregards the directive of this Court in *People v. Flood, supra*, 18 Cal.4th at p. 490, and *People v. Breverman, supra*, 19 Cal.4th at pp. 174-176.)

3. The Court's Conclusion is Based on a Faulty Analysis

As previously noted, the Court of Appeal disagreed with *People v. Campbell, supra*, 233 Cal.App.4th 148, to the extent it "suggests that the jury's guilty verdicts on felony murder and its true findings on a robbery special circumstance allegation do not render the failure to instruct on lesser included offenses of malice murder harmless under *Watson*." (Slip opn. p. 29.) It noted the *Campbell* court distinguished *People v. Earp, supra*, 20 Cal.4th 826, *People v. Koontz*, *supra*, 27 Cal.4th 1041, and *People v. Elliot, supra*, 37 Cal.4th at p. 476, on the basis that in those cases the jury had been instructed on premeditated and deliberate murder in addition to felony murder. Nevertheless, the court found that if appellants' jury had been instructed on premeditated murder, it merely would have allowed the jury to convict

appellants of first degree murder under another theory, and therefore any instructional error was necessarily harmless. (Slip opn. p. 29.) This finding is erroneous for several reasons.

If the jury had been given the option of finding appellant guilty of premeditated murder, it would have been able to convict appellant of first degree murder without being compelled to find the robbery-murder special circumstance true, and appellant would not have been subject to a sentence of life without the possibility of parole. Further, because there was substantial evidence to support instructing the jury on various lesser included offenses of malice murder, if the jury had been instructed on first degree premeditated murder the court would have been compelled to give the lesser included offense instructions as well as instructions on applicable defenses to malice murder.

F. The True Finding on the Robbery-Murder Special Circumstance Does Not Render Harmless the Trial Court's Error in Failing to Instruct on Malice Murder, the Lesser Included Offenses of Malice Murder, and the Defenses to Malice Murder

In *People v. Ramkeesoon* (1985) 39 Cal.3d 346 ("*Ramkeesoon*"), the defendant was convicted of first degree murder and robbery with findings he had personally used a deadly weapon. (*Id.* at p. 348.) Based on the defendant's testimony that he did not form the intent to steal until after he

stabbed the victim to death, he requested the trial court to instruct the jury on larceny and grand and petit theft as lesser included offenses of the charged robbery. The trial court declined to give the instructions, and the jury was instructed on both premeditated murder and felony murder, as well as on second degree murder, voluntary manslaughter, self-defense, and provocation. (*Id.* at p. 350.) This Court found the trial court erred by not instructing on theft. (*Id.* at p. 351.) Since the first degree murder verdict did not disclose the theory on which it was based, this Court assumed it was based on felony murder, and it found the error prejudicial and reversed the defendant's murder conviction because the jury had not been provided with the factual question that would have been included in the theft instructions that were not given. (*Id.* at pp. 352-353.)

The *Campbell* court, in discussing *Ramkeesoon*, explained:

> While in the present case we are not dealing with the failure to give a lesser included on the underlying felony charge, the analysis is substantially the same. In *Ramkeesoon*, it was the after-formed intent; here, it is whether Fort had the intent to aid and abet the robbery. In both cases, it is clear that the defendant killed another person. Because the *Ramkeesoon* court assumed for purposes of the appeal that the murder conviction was based on felony murder, the only way the jury in that case and in the present case could convict the defendant of the homicide was to find that the underlying felony had been committed by the defendant. As in *Ramkeesoon*, the jury here was left with an "'unwarranted all-or-nothing choice.'" (*People v. Ramkeesoon, supra*, 39 Cal.3d at p. 352.)

(233 Cal.App.4th at p. 174.)

Almost five years after the *Ramkeesoon* decision, in *People v. Turner* (1990) 50 Cal.3d 668, where the defendant was convicted of first degree murder, a robbery-murder special circumstance, and robbery, this Court held that the trial court did not commit reversible error in failing to instruct on lesser included offenses of murder where the jury had been given a special instruction on "after-formed intent." (*Id.* at pp. 679, 691.) This Court found the instructions given made it clear the defendant could not be found guilty of the charges if the jury concluded his intent to steal did not arise until after the fatal assault, and the jury's verdicts showed it concluded the defendant had the intent to steal prior to assaulting the victim. (*Id.* at p. 691.)

In several cases following *Ramkeesoon*, this Court found no error or harmless error where the trial court failed to instruct on lesser included offenses of first degree murder, but the jury was given the option of convicting the defendant of first degree murder under more than one theory. In *People v. Millwee* (1998) 18 Cal.4th 96, the jury was instructed on first degree premeditated and deliberate murder, felony murder during the commission of a robbery or a burglary, and second degree express malice murder. (*Id.* at p. 155.) It was also instructed on the accident and misfortune defense, and given a special instruction which stated that grand theft is a lesser included offense of robbery and burglary and it is the timing of an intent to steal that determines whether the greater or lesser offense has been committed. (*Id.* at p. 156.) On

appeal the defendant argued the trial court erred by failing to instruct on second degree murder not involving an intent to kill and on involuntary manslaughter. (*Id.* at p. 155.) This Court held that instructions on these lesser included offenses were not required. It reasoned that by convicting the defendant of robbery and burglary, the jury necessarily found the defendant had the intent to steal at the time he entered the house and killed the victim, and thus the jury concluded the defendant was guilty on a theory of first degree felony murder. (*Id.* at p. 158.)

The defendant in *People v. Sakarias* (2000) 22 Cal.4th 596 ("*Sakarias*") was convicted of first degree murder with robbery-murder and burglary-murder special circumstances, robbery, two counts of burglary and additional offenses. He contended there was insufficient evidence to support his convictions for robbery, first degree murder on a theory of robbery-murder, and the robbery-murder special circumstance. (*Id.* at pp. 618-619.) Additionally he contended that the trial court committed reversible error by failing to instruct on second degree murder as a lesser included offense of the charged murder. After rejecting the defendant's sufficiency arguments, this Court held that even assuming there was evidence from which a reasonable jury could have acquitted the defendant of both burglary and robbery, such a jury could not have reasonably acquitted the defendant of first degree premeditated and deliberate murder because the sole motive for the entry and

attack, which was planned in advance, was to kill the victim. (*Id.* at pp. 626-627.) This Court concluded, "In short, the evidence was consistent with a theory of premeditated and deliberate first degree murder, with a theory of first degree felony murder, or with a theory of both, but not with a theory of neither. No substantial evidence having been presented to support such a verdict, the trial court did not err in refusing to instruct on second degree murder." (*Id.* at p. 627.)

In *People v. Ledesma* (2006) 39 Cal.4th 641 ("*Ledesma*"), this Court found that the trial court erred by failing to instruct on theft as a lesser included offense of robbery because the evidence supported a finding the defendant did not form the intent to steal until after committing the murder. It held that the error required reversal of the defendant's robbery conviction and setting aside the true finding on the robbery-murder special circumstance. However the defendant's first degree murder conviction was affirmed because the jury found a witness-killing special circumstance true which requires a willful, deliberate, and premeditated killing, and this Court held that therefore it could reasonably be concluded the jury would have found the defendant guilty of first degree premeditated murder even if it found the defendant had committed theft instead of robbery. (*Id.* at p. 716.)

Although in the instant case appellants were charged with a robbery-murder special circumstance, they were not charged with robbery. As this

Court has made clear, a trial court does not have a sua sponte duty to instruct on a lesser included offense of an uncharged offense that is the predicate offense for a charged special circumstance. (*People v. Valdez* (2004) 32 Cal.4th 73, 110-111; *People v. Cash* (2002) 28 Cal.4th 703, 736-737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) Nevertheless, the presence or absence of such an instruction is certainly pertinent in determining whether the trial court's failure to instruct on lesser included offenses supported by the evidence was prejudicial. (See e.g. *People v. Kelly* (1992) 1 Cal.4th 495, 530; *People v. Webster* (1991) 54 Cal.3d 411, 444.)

The critical factual question at trial was whether appellants intended to commit a robbery. Although there was some evidence appellants planned a robbery, as previously discussed, there was also evidence to support a finding they planned something else. A reasonable jury could have found appellants intended to steal drugs without the use of force or fear, or planned to purchase drugs from Rosales, or intended to get Rosales to "front" the drugs to them.

There is no doubt appellants' murder convictions were based on felony murder, not only because it is reflected in the jury's verdicts, but also because it was the only murder theory on which the jury was instructed and the jury found the robbery-murder special circumstance to be true as to all three appellants. As in *Ramkeesoon* and *Campbell*, appellants' jury was left with "an unwarranted all-or-nothing choice" between outright acquittal and

conviction on a theory of felony murder. Unlike the juries in *Millwee*, *Sakarias*, and *Ledesma*, appellants' jury was not given the option of finding appellants guilty of first degree premeditated murder. Appellants' case also differs from *Turner,* because their jury was never asked to determine whether appellants had committed a theft or a another noninherently dangerous felony instead of a robbery.[8]

Appellants' jury was not presented with factual questions posed by the omitted lesser included offense instructions. The evidence established only that Rosales was shot and killed by Gonzalez during a course of conduct wherein appellants were attempting to obtain illegal drugs. Since the jury was not provided with an option of finding appellants guilty of a lesser offense, clearly supported by the evidence, it cannot be concluded that the jury's true finding on the robbery-murder special circumstance necessarily resolved adversely to appellants the issues posed by the omitted lesser included offense instructions. Due to the absence of instructions on premeditated murder, second degree implied malice murder, and involuntary manslaughter, the jury was not confronted with the question of whether appellants intended to obtain

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[8] If the jury had been instructed on involuntary manslaughter based on the commission of a noninherently dangerous felony, the trial court would have been required to instruct on the elements of the noninherently dangerous predicate felonies supported by the evidence. (See CALCRIM No. 580; Bench Notes to CALCRIM No. 580 ["The court has a sua sponte duty to specify the predicate misdemeanor, infraction or noninherently dangerous felony alleged and to instruct on the elements of the predicate offense(s)."]

drugs from Rosales without the use of force or fear. Accordingly, the true finding on the robbery-murder special circumstance does not render harmless, the trial court's error in failing to instruct on malice murder, the lesser included offenses of malice murder, and defenses to malice murder.

CONCLUSION

Based upon the foregoing argument and authority, the judgment of the Court of Appeal should be reversed.

Dated: November 4, 2016

Respectfully Submitted;

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WORD COUNT CERTIFICATE

I certify that the foregoing brief uses a 13-point Times New Roman font and that the computer-generated word count for this document is 13,941 words, which does not include the cover, tables, or this certificate.

Dated: November 4, 2016

Valerie G. Wass

DECLARATION OF SERVICE

Case: *People v. Gonzalez et al.,* Case No. S234377

I, Valerie G. Wass, declare as follows:

I am an active member of the State Bar of California and am not a party to this cause. My business address is 556 S. Fair Oaks Avenue, Suite 9, Pasadena, California, 91105. On November 4, 2016, I deposited in a mailbox regularly maintained by the United States Postal Service at Santa Barbara, California, in the county in which I reside, a copy of the attached OPENING BRIEF ON THE MERITS (of appellant Erica Michelle Estrada), in a sealed envelope with postage fully prepaid, addressed to each of the following:

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My electronic service address is wass100445@gmail.com. On November 4, 2016, I transmitted a PDF version of the same document described above by electronic mail to the parties identified below using the e-mail service addresses indicated:

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Additionally, on this date I electronically served a copy of this document to the Court of Appeal, Second Appellate District, on its website at http://www.courts.ca.gov/2dca-efile.htm, in compliance with the court's Terms of Use.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 4th day of November, 2016, at Santa Barbara, California.

VALERIE G. WASS