IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Supreme Court No. S234377
v.	
01) JORGE GONZALEZ,	Court of Appeal No. B255375
02) ERICA MICHELLE ESTRADA,	
03) ALFONSO GARCIA,	Superior Court No. YA076269
Defendants and Appellants.	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
Honorable Scott T. Millington, Judge

APPELLANT ALFONSO GARCIA'S OPENING BRIEF ON THE MERITS

JONATHAN E. DEMSON
Attorney at Law
Cal. State Bar No. 167758
1158 26th Street #291
Santa Monica, CA 90403
(310) 405-0332
jedlaw@me.com

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Supreme Court No. S234377
v.	)	
01) JORGE GONZALEZ,	)	Court of Appeal No. B255375
02) ERICA MICHELLE ESTRADA,	)	
03) ALFONSO GARCIA,	)	Superior Court No. YA076269
Defendants and Appellants.	)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
Honorable Scott T. Millington, Judge

APPELLANT ALFONSO GARCIA'S OPENING BRIEF ON THE MERITS

JONATHAN E. DEMSON
Attorney at Law
Cal. State Bar No. 167758
1158 26th Street #291
Santa Monica, CA 90403
(310) 405-0332
jedlaw@me.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ISSUE PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 20

I. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES TO FIRST DEGREE MALICE MURDER WAS NOT RENDERED HARMLESS BY THE JURY'S FELONY MURDER SPECIAL CIRCUMSTANCE TRUE FINDING, BECAUSE THAT FINDING WAS BASED ON (1) AN INCOMPLETE UNDERSTANDING OF WHAT THE PROSECUTION WAS REQUIRED TO PROVE AND (2) NO AWARENESS OF THE ALTERNATIVES SUPPORTED BY THE EVIDENCE 20

A. Summary of Argument 20

B. The Unwarranted All-Or-Nothing Choice Forced Upon a Jury That Is Not Given the Option of Convicting of a Lesser Included Offense When That Option Is Supported By Substantial Evidence 23

C. Substantial Evidence Supported a Jury Finding That Appellants Intended To Employ Trickery, *i.e.*, Something Less Than Force Or Fear, To Steal Drugs From the Victim, Warranting Instructions On the Lesser Included Offenses of Second Degree Murder and Involuntary Manslaughter 28

D. The Conflict Between *Campbell* and the Court of Appeal's Opinion In This Case 34

E. The Diminished Value Or Significance of the Felony Murder Special Circumstance True Finding In This Case 42

CONCLUSION 53

TABLE OF AUTHORITIES

CASES (Federal) **PAGE(S)**

Keeble v. United States (1973) 412 U.S. 205
[93 S.Ct. 1993, 36 L.Ed.2d 844] 26

CASES (California)

People v. Anderson (2006) 141 Cal.App.4th 430 ..... 34, 48

People v. Ashley (1952) 42 Cal.2d 246 30

People v. Barton (1995) 12 Cal.4th 186 ..... 24, 27

People v. Blakeley (2000) 23 Cal.4th 82 33

People v. Breverman (1998) 19 Cal.4th 142 ..... 27, 31, 43

People v. Brito (1991) 232 Cal.App.3d 316 32

People v. Burroughs (1984) 35 Cal.3d 824 33

People v. Butler (2010) 187 Cal.App.4th 998 31-32

People v. Castaneda (2011) 51 Cal.4th 1292 39

People v. Campbell (2015) 233 Cal.App.4th 148 ..... 25, 34-42, 52

People v. Earp (1999) 20 Cal.4th 826 39

People v. Eid (2014) 59 Cal.4th 650 24

People v. Elliot (2005) 37 Cal.4th 453 39

People v. Flood (1998) 18 Cal.4th 470 43

People v. Green (1980) 27 Cal.3d 1 45

People v. Guillen (2014) 227 Cal.App.4th 934 32

People v. Horning (2004) 34 Cal.4th 871 39

People v. Johnson (2016) 243 Cal.App.4th 1247 33

People v. Kelly (1992) 1 Cal.4th 495 ..... 34, 48

People v. Koontz (2002) 27 Cal.4th 1041 39

People v. Kunkin (1973) 9 Cal.3d 245 45

People v. Lemus (1988) 203 Cal.App.3d 470 31

People v. Lewis (2001) 25 Cal.4th 610 31

People v. Martinez (1999) 20 Cal.4th 225 45

People v. Morales (1975) 49 Cal.App.3d 134 ..... 29, 30, 32

People v. Nieto Benitez (1992) 4 Cal.4th 91 31

People v. Penny (1955) 44 Cal.2d 861 32

People v. Phillips (1966) 64 Cal.2d 574 ..... 30, 32

People v. Ramkeesoon (1985) 39 Cal.3d 346 48-51

People v. Rios (2000) 23 Cal.4th 450 31

People v. Sanchez (2001) 26 Cal.4th 834 24

People v. Sedeno (1974) 10 Cal.3d 703 ..... 26, 42, 52

People v. Smith (2013) 57 Cal.4th 232 24

People v. Taylor (1992) 6 Cal.App.4th 1084 32

People v. Thompson (2010) 49 Cal.4th 79 33

People v. Traster (2003) 111 Cal.App.4th 1377 30

People v. Watson (1956) 46 Cal.2d 818 43

People v. Webster (1991) 54 Cal.3d 411 34

People v. Wickersham (1982) 32 Cal.3d 307 27

People v. Williams (1965) 63 Cal.2d 452 32

STATUTES

Pen. Code, § 187, subd. (a) 2, 21

Pen. Code, § 189 30

Pen. Code, § 190.2 ..... 2, 3, 32, 33

Pen. Code, § 192, subd. (b) 32

Pen. Code, § 211 2

Pen. Code, § 212.5 2

Pen. Code, § 246 ..... 2, 43

Pen. Code, § 484 30

Pen. Code, § 12022, subd. (a)(1) 2

Pen. Code, § 12022.53 2

JURY INSTRUCTIONS

CALCRIM No. 580 34

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Supreme Court No. S234377
v.	)	
01) JORGE GONZALEZ,	)	Court of Appeal No. B255375
02) ERICA MICHELLE ESTRADA,	)	
03) ALFONSO GARCIA,	)	Superior Court No. YA076269
Defendants and Appellants.	)	

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
Honorable Scott T. Millington, Judge

APPELLANT ALFONSO GARCIA'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED FOR REVIEW

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?

STATEMENT OF THE CASE

A second amended felony information filed on August 29, 2013, charged appellant Alfonso Garcia and co-defendants Jorge Gonzalez and Erica Estrada with one count of murder (Pen. Code, § 187, subd. (a)) and a special circumstance that the murder was committed during the commission of a robbery (Pen. Code, §§ 190.2, subd. (a)(17), 211, & 212.5). It was further alleged that a principal involved in the murder was armed with a handgun (Pen. Code, § 12022, subd. (a)(1)). Co-defendant Gonzalez was also charged with shooting at an occupied motor vehicle (Pen. Code, § 246), as well as gun-use enhancements (Pen. Code, § 12022.53, subds. (b) [personal use], (c) [discharge], & (d) [discharge causing death]). (3C.T. 456-459.)

On October 4, 2013, after a joint trial, all three defendants were convicted of first degree felony-murder, with a true finding as to the special circumstance allegation but a not-true finding as to the allegation that a principal was armed with a handgun. Co-defendant Gonzalez was acquitted of shooting at an occupied motor vehicle, with not-true findings as to all gun-use enhancement allegations. (4C.T. 644-649; 3S.C.T. 644-648; 9R.T. 7201-7209.)

At the joint sentencing hearing on March 18, 2014, all three defendants were sentenced to life without the possibility of parole (Pen. Code, § 190.2, subd. (a)(17)(A)). (4C.T. 698-705; 3S.C.T. 673-676; 9R.T. 7546-7549.)

The Court of Appeal (Division Four of the Second Appellate District) affirmed the judgment of the superior court in a published opinion filed on March 30, 2016.[1] This Court granted review on July 13, 2016.

STATEMENT OF FACTS

Prosecution Case

Around 1:00 p.m. on October 6, 2009, Victor Rosales called Alejandro Ruiz and asked Ruiz to drive him to a laundromat on the northeast corner of 112th Street and Prairie Avenue in Inglewood, California. Rosales' former girlfriend, Erica Estrada, had called Rosales and asked him to meet her for lunch near the laundromat. Ruiz picked Rosales up around 2:16 p.m. (3R.T. 2788, 2792.)

---

[1] While affirming the judgments of conviction, the court of appeal directed the superior court to delete all parole revocation fines from the abstracts of judgment.

The day before (October 5), Estrada had checked into the Crystal Inn, located on the northwest corner of 112th Street and Prairie Avenue. (4R.T. 3302-3303, 3323-3325.) On October 6, she checked into the American Inn, a motel located about a block north of the Crystal Inn. (5R.T. 3988-3990.)

Between 2:12 p.m. and 2:28 p.m., appellant Garcia made two phone calls to Rosales and three calls to Estrada and received one call from Rosales and two calls from Estrada. The Verizon cell towers that picked up Garcia's cell phone signal were located within a mile or so of 112th Street and Prairie Avenue and had a range of up to a mile and a half. (4R.T. 3357, 3364-3371, 3378-3380; 5R.T. 3928; 7R.T. 4931-4940, 5102-5105; 4C.T. 540-541.) Around this time, security cameras at the Crystal Inn recorded two men leaving the motel. (4R.T. 3330, 3336-3337.) Video footage also showed a car in the parking lot resembling the one driven by Estrada. (4R.T. 3063, 3334, 3337-3338.)

When they arrived at the laundromat, Rosales asked Ruiz to pull over and park. (3R.T. 2792.) As Ruiz was parking on the side of 112th Street, he saw Estrada and two Hispanic men emerge from behind some palm trees and approach the car. Erica pointed at Rosales. One of the men

walked up to the passenger side of the car, produced a gun, and shot Rosales from a distance of approximately three feet. The same man then walked around to the driver's side and attempted to pull Ruiz out of the car. Fearing for his life, Ruiz hastily accelerated and drove away. (3R.T. 2793; 4R.T. 3030.)

Rosales died from his injury, a single gunshot wound to the chest. (5R.T. 3648.) His blood tested positive for methamphetamine, as well as amphetamine (a component of methamphetamine produced as the body breaks down ingested methamphetamine). (5R.T. 3656.) There was stippling (tiny marks left by ignited gunpowder particles emanating from the muzzle of a fired gun) on the victim's right wrist, indicating that the gun was fired within two feet of the victim's right hand. (5R.T. 3649, 3655, 3658, 3973.) Police found a single shell casing on the floor of the front passenger's side of Ruiz's car. (4R.T. 3112-3114, 3120-3121.)

Estrada and Jorge Gonzalez were arrested later that day in front of Estrada's house. (4R.T. 3018.) Gonzalez had 25 cents on him when he was arrested. (5R.T. 3912-3913.) A gunshot residue test applied to Gonzalez's hand tested positive. (3R.T. 2800; 5R.T. 3626.) During a recorded telephone call from Jail, Estrada mentioned that she had borrowed someone

else's ("Jennifer") cell phone to call Rosales from the Crystal Inn. (6R.T. 4298-4300; 4C.T. 540-541.)

Garcia was arrested at his home at 4:00 a.m. on December 17, 2009. At the time of his arrest, he attempted to flee from the police through the side door. (5R.T. 3992, 3996.)

Testimony of Anthony Kalac, The Prosecution's Star Witness

At the preliminary hearing and at trial, prosecution witness Anthony Kalac invoked his Fifth Amendment privilege against self-incrimination, was granted use immunity by the prosecution, and was ordered by the superior court to answer the prosecution's questions. (2C.T. 89-90; 5R.T. 3934-3936, 4003-4010.) At trial, he testified as follows:

On the morning of October 6, 2009, Kalac went to appellant Garcia's house near 112th Street and Doty Avenue in Inglewood hoping to get high. Kalac had known Garcia for a few years. Kalac's drug of choice was heroin, while Garcia's was methamphetamine. At Garcia's house, Garcia introduced Kalac to Jennifer Araujo. Kalac had already smoked some heroin earlier in the day, and he smoked some more at Garcia's house. He had been using heroin for several years and no longer got much of a high

from the drug; he smoked it to prevent the onset of withdrawal symptoms. (5R.T. 4010-4014; 7R.T. 4936.)

A little later, Garcia, Kalac, and Araujo left Garcia's house and walked over to the Crystal Inn, located about a block away on the northwest corner of 112th Street and Prairie Avenue, to meet up with a friend of Garcia's and get high. Before leaving, Kalac hid what remained of the heroin he had brought with him in Garcia's house for safekeeping in case he was stopped for any reason by the police. (4R.T. 3302-3303; 5R.T. 4016-4017.) In a room at the Crystal Inn, the trio met Jorge Gonzalez and his girlfriend, Erica Estrada. Kalac had never met either of them before. Kalac sat down on the couch and listened to the others talk. (6R.T. 4251-4254; 7R.T. 4815.)

Garcia suggested to Gonzalez that they smoke some methamphetamine, but Gonzalez responded that he and Estrada did not have any drugs. (6R.T. 4256.) The conversation turned to how they might procure some methamphetamine. (6R.T. 4257-4258.) Kalac was carrying around $35 in his pocket, but no one else in the room seemed to have any money. (6R.T. 4259, 4261; but see 7R.T. 4875-4876 [Kalac admits that he did not know for certain whether the others had any money].)

About fifteen minutes after arriving at the motel room, Kalac called his drug dealer and arranged to buy some heroin. He left the motel briefly to meet the dealer at a gas station, but the dealer did not show up, so Kalac returned to the motel room and sat back down on the couch. (6R.T. 4259-4260.)

Estrada told Gonzalez and Garcia that she knew of a drug dealer they could "come up on"[2]: an ex-boyfriend who had been physically abusive, once giving her a black eye. (6R.T. 4261-4262, 4264-4266.) Gonzalez became agitated during this part of the conversation. He and Garcia began to discuss the potential robbery. (6R.T. 4264-4265.) While most of the conversation was in English, bits and pieces were in Spanish, which Kalac could not understand. (6R.T. 4268, 4270; 7R.T. 4842.) Gonzalez, Estrada, and Garcia decided to telephone the drug dealer and order $150 worth of methamphetamine and $50 worth of heroin. (6R.T. 4266.)

---

[2] While Kalac never heard anyone in the room use the term "rob," he understood "come up on" to be vernacular for "rob." (6R.T. 4262-4263; 7R.T. 4831-4832, 4886.) Kalac never heard appellant say "rob" *or* "come up on" during the conversation. (7R.T. 4864-4865.)

Estrada offered to give Kalac whatever heroin they obtained from the robbery in exchange for the $35 he had on him. She explained that she needed the money to pay for that night's accommodation at another motel. Kalac agreed and gave her the money. (6R.T. 4266-4267; 7R.T. 4822.)

Estrada told everyone in the motel room to be quiet and then telephoned the drug dealer. (6R.T. 4268, 4270.) Most of the telephone conversation was in Spanish, but Kalac did overhear Estrada say that she was going to meet the drug dealer and something about 'across the street' and 'thirty minutes.' (6R.T. 4270-4272.) Shortly after the call ended, Gonzalez and Garcia left the motel room. (6R.T. 4272.) Kalac overheard Garcia say that he would be a lookout. (6R.T. 4273, 4411-4412; 7R.T. 4844, 4882-4883.)

After Gonzalez and Garcia left, Estrada began packing up the room and told the others that they were moving to another motel nearby. While packing up the room, Estrada called the drug dealer to see how far away he was. She then called someone to say that the drug dealer was ten to fifteen minutes away. (6R.T. 4275-4276.) Estrada asked Kalac and Araujo to help carry the bags down to Estrada's car. Estrada then drove all three, by a circuitous route, to the American Inn, a motel also located on the west side

of Prairie Avenue about a block north of the Crystal Inn. Estrada checked in and all three carried the bags up to their room. (6R.T. 4277-4278.) A few minutes later, Estrada and Araujo left, leaving Kalac alone in the room. After waiting for a few minutes for Gonzalez and Garcia to bring him the heroin they had promised, Kalac decided to walk down Prairie Avenue to look for them, figuring that, if he did not see them, he would just continue on home. (6R.T. 4279, 4379.)

Kalac was walking southbound on Prairie Avenue toward the intersection with 112th Street when he saw Gonzalez and Garcia walking quickly northbound on the other side of the street. Garcia split off from Gonzalez and crossed the street to meet Kalac while Gonzalez continued on his way. (6R.T. 4280-4281.) Garcia told Kalac to hurry with him back to the American Inn, stating, "Shit went bad." When they got back to the room, Garcia changed his clothes. They then left the motel and walked back to Garcia's house. (6R.T. 4282.) Garcia said nothing more about what had happened. Kalac retrieved the heroin he had stashed at Garcia's house and went home. (6R.T. 4283.) At no point during the events of that day did Kalac ever see any of the others produce a gun. Nor did Kalac ever hear mention of a gun. (6R.T. 4357, 4408, 4413-4414; 7R.T. 4833-4834.)

Defendant Jorge Gonzalez's Case[3]

Jorge Gonzalez testified that he had been employed as a machinist since 1989, most recently for Maglite (the flashlight manufacturer), but ceased regular employment at the beginning of 2009 due to illness. Thereafter, he assisted a paralyzed man, Ernesto Corral, with odd jobs a couple of days a week and otherwise lived off of his savings of approximately $46,000. (8R.T. 5470-5471, 5754-5755.) Corral typically paid Gonzalez $200 at the beginning of each month. On October 6, 2009, when he was at the Crystal Inn, Gonzalez had just been paid and was carrying about $165 or $167. (8R.T. 5471-5472.)[4]

On October 5, 2009, which was Gonzalez's birthday, Erica Estrada telephoned him late in the afternoon and invited him to the Crystal Inn, where she threw him a surprise birthday party. (8R.T. 5473, 5530.) Gonzalez had met Estrada for the first time four to six weeks earlier and became intimate with her about a week earlier, though he did not consider

---

[3] Neither appellant Garcia nor co-defendant Erica Estrada presented evidence.

[4] Ernesto Corral testified that, starting in February 2009, he hired Gonzalez to be his caregiver for $200 per month and had last paid Gonzalez $200 on October 2, 2009, for services rendered in September 2009. (8R.T. 5757, 5759.)

her his girlfriend. (8R.T. 5480-5481, 5531.) He knew that Estrada was dating Victor Rosales, though not the extent of their relationship. Estrada left the birthday party at the Crystal Inn around 9:00 or 10:00 p.m. to be with Rosales, returning around midnight. (8R.T. 5482-5483.) Gonzalez had met Rosales twice before and bought drugs from him on both occasions. Rosales had given him a good deal on the drugs because Gonzalez knew Estrada. (8R.T. 5478-5479, 5520-5530.)

Gonzalez and Estrada stayed at the Crystal Inn the night of October 5, 2009. Gonzalez's friend Jennifer Araujo was in the room for part of the night but seemed high on methamphetamine and did not sleep there. (8R.T. 5473, 5482-5483, 5488, 5490, 5532.) Around 3:00 or 4:00 a.m., appellant Garcia showed up with another man and asked Gonzalez if he wanted to get high. Gonzalez declined and went back to sleep. (8R.T. 5483-5484, 5487.)

The next morning, Garcia came back over to the room, accompanied by Araujo and Anthony Kalac. Gonzalez had attended high school with Garcia and was friends with Araujo but had never met Kalac before. (8R.T. 5474, 5480, 5487, 5533, 5710-5711.) Kalac sat down on the couch and appeared at times to fall asleep. He appeared to be either extremely tired or high on drugs. (8R.T. 5474-5475, 5711.)

Garcia wanted to smoke some drugs but Gonzalez did not have any. Gonzalez used methamphetamine and had smoked some the night before, though he had not smoked any that morning. Gonzalez asked Estrada to call Rosales and order some methamphetamine. (8R.T. 5475-5476, 5486, 5533-5534.) While Gonzalez was on his cell phone, chatting with a friend in Spanish, Estrada called Rosales to order some methamphetamine and some heroin for Kalac. Kalac initially requested $50 worth of heroin, but reduced it to $30 when he realized that was all the cash he had on him. Estrada promised to get him $50 worth of heroin for $30. (8R.T. 5484-5485.) Gonzalez was focused on his own telephone call; what little he overheard of Estrada's call to Rosales was in English. (8R.T. 5486.)

There was never any discussion in the motel room of robbing anyone. Nor was there any mention of being broke, since Gonzalez, for one, had plenty of money on him. (8R.T. 5472, 5476-5477, 5486-5487, 5711.) Gonzalez was not armed; nor did he see anyone else in the room with a gun. (8R.T. 5489-5491.)

While Gonzalez and Estrada were on their respective cell phones, the manager of the Crystal Inn called the room and spoke with Araujo. He told her that they would have to leave the motel because there were too

many people coming in and out of the room, in violation of the motel's rules. When Araujo passed along the message, Gonzalez and the others decided to move up the street to the American Inn. (8R.T. 5535-5536.)

Estrada asked Gonzalez to go meet Rosales at the laundromat across the street to purchase the drugs they had ordered while she packed up their belongings and moved to the American Inn. (8R.T. 5494-5495, 5537.) Gonzalez asked Garcia to keep him company, and Garcia agreed. No one ever said anything about acting as a 'lookout.' Gonzalez left the room first; Garcia followed moments later and caught up with Gonzalez on the street, and they walked over to the laundromat together. Estrada did not go with them. Gonzalez went inside the laundromat briefly, looking for a place to sit down, but the laundromat was too crowded, so he decided to wait for Rosales out front on Prairie Avenue. (8R.T. 5496-5497, 5537-5539, 5711-5712.)

While Gonzalez was waiting, a man named Pato, who had called him earlier and wanted to buy a diamond bracelet that Estrada had pawned, pulled up hoping to pick up Gonzalez and go get the bracelet. Gonzalez told Pato that he was waiting for someone and to come back in ten minutes. (8R.T. 5499, 5510.)

Gonzalez waited for almost half an hour outside the laundromat, but Rosales did not show up. (8R.T. 5498.) Frustrated at having to wait for so long, Gonzalez walked over to the corner and saw Rosales sitting in the front passenger seat of a car parked about fifty feet away on 112th Street. Gonzalez began walking toward car. Rosales' seat back was pushed all the way back and he was leaning back and to his right against the car door, observing Gonzalez. (8R.T. 5499-5500, 5502, 5544-5545, 5549, 5713.) The way Rosales was sitting, Gonzalez could not see his right hand. (8R.T. 5504, 5550, 5713.)

Rosales' face was distorted and he looked upset; he kept "mad dogging" Gonzalez. When Gonzalez got close enough to the car window, which was open, he said "What's up, Victor?" but Rosales did not respond. Crouching down, Gonzalez leaned in closer to the car and repeated "What's up, Victor?" Rosales still did not respond. Gonzalez glanced at the driver, whom he had never seen before. The driver looked spooked out and seemed to be either extremely nervous or extremely high on methamphetamine. Gonzalez asked Rosales, "Do you want me to get Erica?" At that point, Rosales lifted his arm and Gonzalez could see that he was holding a gun. (8R.T. 5500-5502, 5506, 5547, 5549-5550, 5714.)

Rosales never spoke a word to Gonzalez, and there was no discussion of any drug transaction. (8R.T. 5516-5517.)

Fearing for his life, Gonzalez grabbed the gun, leaning fully inside the car window to try to pull the gun out of Rosales' grasp. (8R.T. 5501-5502, 5551.) Gripping the gun with both hands, Gonzalez twisted it around so that it was no longer aiming at him. He managed to twist the gun completely out of Rosales' grip, but as he attempted to pull the gun out of the car window, Rosales grabbed his hands. While this was happening, Gonzalez noticed the driver reaching under his own car seat. Gonzalez twisted his entire body around in order to wrench himself free from Rosales' grasp, and the gun went off accidentally. (8R.T. 5504-5505, 5516, 5552-5554, 5715-5724; see 5735-5741 [struggle reenacted during cross-examination using replica gun].) Gonzalez was twisted around, facing away from the vehicle, when the gun went off and did not realize that Rosales had been hit by the bullet. (8R.T. 5511.)

Eager to get away from Rosales and his compatriot, Gonzalez ran eastbound on 112th Street, still holding the gun. He tripped and almost fell on the curb, causing him to turn around briefly, and he saw Rosales' car reversing and then moving forward, at one point hitting the car parked in

front of it. The car reversed once more and then pulled away from the curb. Gonzalez darted into the side door of the laundromat. Through the window, he could see the car approaching the corner of Prairie Avenue, temporarily blocked by traffic. (8R.T. 5506, 5741.)

Gonzalez waited inside the laundromat until the car drove away, and then went out the front onto Prairie Avenue, where he found Garcia. Gonzalez had lost track of Garcia when Gonzalez initially walked over to Rosales' car; Garcia had not followed him, and Gonzalez had not seen Garcia at any point during the struggle with Rosales. Gonzalez said "Come on" and hurried northbound on Prairie Avenue with Garcia following close behind. (8R.T. 5507-5508, 5545-5546, 5712, 5743-5744.) Gonzalez was worried that Rosales and his compatriot might have another weapon and might come back for him. (8R.T. 5512.)

Gonzalez saw Kalac walking toward him on the sidewalk. Kalac said, "We're at the American Inn. We got a room." Gonzalez was in shock, scared, confused, and not thinking clearly. Eager to get rid of the gun, he gave it to Kalac and just kept walking. (8R.T. 5508-5509, 5746-5750.)

By this time, Pato had come back, saw Gonzalez walking up Prairie, and picked him and Garcia up, hoping once again to go purchase the

bracelet he wanted. Gonzalez told Pato he could not do that right now and asked Pato to drop him off at 105th Street. Gonzalez was worried that either Rosales or the police might find him if he went back to the motel. He gave Pato $70 and asked him and Garcia to drive back to the motel and tell Estrada to gather Gonzalez's belongings and get him a room somewhere else. After Pato dropped him off, Gonzalez wandered the streets for a while. He could hear sirens and began to wonder whether Rosales had been shot when the gun went off. (8R.T. 5509-5511, 5513.)

After a while, Gonzalez called Pato, who told him that Estrada had checked into the Deluxe Inn. Gonzalez called another friend, Juan, who picked him up and drove him to the Deluxe Inn, where Estrada and Araujo were waiting for him in their room. (8R.T. 5513.) Estrada asked what had happened, and Gonzalez told her "I think Victor got shot." Estrada started crying and Gonzalez decided not to tell her anything more about the incident. He took everything out of his pockets, including his cell phone and money, and put it in a drawer, lay down on the bed, and fell asleep. (8R.T. 5514.)

When Gonzalez awoke a little later, Estrada said she wanted to go home and see her son, and Gonzalez said he would go with her. He left the

contents of his pockets, including the cash he was carrying, in the drawer in the motel room. (8R.T. 5514-5515.) They drove to Estrada's house at 12536 Truro Avenue in Hawthorne, where they were apprehended by the police and arrested. (8R.T. 5515; see 4R.T. 3018.)

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES TO FIRST DEGREE MALICE MURDER WAS NOT RENDERED HARMLESS BY THE JURY'S FELONY MURDER SPECIAL CIRCUMSTANCE TRUE FINDING, BECAUSE THAT FINDING WAS BASED ON (1) AN INCOMPLETE UNDERSTANDING OF WHAT THE PROSECUTION WAS REQUIRED TO PROVE AND (2) NO AWARENESS OF THE ALTERNATIVES SUPPORTED BY THE EVIDENCE

A. Summary of Argument

When a trial court fails to instruct the jury on lesser included offenses supported by substantial evidence, the jury is forced to make an unwarranted all-or-nothing choice between conviction of the charged offense or acquittal. Courts, including this Court, have recognized that this creates the potential for error that is prejudicial, because a jury that believes a defendant has engaged in some form of criminal misconduct yet also harbors a reasonable doubt about an element of the charged offense may resolve the dilemma by disregarding the prosecution's burden of proof and convicting the defendant of an offense greater than that established by the evidence, rather than acquitting the defendant altogether.

This Court has also recognized, however, that in 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, which in turn shows that the omission of the missing instruction was harmless.

Count one in the second amended information charged appellants with murder "with malice aforethought" pursuant to Penal Code section 187, subdivision (a). At the close of evidence, however, the prosecution advised the superior court that it would be proceeding exclusively on a felony-murder theory as to all three defendants. The court instructed the jury on first degree felony-murder, but not on first degree malice murder or any lesser included offenses.

The question presented by this Court's order granting review presupposes that the trial court erred in failing to instruct the jury on any lesser included offenses; the sole issue is whether any error was shown to have been harmless by the jury's felony murder special circumstance true finding. It is nevertheless necessary to review what, if any, lesser included offense instructions were warranted by substantial evidence, because the

value or significance of the jury's special circumstance true finding is a function of how the jury was instructed and of what, specifically, it was required to decide.

Appellants were charged with murdering a drug dealer while attempting to rob him, but substantial evidence at trial would also have supported a jury finding that appellants intended to employ trickery, *i.e.*, something less than force or fear, to obtain drugs from the victim. Such evidence thus warranted jury instructions on the lesser included offenses of second degree implied malice murder and involuntary manslaughter.

Given the prosecution's decision to proceed exclusively on a felony-murder theory, an accurate determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict. But because the jury was not instructed on any lesser included offenses, it was not required to make any such determination. Nor was the jury instructed on the differences between robbery and theft or on alternatives to felony murder that were fully supported by the evidence. Instead, the jury was confronted with an unwarranted all-or-nothing choice between felony murder or complete acquittal.

The special circumstance true finding does not, therefore, necessarily show that the jury resolved the robbery allegation adversely to appellants in any reliable sense, because (1) that finding was based on an incomplete understanding of what the prosecution was required to prove and (2) the jury was prevented from considering alternative verdicts that would have been reasonable in view of the evidence. Thus, the trial court's failure to instruct the jury on lesser included offenses to first degree malice murder was not rendered harmless by the jury's felony murder special circumstance true finding. Accordingly, the decision of the court of appeal should be reversed.

B. The Unwarranted All-Or-Nothing Choice Forced Upon a Jury That Is Not Given the Option of Convicting of a Lesser Included Offense When That Option Is Supported By Substantial Evidence

As this Court has explained: "'California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the

pleadings and the evidence.' [Citation.] '[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. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits."'" (*People v. Smith* (2013) 57 Cal.4th 232, 239-240 [citations omitted].)

Juries are presumed, of course, to follow the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Yet, in spite of that presumption, both this Court and the U.S. Supreme Court have repeatedly acknowledged the very real possibility that a jury faced with an unwarranted all-or-nothing choice between conviction of the greater offense or complete acquittal may choose to convict notwithstanding its reasonable doubt that the defendant is guilty of the greater crime charged. As this Court recently observed, "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 . . . ." (*People v. Eid* (2014) 59 Cal.4th 650, 657; see *People v. Barton* (1995) 12 Cal.4th 186, 196 ["'Our courts are not gambling halls but

forums for the discovery of truth.' [Citation.] Truth may lie neither with the defendant's protestations of innocence nor with the prosecution's assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court's failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury's truth-ascertainment function"]; *People v. Campbell* (2015) 233 Cal.App.4th 148, 168, fn. 12 ["Although the law ordinarily presumes that jurors follow the court's instructions, the law requiring instructions on lesser included offenses is based, in part, on the possibility that they will not; that is, when faced with an unwarranted all-or-nothing choice between the charged offense and acquittal, jurors may convict a defendant of the charged offense even though they harbor 'reasonable doubt of guilt of the charged offense . . . solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense'"].)

The U.S. Supreme Court has long expressed the same concern: "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." (*Keeble v. United States* (1973) 412 U.S. 205, 212-13 [93 S.Ct. 1993, 1997-98, 36 L.Ed.2d 844].)

This Court has also recognized, however, that "in 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." (*People v. Sedeno* (1974) 10 Cal.3d 703, 721, disapproved on other grounds in *People*

v. Breverman (1998) 19 Cal.4th 142, 165.) The question posed by this Court's order granting review is whether, in this case, the robbery-murder special circumstance true finding shows that the factual questions posed by any erroneously omitted lesser included offense instructions were necessarily resolved adversely to appellants under the instructions on the special circumstance allegation, which in turn would indicate that the omission of the missing instructions was harmless.

Lesser included offense instructions are required only if there is substantial evidence that only the lesser crime was committed. (*People v. Wickersham* (1982) 32 Cal.3d 307, 325, disapproved on another point in *People v. Barton, supra,* 12 Cal.4th at p. 205.) The question presented by this Court's limited grant of review presupposes that the trial court erred in failing to instruct the jury on any lesser included offenses; as mentioned above, the sole issue is whether any error was shown to have been harmless by the special circumstance true finding. It is nevertheless necessary to review what, if any, lesser included offense instructions were warranted by substantial evidence, because the value or significance of the jury's verdicts and findings is a function of how the jury was instructed and what, specifically, it was required to decide.

C. Substantial Evidence Supported a Jury Finding That Appellants Intended To Employ Trickery, i.e., *Something Less Than Force Or Fear, To Steal Drugs From the Victim, Warranting Instructions On the Lesser Included Offenses of Second Degree Murder and Involuntary Manslaughter*

Evidence was presented that appellants arranged to meet the victim, Rosales, for the purpose of obtaining drugs. Whether appellants intended to pay for the drugs or to try to steal them was disputed at trial. Gonzalez testified that he intended to pay for the drugs and robbery was never even discussed. (8R.T. 5472, 5475-5477, 5486-5487, 5711.) Kalac, on the other hand, testified that defendants planned to "come up" on Rosales. (6R.T. 4261-4262, 4264-4268, 4270-4273.)

The prosecution's felony-murder theory hinged on defendants' alleged use of this expression. Although Kalac testified that "to come up on" meant "to rob" (6R.T. 4262-4263), he also testified that he himself had "robbed" drug dealers in the past by snatching the drugs out of their hand and running (7R.T. 4872-4875), which showed that his own personal definition of "robbery" included theft without the use of force or fear:

> Q Did you use a gun or weapon when you would rob them?
>
> A No.

Q What did you use?

A My hands.

Q What does that mean?

A I would grab from my drug dealer and took off.

Q So you would just snatch drugs and run?

A That's correct.

Q But you're saying you never had to use physical violence other than snatching?

A No sir.

. . .

Q Did anyone ever chase you?

A No.

Q So you just snatched drugs from a drug dealer, they watched you run off?

A Yes.

Q Where would this occur?

A Wherever I met them.

(7R.T. 4872-4873.) Where the element of force or fear is absent, a taking from the person is grand theft rather than robbery. (*People v. Morales* (1975) 49 Cal.App.3d 134, 139.) More specifically, what Kalac described in his testimony regarding his own previous misdeeds amounted to larceny

by trick, not robbery. (See *People v. Traster* (2003) 111 Cal.App.4th 1377, 1387; *People v. Ashley* (1952) 42 Cal.2d 246, 258; Pen. Code, § 484.)

In contrast to robbery, which is one of the predicate offenses for first degree felony-murder listed in Penal Code section 189, grand theft from the person has long been held to be a felony not inherently dangerous to life and therefore does not rise to the level of a predicate offense for either first or second degree felony-murder. (*Morales, supra,* 49 Cal.App.3d at p. 143; *People v. Phillips* (1966) 64 Cal.2d 574, 580-583.)

Thus, in addition to the two extremes of (1) a drug purchase (Gonzalez's testimony) and (2) a robbery (Kalac's use of the word), substantial evidence also supported a finding somewhere in between: that defendants intended to steal the drugs from Rosales but without resorting to force or fear, much in the same way that Kalac had taken drugs from his suppliers in the past without paying for them. In other words, substantial evidence supported the finding that appellants intended to commit grand theft from the person but lacked the specific intent to commit robbery.[5]

---

[5] The trial court's duty to instruct as to a lesser included offense "arises if there is substantial evidence the defendant is guilty of the lesser offense, but not the charged offense. . . . In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal

At a minimum, then, substantial evidence warranted instructions on second degree implied malice murder.[6] Based on the evidence, a reasonable jury could have found that, in accompanying Gonzalez to the meeting with Rosales for the purpose of either buying or stealing drugs, Garcia was performing an activity whose natural consequences were dangerous to life, that he was aware of the danger, and that he acted with conscious disregard for life.

Substantial evidence also warranted instructions on involuntary manslaughter.[7] There was substantial evidence that the shooting occurred

---

sufficiency, not its weight." (*People v. Breverman, supra,* 19 Cal.4th 142, 177.) "The testimony of a single witness, including the defendant, can constitute substantial evidence requiring the court to instruct on its own initiative." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Any doubt as to the sufficiency of the evidence requiring such an instruction should be resolved in favor of the defendant. (*People v. Lemus* (1988) 203 Cal.App.3d 470, 476.)

[6] Implied malice has a physical and a mental component. The physical component is satisfied by the performance of an act whose natural consequences are dangerous to life. The mental component calls for the act to be deliberately performed by someone who knows his or her conduct endangers the life of another and acts with conscious disregard for that life. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 106-107.)

[7] Involuntary manslaughter is a lesser included offense of murder, distinguished by its *mens rea*. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) The *mens rea* for murder is specific intent to kill or conscious disregard for life. Absent these states of mind, a killing may instead fall within the category of involuntary manslaughter. (*Id.* at p. 466; *People v. Butler*

during an attempted drug possession or an attempted grand theft from the person --offenses that are, at worst, non-inherently-dangerous felonies. (See *People v. Williams* (1965) 63 Cal.2d 452, 458 ["conspiracy to possess methedrine [a form of methamphetamine], is surely not, as such, inherently dangerous"]; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090, 1095; *Morales, supra,* 49 Cal.App.3d at p. 143 [grand theft from the person not inherently dangerous to life]; *Phillips, supra,* 64 Cal.2d at pp. 580-583 [same].) A reasonable jury could also have found that Garcia, in going along with the plan, was acting with criminal negligence but without implied malice.[8]

(2010) 187 Cal.App.4th 998, 1006.) Through statutory definition and judicial development, there are three types of acts that can underlie commission of involuntary manslaughter: a misdemeanor, a lawful act, or a non-inherently-dangerous felony. (See Pen. Code, § 192, subd. (b); *Butler, supra*, at p. 1006.) For all three types of predicate acts, the required *mens rea* is criminal negligence (*Butler, supra*, at p. 1006), which has been defined as unintentional conduct that is gross or reckless, amounting to a disregard of human life or an indifference to the consequences. (*People v. Penny* (1955) 44 Cal.2d 861, 879; *People v. Guillen* (2014) 227 Cal.App.4th 934, 1027.) Criminal negligence is sometimes referred to as "gross negligence." (See, e.g., *People v. Brito* (1991) 232 Cal.App.3d 316, 321 [using the terms interchangeably].)

[8] With respect to appellant Garcia and co-defendant Estrada, both of whom were charged as accomplices, in order to find the special circumstance allegation to be true, the jury was required to make the additional finding that the defendant either intended to kill (Pen. Code, § 190.2, subd. (c)) or

Had the jury been properly instructed on second degree murder and involuntary manslaughter, it would have been required to decide whether the evidence at trial constituted proof beyond a reasonable doubt that appellants specifically intended to rob the victim, *i.e.*, to use force or fear, as opposed to some form of trickery, such as the snatch-and-run technique employed by Kalac to obtain drugs from his suppliers without paying for them.[9]

---

acted with "reckless indifference to human life and as a major participant" in the underlying robbery (Pen. Code, § 190.2, subd. (d)). (See *People v. Thompson* (2010) 49 Cal.4th 79, 125-126.) There was no evidence presented from which the jury could find that appellant Garcia intended to kill the victim, Rosales, as required by section 190.2, subdivision (c). Thus, the jury's special circumstance true finding can only mean that the jury found that Garcia acted with reckless indifference to human life, pursuant to section 190.2, subdivision (d). One court recently concluded that "the 'reckless indifference to life' necessary for death penalty eligibility requires subjective awareness of a higher degree of risk than the 'conscious disregard for human life' required for conviction of second degree murder based on implied malice." (*People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285.) But regardless of whether the jury's special circumstance true finding shows that the jury would necessarily have rejected any lesser included offense with a *mens rea* less culpable than that required for second degree murder, instructions on involuntary manslaughter were still warranted by substantial evidence in this case. Moreover, nothing about the special circumstance true finding shows that the jury would necessarily have rejected the lesser included offense of second degree murder.

[9] It should be noted that instructions on involuntary manslaughter in this case would have included instructions on the elements of grand theft. (See *People v. Burroughs* (1984) 35 Cal.3d 824, 835, disapproved on other

D. The Conflict Between Campbell *and the Court of Appeal's Opinion In This Case*

The question posed by this Court's order granting review was squarely addressed by the Court of Appeal for the Fourth District (Division Two) in *People v. Campbell, supra,* 233 Cal.App.4th 148, a case with important similarities to this one. Like this case, *Campbell* involved a drug transaction that turned violent, resulting in a shooting death. (*Id.* at pp. 150-151.) Defendants had come to the victim's house to obtain marijuana,

---

grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89; CALCRIM No. 580 [Involuntary Manslaughter: Lesser Included Offense (Pen. Code, § 192(b))]; Bench Notes to CALCRIM No. 580 [trial court has sua sponte duty to specify predicate noninherently dangerous felony alleged and to instruct on elements of that offense].) Regardless of whether the trial court had a sua sponte duty to instruct on the elements of theft, however, the absence of such instructions is pertinent to the determination of whether the failure to instruct on any lesser included offenses was prejudicial in this case. As this Court observed in analogous circumstances: "Here, the jury was instructed on and found true the robbery special circumstance, but the instructions did not focus on the 'after-formed intent' question, or on whether the jury, having found defendant guilty of robbery, could find the robbery special circumstance not true. As we recently explained, although there is no sua sponte duty to give such instructions, their presence or absence is pertinent to 'deciding whether reversible *prejudice* had arisen from the trial court's erroneous failure to furnish *any* instructions or verdict forms on lesser included offenses supported by the evidence.' (*People v. Webster* [(1991)] 54 Cal.3d [411, 444] emphasis in original.)" (*People v. Kelly* (1992) 1 Cal.4th 495, 530; accord *People v. Anderson* (2006) 141 Cal.App.4th 430, 449-450 ["While we find no sua sponte duty to instruct on theft, it was error for the trial court not to have instructed on second degree murder and voluntary manslaughter"].)

but there was conflicting evidence as to whether one of the defendants, Fort, knew that his co-defendant, Campbell, intended to take the marijuana by force. (*Id.* at pp. 163-164.) At the close of the prosecution's case, the prosecution informed the trial court that it would be proceeding solely on a felony murder theory. (*Id.* at p. 159, fn. 3.) The trial court did not instruct the jury on any lesser included offenses, and the jury found defendants guilty of felony murder and two counts of robbery and found true a felony murder special circumstance allegation. (*Id.* at p. 151.)

On appeal, the *Campbell* court held that the trial court erred in failing to instruct the jury on second degree murder and voluntary manslaughter based on imperfect self-defense as to defendant Fort in view of substantial evidence that he neither knew of his co-defendant's intent to commit, nor intended to aid and abet, robbery. (*Id.* at pp. 163-165.) The Attorney General argued, however, that any error was harmless in view of the jury's true finding as to the robbery-murder special circumstance allegation and guilty verdicts on the robbery counts, because the true finding and the robbery verdicts showed that the jury would have convicted the defendant of felony murder even if it was instructed on lesser included offenses. (*Id.* at p. 166.)

The *Campbell* court rejected this argument: "[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." (*Id.* at p. 168.)

The very same may be said of the special circumstance true finding in this case. Having chosen the only option available other than outright acquittal, the jury was left with little choice when it came to the special circumstance allegation. Since the elements of the special circumstance allegation were substantially similar to the elements of the underlying murder charge insofar as both required the jury to find that appellants were attempting to rob the victim when he was killed, the jury faced the same dilemma it confronted in being forced to choose between conviction of the only available option or outright acquittal. The jury could hardly be expected to find appellants guilty of felony-murder based on the predicate

offense of robbery only to find that the special circumstance allegation that the murder was committed while defendants were perpetrating a robbery was *not true*.

As the *Campbell* court went on to explain, using reasoning equally applicable to this case: "Fort's commission of an underlying felony was not patently clear. There was substantial evidence that Fort did not intend to aid and abet a robbery when he fired the shots; the jury could have thus found him guilty of second degree murder or voluntary manslaughter. Nonetheless, because the jury was instructed on felony murder only, the jury was faced with an all-or-nothing proposition: felony murder or acquittal. As instructed, jurors who doubted that Fort aided or abetted a robbery would still understand that convicting Fort of murder meant that they would have to also find him guilty of the underlying felony, robbery. Otherwise, the juror would be left in the seemingly untenable position of voting not guilty as to robbery and allowing an individual who shot and killed another person to walk free. Thus, without the option of convicting Fort of either a lesser offense or of premeditated first degree murder, the jury, if it was to convict Fort at all for the killing of [the victim], was, in essence, compelled to further convict Fort of robbery and find the robbery-

murder special circumstance true. Thus, given the facts and instructions presented here, it cannot be said that the jury's true finding on the special circumstance allegation necessarily means that the jury would have found defendant guilty of felony murder if it had been instructed on lesser offenses." (*Id.* at pp. 172-173.) For substantially the same reasons, in view of the facts and instructions given in this case, it cannot be said that the jury's true finding on the special circumstance allegation necessarily means that the jury would have found appellants guilty of felony murder if it had been instructed on lesser included offenses.

The court of appeal's opinion in this case rejected *Campbell*, holding that any instructional error in failing to instruct on lesser included offenses was not prejudicial. (Slip opn. at pp. 25-29.) As the court explained: "[T]he jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In determining whether appellants were guilty of murder under the felony-murder theory, 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. Thus, 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. [Citations.] [¶] To the extent *Campbell*, *supra*, 233 Cal.App.4th 148, 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*, we respectfully disagree." (Slip opn. at pp. 28-29.) The court of appeal's opinion set forth no reasons for its disagreement with *Campbell*, however, leaving the *Campbell* court's compelling reasoning and analysis unanswered.

As authority for its holding, the court of appeal's opinion cited five cases in which this Court held that any error in failing to instruct the jury on lesser included offenses (or defenses) to first degree malice murder was shown to have been harmless by the jury's true finding with respect to one or more special circumstance allegations. (Slip opn. at pp. 28-29, citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328, *People v. Elliot* (2005) 37 Cal.4th 453, 476, *People v. Horning* (2004) 34 Cal.4th 871, 906, *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087, *People v. Earp* (1999) 20 Cal.4th 826, 886.)

Yet, in an in-depth case-by-case analysis, the *Campbell* court distinguished each of these five cases on two grounds that also distinguish those cases from this one: "First, we note that in each of the cited cases the jury was instructed on felony murder *and* premeditated and deliberate murder. [Citing *Castaneda*, *Elliot*, *Horning*, *Koontz*, and *Earp*.] Thus, each jury had an option of finding the defendant guilty of first degree murder (based on premeditation and deliberation) without having to find the special circumstance true. When, in that situation, the jury does make the special circumstance finding, it can be said with confidence that the jury would have convicted the defendant of felony murder even if it had been instructed as to lesser offenses. Such confidence does not exist when, as here, the jury has been instructed on felony murder only." (*Campbell, supra,* 233 Cal.App.4th at pp. 167-168.) Likewise in this case, the jury was instructed on felony murder only.

Second, all five cases "are easily distinguished from our case based on their facts." (*Campbell, supra,* 233 Cal.App.4th at p. 169.) As the *Campbell* court explained, "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." (*Id.* at p. 167.) Applying this framework, the *Campbell* court observed: "In each case, the jury was offered alternative grounds for finding first degree murder. Significantly, it was patently clear from the facts in each case that an underlying felony had been committed by the perpetrator of the murder. In three of the cases the only defense raised was that it was not the defendant who committed the crimes. In a fourth case, the defendant offered no evidence. In each matter, based on the facts, the defenses presented, the jury instructions given, and the verdicts returned, the court properly concluded that the jury premised its murder verdict on the theory of felony murder and, therefore, would not have returned a verdict on a lesser included offense." (*Id.* at p. 172.)

Here, by contrast, as in *Campbell*, it was not patently clear from the evidence that the killing occurred during the commission of a robbery, and therefore the superior court's error in failing to instruct on lesser included offenses to murder was not shown to have been harmless by the jury's true finding with respect to the special circumstance allegation.

The court of appeal's opinion in this case set forth no reasons for its implicit rejection of the *Campbell* court's detailed explanation of why the five aforementioned cases were twice-over distinguishable from a case like this one.

E. The Diminished Value Or Significance of the Felony Murder Special Circumstance True Finding In This Case

As a result of the prosecution's decision to proceed exclusively on a first degree felony-murder theory, an accurate determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict. But because the jury was not instructed on any lesser included offenses, it was not required to make any such determination. Nor was the jury instructed on the differences between robbery and theft or on alternatives to felony murder that were fully supported by the evidence. Instead, the jury was confronted with an unwarranted all-or-nothing choice between convicting appellants of felony murder or complete acquittal.

As noted in section B, *ante*, in *People v. Sedeno, supra,* 10 Cal.3d at p. 721, this Court observed that it is sometimes 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 *People v. Flood* (1998) 18 Cal.4th 470, the Court explained that *Sedeno* should not be read as "delineat[ing] circumstances in which such instructional error *categorically* may be deemed harmless"; rather, the prejudicial effect of such instructional error under California law must ultimately be determined under the *Watson* test.[10] (*Flood, supra*, at p. 490 [italics added].) In *People v. Breverman, supra,* 19 Cal.4th 142, the Court held that the failure to give a required lesser included instruction "is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affect the outcome." (*Id.* at p. 165.)

Here, while convicting all three defendants of first degree felony-murder, the jury found the allegation that a principal was armed with a handgun to be not true and acquitted Garcia's co-defendant Gonzalez of shooting at an occupied motor vehicle (Pen. Code, § 246), with not-true findings as to all gun-use enhancement allegations. (4C.T. 644-649; 3S.C.T. 644-648; 9R.T. 7201-7209.) The verdicts and findings show that the jury believed Gonzalez's testimony that Rosales was shot with his own gun. They also show that the jury did not believe the version of events

---

[10] *People v. Watson* (1956) 46 Cal.2d 818.

recounted to the police by Alejandro Ruiz, who allegedly claimed that Gonzalez simply walked up and shot Rosales.

To be sure, the verdicts also suggest that the jury believed that defendants were perpetrating a crime when Rosales was killed, which explains why all three were found guilty of felony-murder despite the jury's rejection of the gun-related charge and allegations. But, as mentioned previously, given the prosecution's decision to proceed exclusively on a felony-murder theory, an informed determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict. The superior court's failure to instruct the jury on lesser included offenses prevented the jury from undertaking such an informed evaluation of Kalac's claim that defendants set out to "rob" the victim.

Kalac testified that appellants planned to "come up" on Rosales, and he also testified that he understood "to come up on" to mean "to rob." As discussed in section C, *ante*, however, Kalac used the term "robbery" to describe theft without the use of force or fear, *i.e.*, grand theft from the person. This technical imprecision on the part of a layman witness not schooled in the formal elements of the offense of robbery (7R.T. 4880 ["I don't know the laws"]) is hardly surprising. As this Court has observed, the

"public's common understanding of the term" may not always be consistent with the "technical legal concept of robbery." (*People v. Green* (1980) 27 Cal.3d 1, 58, overruled on a different ground in *People v. Martinez* (1999) 20 Cal.4th 225; see *People v. Kunkin* (1973) 9 Cal.3d 245, 252 ["We have heretofore recognized that words of common usage do not necessarily reflect the subtle distinctions they bear before bench and bar"].) Regardless, Kalac's overly-broad use of the term "robbery" rendered his testimony ambiguous with respect to whether appellants specifically intended to obtain the drugs from Rosales by means of robbery or larceny by trick.

Kalac never testified that any of the defendants ever mentioned the use of force or fear. Indeed, Kalac was unable to recall any of the details of their plan:

> Q As far as the execution of how this so-called robbery was supposed to take place, you're saying there was details discussed?
>
> A Yes.
>
> Q What were the details?
>
> A Can't remember exactly what they were.

(7R.T. 4834.) Kalac *was* clear that appellant Garcia contributed virtually

nothing to the plan:

> Q Now, did Alfonso Garcia . . . ever say, "I'm gonna rob this man and I'm gonna use this gun?
>
> A No, sir.
>
> Q At any time about the details of this robbery that you claim was being planned and [Garcia] was a participant in this robbery, tell me what details did he provide?
>
> A Zero.

(7R.T. 4853-4854.) Kalac also made it clear that his understanding of what defendants were planning was based on his own similar conduct in the past:

> Q Do you have any other details that you can supply to this jury to evidence that a robbery was being planned?
>
> A Yes.
>
> Q What is that?
>
> A Those three talking about not having money and . . . trying to figure out someone they can call and come up on.
>
> Q That's it?
>
> A That's correct.
>
> Q For you that shows that a robbery was being planned?
>
> A That's correct. . . . "Come up" to me, yes, is robbing somebody.

. . .

Q Because that's what you used to do?

A That's correct.

(7R.T. 4885-4886.) At no point did Kalac ever see any of the defendants produce a gun or hear any mention of a gun. (6R.T. 4357, 4408, 4413-4414; 7R.T. 4833-4834.) If, as the jury apparently believed, Gonzalez and Garcia were unarmed when they went to meet Rosales and Ruiz, and assuming that Gonzalez's testimony that he intended to pay for the drugs was untruthful, the most likely scenario is that appellants were planning somehow to trick Rosales into tendering the drugs so that Gonzalez could grab them and run.

Kalac's misleading use of the word "robbery" and the lack of weaponry gave rise to a reasonable doubt as to whether appellants specifically intended to use force or fear to obtain the drugs from Rosales. In view of the evidence, the jury should have been given the option of finding that the appellants specifically intended grand theft from the person, which would have required the jury to reject the felony-murder charge in favor of a lesser included offense to first degree malice murder. It is unreasonable to infer that the jury made a considered, informed finding that

appellants specifically intended robbery and not mere theft when the jury was never instructed on the differences between the two offenses nor asked to choose between them.[11]

If this were a case in which the evidence made clear that, if guilty of anything, appellants committed an attempted robbery, then instructions solely on that one offense would have been adequate. But where, as here, substantial evidence supports both robbery and theft, a jury that has not been instructed on *both* offenses is ill-equipped to make an adequately-informed finding with respect to the robbery allegation.[12]

This Court addressed this very issue in *People v. Ramkeesoon* (1985) 39 Cal.3d 346 and arrived at the same conclusion. In *Ramkeesoon*, the defendant was convicted of first degree murder and robbery with findings

---

[11] Moreover, because robbery was not charged as a separate offense in the information, the jury was never asked to arrive at a stand-alone verdict with respect to the robbery allegation.

[12] As mentioned previously (see footnote 9, *ante*), this Court has recognized that the absence of instructions on the elements of theft in a case like this one is pertinent to deciding whether reversible *prejudice* has arisen from the trial court's erroneous failure to furnish any instructions or verdict forms on lesser included offenses supported by the evidence, regardless of whether the trial court had a sua sponte duty to instruct the jury on the elements of theft. (See *People v. Kelly, supra,* 1 Cal.4th at p. 530; see also *People v. Anderson, supra,* 141 Cal.App.4th at pp. 449-450.)

that he used a deadly weapon. (*Id.* at p. 348.) The defendant met the victim at a bar while playing pool. After some barhopping and eating dinner together, the victim told the defendant the victim was gay. Two more days of round-the-clock socializing marked by continued unwanted sexual advances culminated with the defendant stabbing the victim to death. The defendant testified that after stabbing the victim, he observed the victim's wallet, set of keys, and a wristwatch on the victim's nightstand. It was at that time that it first occurred to the defendant to steal the objects. (*Id.* at pp. 348-350.)

At trial, the defendant requested that the jury be instructed on theft as a lesser included offense of robbery. The request was based on the evidence of the defendant's after-formed intent to steal. If believed, the defendant would be guilty merely of theft as opposed to robbery, and could not be found guilty of felony murder. The trial court refused to instruct on theft as a lesser included offense. (*Id.* at p. 350.)

Finding that the trial court erred in not instructing on theft, this Court noted: "For purposes of this appeal, we must assume that the first degree murder verdict was based on felony murder since we have no way of knowing whether the jury relied on that theory or on premeditation and

deliberation." (*Ramkeesoon, supra,* at p. 352 [citations omitted].)

As this Court explained in reversing the murder conviction: "In the present case, the jury was never presented with the factual question posed by the omitted theft instructions. All it had to work with was a victim who had obviously died as a result of violence perpetrated by another and a defendant who was in possession of the victim's property under extremely suspicious circumstances. Since the jury was deprived of the 'theft option' which was clearly supported by some evidence, it cannot be said that a verdict finding defendant guilty of robbery necessarily resolved the issue posed by the lesser offense instruction adversely to defendant . . . . [¶] The jury here was left with an 'unwarranted all-or-nothing choice' [citation] on both the robbery and murder counts. The omission of the theft instructions practically guaranteed robbery and felony-murder convictions since defendant had admitted taking [the victim's] property and robbery was the only available theft offense. The findings of robbery and murder did not necessarily resolve the factual question of whether the intent to steal was formulated after defendant had inflicted the fatal blows because the jury was never required to decide specifically whether defendant had formed the intent to steal after the assault . . . . Accordingly, the error in failing to

instruct on theft and larceny cannot be deemed harmless." (*Ramkeesoon, supra,* at pp. 352-53.)

In view of the similarities between this case and *Ramkeesoon*, this Court's analysis in *Ramkeesoon* appears to be virtually dispositive of the issue presented in this case. In both cases, there was substantial evidence that the underlying felony --robbery-- was neither committed nor attempted. In *Ramkeesoon*, such evidence consisted of the defendant's testimony concerning his after-formed intent; here, the evidence was consistent with a finding that appellants intended to use trickery, as opposed to force or fear, to obtain drugs from the victim. In both cases, it is clear that (one of) the defendant(s) killed another person. Because in *Ramkeesoon* this Court assumed for purposes of the appeal that the murder conviction was based on felony murder, the only way the jury in both *Ramkeesoon* and this case could convict the defendant(s) of the homicide was to find that the underlying robbery had been committed. Thus, in both cases, the jury was left with an unwarranted all-or-nothing choice, warranting reversal. (See *Ramkeesoon, supra,* at p. 352.)

The special circumstance true finding in this case does not, therefore, necessarily show that the jury resolved the robbery allegation

adversely to appellants in any reliable sense, because that finding was based on an incomplete understanding of what the prosecution was required to prove and the jury was prevented from considering alternative verdicts that would have been reasonable in view of the evidence.[13] Thus, the trial court's failure to instruct the jury on lesser included offenses to first degree malice murder was not rendered harmless by the jury's felony murder special circumstance true finding.

Accordingly, the decision of the court of appeal should be reversed.

---

[13] In addition, as the *Campbell* court observed, "the *Sedeno* rule was based upon the jury resolving the question posed by the omitted instruction 'in another context.' (*Sedeno, supra*, [10 Cal.3d at p. 721].) Because the finding on the special circumstance allegation and robbery conviction in this case are inextricably interwoven with the verdict on the felony murder count, it cannot be said that special circumstance finding and robbery verdict resolved the question posed by the omitted instruction 'in another context.'" (*Campbell*, *supra*, 233 Cal.App.4th at p. 167.)

CONCLUSION

Because, contrary to the court of appeal's opinion in this case, the trial court's failure to instruct the jury on lesser included offenses to first degree malice murder was not rendered harmless by the jury's felony murder special circumstance true finding, the decision of the court of appeal should be reversed.

Respectfully Submitted,

Dated: November 10, 2016

JONATHAN E. DEMSON
Attorney for Appellant Alfonso Garcia

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	Supreme Court No. S234377
v.	)	
01) JORGE GONZALEZ,	)	Court of Appeal No. B255375
02) ERICA MICHELLE ESTRADA,	)	
03) ALFONSO GARCIA,	)	Superior Court No. YA076269
Defendants and Appellants.	)	

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.360(b)(1) of the California Rules of Court, appellant Alfonso Garcia certifies that his opening brief on the merits filed in connection with the above-captioned matter consists of approximately 10,503 words, as determined by using the "word count" feature of the Microsoft Word program used in drafting the brief.

Respectfully Submitted,

Dated: November 10, 2016

JONATHAN E. DEMSON
Attorney for Appellant Alfonso Garcia

PROOF OF SERVICE BY MAIL

Re: Appellant Alfonso Garcia, Court Of Appeal Case: B255375, Superior Court Case: YA076269

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On November 10, 2016, I served a copy of the attached Opening Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

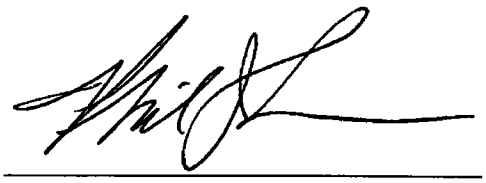
California Appellate Project
Los Angeles Office
520 S. Grand Avenue
4th Floor
Los Angeles, CA 90071

Superior Court of California, County of
Los Angeles, SW Dist
Hon. Scott T. Millington, Dept. SW-O
Inglewood Courthouse
One Regent Street
Inglewood, CA 90301

California State Prison, Centinela
Alfonso Garcia #AT3883
P.O. Box 911
Imperial, CA 92251-0911

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 10th day of November, 2016.

Phil Lane
(Name of Declarant)



(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Appellant Alfonso Garcia, Court Of Appeal Case: B255375, Superior Court Case: YA076269

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On November 10, 2016 a PDF version of the Opening Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

Court of Appeal, 2nd District
Clerk of Court
Los Angeles, CA 90013

State of California Supreme Court
Supreme Court
San Francisco, CA 94102-4797

Office of the Attorney General
Los Angeles
Los Angeles, CA 90013-1230
docketingLAawt@doj.ca.gov

California Appellate Project
Los Angeles Office
Los Angeles, CA 90071
CAPdocs@lacap.com

Robert F. Howell, Esq.
Robert F. Howell, Esq.
Las Vegas, NV 89170
AttorneyHowell@yahoo.com

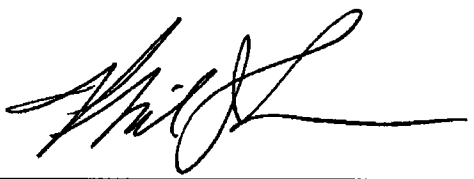
Valerie G. Wass, Esq.
Valerie G. Wass, Esq.
Pasadena, CA 91105
crimappeals@gmail.com

District Attorney's Office, County of Los Angeles
Ethan Milius, Deputy District Attorney
Los Angeles, CA 90012
EMilius@da.lacounty.gov

Law Offices of Gilbert Rodriguez
Gilbert Rodriguez, Esq.
Santa Monica, CA 90405
gilrodlaw@aol.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 10th day of November, 2016 at 15:34 Pacific Time hour.

Phil Lane
(Name of Declarant)



(Signature of Declarant)