SUPREME COURT OF THE STATE OF CALIFORNIA

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

No. S234377

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

GONZALEZ'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

Jorge Gonzalez, Erica Estrada, and Alfonso Garcia were each charged with first degree murder with the special circumstances allegation that the homicide occurred during the course of a robbery. Although the charging document alleged murder in violation of Penal Code section 187, and in statutory language which refers only to malice murder, the trial court at the prosecution's request instructed only on felony murder, and gave no instructions on malice murder, on any lesser-included offenses, or any defenses.

The jury returned a verdict of first degree murder which did not specify whether it was based on malice murder or felony murder, and

made no reference to robbery. The jury also made a true finding on the sole special circumstances allegation, i.e., that the homicide occurred during the course of a robbery.

Gonzalez argued on appeal, *inter alia*, that the failure to instruct on malice murder, second degree murder, other lesser-included offenses to malice murder, and specified defenses was error which was reversible *per se*. Gonzalez also argued, in the alternative, that if the error was not reversible *per se*, then that it nonetheless required reversal because he was prejudiced by the failure to instruct.

The Court of Appeal assumed that the failure to instruct was error, but ruled that it was harmless because of the jury's true finding on the felony murder special circumstances allegation.

This Court granted review to consider whether the finding on the felony murder special circumstances allegation rendered harmless the trial court's error in failing to instruct on malice murder and relevant lesser-included offenses and defenses to malice murder.

Gonzalez respectfully submits that the error is structural and therefore reversible *per se*, and that in the alternative the failure to instruct was prejudicial and requires reversal of the judgment.

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STATEMENT OF THE CASE

The Los Angeles County District Attorney jointly charged Jorge Gonzalez (hereinafter sometimes referred to as "appellant"), Erica Michelle Estrada and Alfonso Garcia by amended information, in count one, with the malice murder (§ 187, subd. (a)), of Victor Rosales on October 6, 2009, while engaged in the commission of a robbery (§§ 211, 190.2, subd. (a)(17)). It was also alleged that a principal was armed with a handgun (§ 12022, subd. (a)) during the murder. (3CT 457.) The amended information charged appellant, in count two, with shooting a handgun at an occupied motor vehicle. (§ 246.) (3CT 457.) The amended information further alleged that appellant personally discharged a handgun in committing both crimes (§§ 12022.53, subds. (b) (c) (d)). (3CT 458.)

The case was tried to a jury before Judge Scott T. Millington over 25 trial days. (3CT 452-453, 462-463, 472-512, 515-518, 522-523, 644-648.) On October 4, 2013, the jury convicted appellant of first degree murder and found the special circumstances allegation to be true, but found that each of the firearm use allegations (§§ 12022.53, subds. (b) (c) (d), § 12022, subd. (a)) to be not true. The

jury also acquitted appellant on count two, the charge of shooting at an occupied motor vehicle (§ 246). (3CT 644-647.)

The trial court sentenced appellant to state prison for life without possibility of parole. (3CT 673, 675.) Appellant appealed from the judgment. (3CT 677.)

The California Court of Appeal, Second Appellate District, Division Four, affirmed the judgment in a written opinion filed on March 30, 2016. The appellate court ruled that any error in failing to instruct was harmless (Slip Opn. [Appendix A to Petition for Review], at pages 27-28):

> It is not reasonably probable that appellants would have obtained a more favorable outcome had the jury been instructed on malice murder, its lesser included offenses and the defenses of accident and self-defense. The jury found beyond a reasonable doubt that appellants were guilty of first degree murder for a death that occurred during the perpetration or attempted perpetration of a robbery. Accordingly, the 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. Nor was the failure to instruct on accident and self-defense prejudicial, as neither accident nor self-defense is a defense to felony murder. (Citations omitted.)
>
> Additionally, the jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstances allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In determining whether

> appellants were guilty of murder 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 omitted.)

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

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

Gonzalez accordingly submits this brief, limited as directed by the Court, to that single, specific issue.[1]

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[1] In the Court of Appeal, the Attorney General argued that a trial court has no duty to instruct on malice murder in the circumstances of this case, i.e., where the charging documents cites and contains allegations only under Penal Code section 187 and makes no reference to felony murder. The Attorney General also argued that there was no duty to instruct because of lack of substantial evidence to support any additional jury instructions. Gonzalez does not understand that this issue (whether the trial court had a duty to instruct) to be within the scope of this Court's grant of review, and accordingly has not addressed it in this brief.

STATEMENT OF THE FACTS

Prosecution Case.

A. Introduction.

The prosecution case depended heavily if not exclusively on two unusual sources. The first source were the out-of-court statements attributed to Alejandro Ruiz, an undocumented alien whose unsworn accounts provided the only prosecution evidence of how the shooting allegedly occurred, and who did not appear at trial because the police apparently could not locate him. (7RT 5139.) Although his out-of-court accusations are included in the following summary of prosecution evidence, the jury found that his testimony was not true – at least in material part – when it found that none of the defendants used a gun in the alleged robbery, as reflected in their "not true" findings on all of the firearm use allegations.

The second principal source of prosecution evidence was the testimony of Anthony Kalac, who appeared but refused to testify until given a grant of use immunity.[2] Kalac was a heroin addict who

[2] Kalac was initially called to testify outside the presence of the jury, and with his personal attorney present, declined to answer any questions, citing the Fifth Amendment. (5RT 3934-3935.) Kalac was then granted use immunity for his trial testimony. (5RT 4008-4009.)

admitted that he had personally robbed drug dealers in the past, but who claimed that he was merely present during the planning of the robbery in this case.[3] Kalac conceded that he was stoned on 15 hits of heroin at the time he made his alleged observations. Kalac was the only witness who claimed that the shooting grew out of an agreement or a conspiracy to rob Victor Rosales, and thus supplied the only evidence to support the prosecution's felony murder theory and special circumstances allegation.

The following narrative is a unified summary of all the relevant proffered prosecution evidence, including the out-of-court and partially rejected account of the absconding Ruiz, and the claims of Kalac, even though completely self-serving and made through the lens of admittedly heavy heroin intoxication.

B. Summary Of Prosecution Evidence.

On October 6, 2009, Kalac went to the residence of his friend "Alf" Garcia, with the intent to get high on drugs. (5RT 4010; 7RT

[3] If there was a robbery or attempted robbery of Rosales in this case, it was carried out through the use of Kalac's personal *modus operandi*, which as he described it was to "snatch and run" with drugs seized from the drug dealer, and did not involve the use of any weapon or intimidation. (7RT 4872-4875.)

4367.) Kalac had a heroin habit,[4] whereas Garcia's drug of choice was methamphetamine ("meth"). (5RT 4011.). Kalac entered Garcia's house, where he met Jennifer Araujo, who was Garcia's girlfriend. (5RT 4012; 7RT 4367.) Kalac smoked some heroin while waiting for Garcia to get dressed. (5RT 4012, 4013.) Kalac had already smoked about 10 "hits" of heroin that morning, before going to Garcia's residence, and smoked another 5 or 6 "hits" once he got there. (5RT 4014; 6RT 4366, 4368, 4432.)

Garcia told Kalac that there had been a birthday party at a motel down the street the previous night, and asked him if he wanted to go hang out and get high there. (5RT 4016; 7RT 4367.) Kalac agreed to go but hid his heroin, which was slightly less than half a gram, in Garcia's house, because he did not like to travel with it. (5RT 4016; 7RT 4367-4369, 4419.) Kalac expected to use meth to get high at the motel, but called his drug dealer on the way there to try to get a bag of heroin. (6RT 4430, 4431; 7RT 4865.)

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[4] Kalac admitted that he had used heroin for a "few years" prior to October of 2009, but claimed to have successfully kicked his habit since then, and to be sober during his trial testimony. (5RT 4011, 4015; 7RT 4867, 4876.) In October of 2009, Kalac was inhaling about one-half gram of black tar heroin on a daily basis. (6RT 4361, 4418.) Kalac was also an occasional meth user, although it was not his "drug of choice." (6RT 4386, 4421)

Kalac, Garcia and Araujo walked down the street to the Crystal Inn, and Garcia knocked on the door of one of the rooms. (5RT 4017; 6RT 4250.) Appellant (known to Garcia as "Sharkie") answered the door. (5RT 4017; 6RT 4251.) Kalac, Garcia, and Araujo entered the room, where Estrada, whom Garcia described as being appellant's "girlfriend," was also present. (6RT 4252, 4253.) Kalac immediately walked over to the couch, and sat down. (4254.)

Kalac heard the other people in the room talking among themselves, but he remained silent because he did not know anyone except Garcia. (6RT 4255.) Garcia suggested to appellant that they "pack a bowl," which Kalac understood to mean put meth in a pipe and smoke it. (6RT 4256, 4370.) Appellant told Garcia that there were no drugs in the room. (6RT 4256.)

Everyone talked and watched television. (6RT 4257.) Kalac thought that the others were discussing something "along the lines of finding someone that they could get dope from, basically," but Kalac did not know "exactly what was said."[5] (6RT 4257, 4258.)

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

After about 15 minutes, Kalac telephoned his drug dealer and arranged to meet him at a nearby gas station so that he could buy $30 or $35 worth of heroin. (6RT 4259, 4260.) Kalac left the room and went to the gas station, but his heroin dealer did not show up, so after awhile Kalac returned to the motel room, where Garcia, appellant, Estrada and Araujo were all still present. (6RT 4259.)

Kalac again sat on the couch, and listened to the others' conversations. (6RT 4261.) Kalac thought that now there was some conversation to the effect that no one had any money, and that they were trying to figure out how to borrow money or to get someone to "front" them some drugs. (6RT 4261, 4372; 7RT 4875.) Kalac heard Estrada say that she knew someone "that they could come up on," although he didn't know exactly what she said. (6RT 4262, 4373, 4374.) Kalac understood that the phrase "come up on" meant "to rob basically."[6] (6RT 4262.) Gomez, Estrada and appellant were primarily

[6] Kalac testified that he had heard the phrase "come up on" hundreds of times in the past when people were talking about robbery. (6RT 4263; 7RT 4863.) The phrase "come up" was never uttered by Kalac, however, during an extensive police interview which was conducted after the homicide. (7RT 5188.) Kalac also testified that he used that phrase when, in the past, he had "come up" on Hispanic drug dealers and robbed them himself, although that phrase "never physically came out of [his] mouth." (7RT 4864, 4870, 4874.) Kalac had "no clue" about the number of drug dealers whom he had personally robbed, and could not identify even the calendar years in which his robberies occurred. (7RT 4871-4872.)

speaking Spanish to one another, and Kalac did not participate in their discussions.[7] (6RT 4374-4375.) Kalac was watching television while the conversations were occurring. (6RT 4416.) Kalac was a "drug addict at the time," so that his "one and only concern was to get high." (6RT 4422; see 6RT 4428-4429.)

Appellant was talking on his own cell phone when Estrada used the phrase "come up on,"[8] and although Kalac could not hear "specifically what they were saying," he thought that the "general subject" of the conversations was "robbing this gentleman that [Estrada] spoke of." (6RT 4264.) Estrada said something "along the lines of it being an ex-boyfriend who had been physical with her." (6RT 4265.) Kalac thought that appellant got "a little agitated" when he heard this news. (6RT 4265.) Kalac did not know "exactly what she was saying," but concluded that she was talking about robbing

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[7] A homicide detective later interviewed Kalac and asked him: "In reality, you don't know what they were actually planning at the time?" Kalac responded: "I don't know what they were doing." (6RT 4375.) Kalac did not see a gun in the motel room at the Crystal Inn, and did not hear anyone mention one. (6RT 4413, 4414.)

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

her assailant because she mentioned "the physical abuse, the black eye." (6RT 4266.)

Estrada decided to ask Rosales for $150 in meth and $50 in heroin, asked Kalac to give her his money, and told him that they would give him heroin from the robbery. (6RT 4266-4267.) Kalac gave them about $28 or $29. (6RT 4267.)

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

Garcia said that he would go along and be the "lookout for the robbery"[9] and he and appellant walked out of the motel room. (6RT 4273, 4411; 7RT 4882, 4883.) As soon as they left, Estrada started to pack up her property, and told Kalac that they were "going to move next door to a cheaper hotel." (6RT 4275, 4276.) Estrada made another phone call to see "how far out the drug dealer was from getting there," and told him that she would be there in 10 to 15 minutes. (6RT 4275, 4398.)

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[9] At the preliminary hearing, Kalac testified that Garcia had agreed to be the lookout for "the drug transaction." (6RT 4412.)

At about 1 p.m., Rosales telephoned his friend Alejandro Ruiz and asked Ruiz to give him a ride. (3RT 2792.) Ruiz agreed and picked up Rosales at about 2:14 p.m. (3RT 2792.) Rosales told Ruiz that he had received a telephone call from his girlfriend, Estrada, who wanted him to meet her. (3RT 2792.) Rosales told Ruiz that he and Estrada had agreed to meet at a laundromat that was on the corner of Prairie Avenue and 112th Street. (3RT 2792.)

Rosales was a drug dealer, who sold drugs to Estrada at a discount, and sometimes gave them to her. (8RT 5467.) Rosales was also a drug user, and on this day he had both methamphetamine ("meth") and amphetamine in his blood. (5RT 3656, 3674.)

As they approached the laundromat, Rosales told Ruiz to pull over and park along the curb. (3RT 2792.) As Ruiz was parking, he saw Estrada and two male Hispanics walk out from behind some large palm trees. (3RT 2793; 7RT 5140.) Estrada pointed at Rosales, whereupon one of the two men who with her walked up to within 3 feet of the passenger side of Ruiz's car, pulled out a small chrome semi-automatic handgun, and fired one shot. (3RT 2793; 4RT 3030, 3054.) The shooter reached in and grabbed Rosales, and attempted

to pull him out of the car, but Ruiz accelerated his vehicle and drove westbound on 112th Street. (3RT 2793.)

Liliana Rosales (Liliana"), who was Rosales's sister, walked out of her residence, located at 3947 110th Street in Inglewood, and went to the driveway to get into her car. (3RT 2475, 2479, 2738.) Ruiz drove up, stopped his Alero, and told Liliana that Rosales had been shot. (3RT 2480, 2482-2483, 2493, 2527; 4RT 3079, 3108.)

Liliana ran over to the Ruiz's van, saw that Rosales was hurt, and asked him "who did this to you?" (3RT 2483.) Rosales replied: "Erica. Erica." (3RT 2484.) Ruiz also stated: "Erica, Erica." (3RT 2493-2494, 2706, 2714-2716.) After Rosales's mother arrived, bystanders asked Ruiz who had done it, and he stated: "the girlfriend, the girlfriend." (3RT 2508, 2509, 2514.) Estrada had previously met Rosales's mother and two of his sisters, who understood that Estrada and Rosales had no serious romantic relationship, but were merely "friends with benefits." (3RT 2477, 2512, 2520.)

Rosales was taken in an ambulance to the hospital, where he died from a single gunshot wound.[10] (3RT 2491, 2711, 2753-2754.)

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[10] An autopsy confirmed that Rosales died from a single gunshot wound to his chest. (5RT 3648, 3654, 3666.) The fatal bullet entered the right side of the chest close to the midline, traveled at 45 degree angles from left to right and from top to

Estrada, Araujo and Kalac took the luggage from the room at the Crystal Inn and put them in Estrada's older, black Cadillac. (6RT 4277; 7RT 4359, 4377.) Kalac and Araujo got into the car, and Estrada drove it in a roundabout way to the American Inn. (6RT 4277, 4377-4378.) Estrada went into the motel and registered,[11] and then they took the bags to the room. (6RT 4278, 4378.)

Kalac left the room and walked down Prairie Avenue, where he ran into appellant and Gomez, who were waking northbound on the other side of the street. (6RT 4279-4281, 4379, 4393.) Garcia crossed the street and told Kalac that "shit went bad." (6RT 4282, 4381, 4394, 4409.) Kalac and Garcia went to the motel room, where Garcia changed clothes, and then they went to Garcia's residence. (6RT 4282, 4405.) Kalac retrieved the heroin that he had stashed at Garcia's house, and then returned to his own residence. (6RT 4283.)

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bottom, pierced the heart, and lodged in the left back. (5RT 3657, 3658.) In addition to the bullet wound, Rosales had stippling on his right hand and right wrist. (5RT 3649, 3960-3961, 3973.) "Stippling" is a small abrasion or scratch left on the skin when struck by gunpowder particles. (5RT 3655, 3959.) It occurs when a firearm is discharged within 2 feet of the skin. (5RT 3655, 3658.) Because there was no stippling around the entry wound on Rosales's chest, the autopsy surgeon concluded that the gun had been fired from more than 2 feet away from the chest. (5RT 3664.) The prosecution firearms examiner, however, testified that if the victim was wearing clothing, it would prevent stippling on the skin if the bullet passed through the cloth before hitting the skin. (5RT 3982.) No attempt was made to examine Rosales's shirt for the presence of gunshot residue. (7RT 5206.)

[11] Estrada paid $51 for the room at the American Inn. (5RT 3990; 7RT 5139.)

Myra Gomez, another of Rosales's sisters, talked with responding police officers[12] and directed them to Estrada's residence, which was located at 102536 South Truro Street. (3RT 2712-2713, 2774-2780, 2797.) Later that day, around 7:14 p.m., several police officers conducted a "high risk" stop of Estrada's black Cadillac in the street outside her residence, and arrested her and appellant. (3RT 2797-2799; 4RT 3018, 3063-3064.) The police searched the car, but no gun was found.[13] (4RT 3064; 8RT 5431.)

A police search of Ruiz's Oldsmobile Alero was conducted later at a locked, secure police towing yard, and police found a baseball bat, a cell phone lodged between the front, center console and the passenger seat, and an expended .22 caliber shell casing that was lying on the passenger-side floor board. (4RT 3088, 3112-3114; 7RT

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[12] Several Inglewood police officers received a radio dispatch informing them of the shooting at 2:36 p.m., and arrived at the shooting scene at about 2:40 p.m. (3RT 2738-2739, 2742, 2744, 2758, 2759, 2768, 2788, 2790; 4RT 3053.)

[13] A police criminalist examined a bullet recovered from Rosales's body at the autopsy and concluded that it was "most consistent with a .22 long rifle caliber." (5RT 3954, 3955; see 5RT 3985.) The criminalist could not match the bullet to the expended cartridge case found inside Ruiz's car, but thought "that it is the type of cartridge case that I would expect from a .22 long rifle caliber bullet." (5RT 3955.) The criminalist testified: "There's no way to identify that that bullet specifically came from that cartridge case ..." (5RT 3956.) The handgun used in the shooting was never found. (8RT 5431.)

4930-4934.) The only fingerprints found on the vehicle that could be matched to anyone were those of Rosales. (4RT 3123-3124.)

At 4 a.m. on December 17, 2009, police went to 3725 West 112th Street in Inglewood to search the house at that address. (5RT 3992-3993.) When the police announced their presence at the front door, Garcia ran about 5 steps out the east door of the residence. (5RT 3995, 3998-3999, 4002.) A police officer shot Garcia in his left, inner thigh with a .40 millimeter foam baton round, whereupon Garcia turned and ran back inside the house. (5RT 3996-3997.) Eventually, Garcia surrendered himself to at the front door. (5RT 3997.)

Several months later, Kalac told Stephanie San Angelo, who was his sometimes roommate and girlfriend, about the shooting. (7RT 4891, 4895.) Kalac told her that a male subject named "Ralph" or "Alf" was the "mastermind" of a robbery which took place in October of 2009, which was carried out by Alf, Kalac, and two other subjects (one male and one female). (7RT 4921.) Kalac stated that they intended to jack either the girl's boyfriend, ex-boyfriend, or the father of her child. Kalac told San Angelo that Alf shot and killed the drug dealer, who was in a car, in the area of 113th Street and Prairie

Avenue, and that after the robbery Alf gave the gun to Kalac. (7RT 4921; 4895-4896.)

San Angelo asked Kalac if he had walked past the dead body without saying anything, and Kalac replied: "Yeah, I didn't care about it. I cared about my dope." (7RT 4896.)

Kalac's response bothered San Angelo enough that, on February 1, 2010, she went to the Inglewood Police Department and reported Kalac's statements to Detective Michael Han. (7RT 4909, 4914-4915, 4921, 5167.)

Detective Han did not work in the homicide section, so he sent the following e-mail to several homicide officers to try to find the detective assigned to the case (7RT 4920-4921):

> For your information, on Monday, February 1, 2010, I met with an anonymous informant at the IPD lobby. The informant said he/she heard the following story from a male white subject by the name of Anthony Kalac. The informant relayed that recently he/she heard Anthony Kalac talk about a robbery to a drug dealer. Anthony Kalac said a male subject by the name of "Ralph" or "Alf" was the mastermind in the robbery. On or about October, 2009, "Ralph," Anthony Kalac, and two other subjects (one male and one female) executed the drug dealer, who was in the car, in the area of 113th Street and Prairie Avenue. After the murder, "Ralph" gave the gun to Anthony Kalac to get rid of it.

Han also made some handwritten notes of his conversation with San Angelo, which included her first name, her cell phone number, her residence address, and the name "Kevin." (7RT 4923-4924, 5168-5169.)

The homicide detective assigned to the case was Kevin Lane, who received Han's e-mail and notes, and subsequently met with Kalac and Araujo, and interviewed each of them.[14] (7RT 5125, 5134, 5167-5168, 5172, 5177-5181, 5184.) Lane made no attempt, however, to more fully identify, locate, or interview the "anonymous informant," San Angelo. (7RT 5176; 8RT 5430.)

Detective Lane was aware that the "anonymous informant" had provided information that Garcia gave Kalac the gun and told him to hide it. (8RT 5453.) Lane asked Kalac if Garcia made such a request, but Kalac replied that he never saw or heard a gun, and did not know anything about it. (8RT 5453.) Kalac was never arrested or charged. (7RT 5187, 5197; 8RT 5437-5438.)

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[14] Araujo did not appear at trial. (7RT 5135-5136.) The only statement attributed to her by anyone was Kalac's claim, made during interrogation of him by Detective Lane, that Araujo told him that the shooter said: "If you drive off, I'm going to shoot. Give me your dope." (8RT 5451.) Lane concluded that Kalac's knowledge of how the shooting took place originated from Araujo (8RT 5451), but there is no hint in the record either that Araujo had percipient knowledge of the shooting, or that any such witness described to her how the shooting took place. Apparently no inquiry was made concerning the "Kevin" listed in Han's notes, nor was any effort made by Officers Han and Lane to locate him.

C. Defense Evidence.

Appellant testified, and called a former employer to testify for the limited purpose of corroborating a portion of his testimony concerning his income.

Appellant worked as a machinist from 1989 to 2009, but stopped working in that capacity at the beginning of 2009 due to an illness, and had about $46,000 in savings at that point. (8RT 5470, 5754-5755; Exh. A.) Appellant's last machinist job was in the Research Department of Maglite Corporation. (8RT 5470.)

Beginning in 2009, appellant worked part time by helping Ernesto Corral, a paralyzed friend, by doing household chores such as cooking and laundry, and by assisting Corral with his personal hygiene needs. (8RT 5470, 5757.) In exchange, Corral provided appellant with room and board as needed, and paid him $200 or more at the beginning of each month. (8RT 5471, 5761.) The last payment from Corral to appellant $200, which was paid on October 2, 2009. (8RT 5471, 5757.)

Appellant first met Victor Rosales in September of 2009 when Erica Estrada brought him to a hotel so that appellant could buy meth from him. (8RT 5478, 5520-5521.) Appellant used Estrada as his

"hook up" with Rosales because he could get drugs through her at a discount. (8RT 5522, 5524.) Appellant bought drugs from Rosales a second time, again by hooking up with him through Estrada, at the American Inn in Inglewood, in the last week of September of 2009. (8RT 5478, 5526-5527.) Appellant used $20 to $40 worth of meth to get high, but appellant did not use drugs on a daily or regular basis. (8RT 5477, 5530.)

Appellant did not sense any hostility on Rosales's part during either of these two transactions. (8RT 5479, 5530.) However, after the second drug purchase from Rosales in the last week of September, appellant and Estrada had sex for the first time. (8RT 5481, 5530.) Appellant was not in love with Estrada, did not consider her to be his girlfriend, and did not consider their relationship to be "romantic." (8RT 5481.) It did not bother appellant that Estrada and Rosales appeared to be having sex together. (8RT 5481-5482.)

On October 5, 2009, appellant met Estrada in one of the rooms at the Crystal Inn. (8RT 5530.) Estrada threw a small surprise birthday party for appellant,[15] complete with balloons, pizza, a cake, and presents consisting of a Dodgers jersey and hat. (8RT 5530-

[15] Appellant was born on October 5, 1973. (5RT 3913.)

5531, 5482.) Jennifer Araujo was also present, and shared a small amount of meth with appellant. (8RT 5531.) Estrada left late in the evening to go and be with Rosales. (8RT 5531, 5482.) When Estrada returned to the motel room around midnight or later, she and appellant engaged in some "hanky panky," and then appellant went to sleep. (8RT 5532.)

Sometime between 10 and 11 a.m. the next day, Garcia, Kalac, and Araujo came to the motel room. (8RT 5474, 5484, 5532.) Appellant knew Garcia because he had attended high school with him, and they were both friends with Araujo, but appellant had never met Kalac before. (8RT 5533, 5487-5488, 5710-5711.)

Garcia asked appellant to "pack a bowl," which appellant understood to mean that Garcia wanted to smoke some meth. (8RT 5475, 5533.) Appellant told Garcia that he did not have any drugs. (8RT 5475, 5533.) Appellant asked Estrada to telephone Rosales and ask request that he bring over a "teena," which is street slang for 1/16th of an ounce of crystal meth. (8RT 5475-5476, 5534.) Kalac asked Estrada if she could also hook him up with $30 worth of heroin, and she agreed to do so. (8RT 5485.)

After appellant heard Estrada request drugs from Rosales over the telephone, appellant stopped paying attention to her phone conversation, and began to make calls on his own cell phone. (8RT 5535, 5486.) Appellant was not worried that meeting with Rosales would be a problem, even though he had just had sex with Estrada earlier that morning, because he believed that he and Rosales were only two of several men with whom Estrada had been "hanging out.[16]" (8RT 5535.)

There was no conversation or discussion in the motel room about "being broke or not having any money." (8RT 5476.) There was no talk about any scheme to raise money to buy drugs. (8RT 5476-5477.) Appellant had been paid by Corral only 4 days earlier, and had about $165 in cash with him. (8RT 5471-5472.)

There was no talk in the motel room about robbing anyone, or about any plan to rob Rosales. (8RT 5486.) Appellant did not have a gun and did not see a gun in the room at the Crystal Inn, and he did not hear any discussion about a gun. (8RT 5489-5491.)

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[16] Estrada never told appellant that Rosales beat her. Estrada told appellant that it was her "baby daddy" who beat her up. (8RT 5489.) Estrada's "baby daddy" was, literally, the father of her child, and that person was not Rosales. (8RT 5489.)

Kalac was nodding and appeared to be high and "zoned out," and at times even to be asleep. (8RT 5486, 5711.) Appellant did not hear any talk about a robbery, and he had no plans to rob anyone. (8RT 5472, 5711.) Appellant, a self-described "phone monster," spent most of his time, after Kalac and Garcia arrived in the room, talking to people on his own cell phone. (8RT 5484, 5493-5494, 5711.)

The motel manager called the room and told Estrada that they would have to leave because there had been too many people going in and out of her room. (8RT 5536.) Estrada and appellant decided that they would move down the street to the American Inn, which was within walking distance. (8RT 5536.) Estrada asked appellant to go and meet Rosales at the laundromat across the street, while she moved their property to the American Inn down the street. (8RT 5494-5495, 5537, 5539.)

Appellant left the motel and walked across the street to the laundromat, followed closely by Garcia.[17] (8RT 5538-5539, 5712.) Rosales was not inside the laundromat, so appellant walked outside to wait for him. (8RT 5539, 5497, 5498.)

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[17] Appellant testified that Estrada did not go to the laundromat with him to meet Rosales, and asserted that Ruiz's claim that she was on the street and pointed out Rosales to him and Garcia was "a lie." (8RT 5495.) Appellant also testified that: "nobody ever asked anybody to be a look-out for anything." (8RT 5496.)

After 20 to 30 minutes, appellant walked down Prairie Avenue toward 112th Street, and saw Rosales sitting in the front passenger seat of a parked car, which had someone whom appellant did not recognize sitting in the driver's seat. (8RT 5499, 5541, 5544.)

Rosales was leaning out the open passenger window. (8RT 5500, 5545.) As appellant approached the car, he could see that Rosales was staring at him in an angry manner ("mad-dogging"). (8RT 5500, 5545, 5547, 5712.) Appellant stated: "What's up, Victor," but Rosales did not reply. (8RT 5501, 5549, 5713.)

Appellant crouched down and leaned against the car to talk to Rosales, who was reclined in his seat and leaning to his right, and again stated: "What's up, Victor?" (8RT 5501, 5502) Again, Rosales did not respond. (8RT 5501.) The driver appeared to appellant to be either extremely high or extremely nervous, and Rosales's face was distorted, and he continued to "mad-dog" appellant. (8RT 5501.)

Appellant asked Rosales if he wanted appellant to go and get Estrada. (8RT 5501, 5504, 5550.) Rosales responded by raising a gun[18] in his right hand. (8RT 5501, 5551, 5713-5714.) Appellant, fearing for his life, immediately grabbed the barrel of the gun with

[18] The pistol was 6 to 8 inches long. (8RT 5725.)

both hands, and twisted it to the left and outward, towards the driver's side. (8RT 5501, 5551-5552, 5715-5718, 5735.) The driver reached under his car seat. (8RT 5504.)

Appellant momentarily got the gun out of Rosales's hand. (8RT 5554, 5718-5719.) Appellant changed his grip on the gun to hold it by the hand grip in his right hand, with his finger on the trigger, and started to pull it back toward himself, out of the car. (8RT 5720-5721, 5725.) Rosales used both his hands to grab appellant's right wrist, as appellant turned away from Rosales and yanked the gun in an attempt to get it away from him, and the gun unexpectedly fired.[19] (8RT 5505, 5722-5724, 5739-5740.)

Appellant did not know that Rosales was shot, because at that point during the struggle he was facing away from him. (8RT 5511.)

Appellant took the gun and ran eastbound down 112th Street. (8RT 5506, 5741.) Appellant turned and looked back at the Alero, which backed up, and then pulled forward and hit the car in front of it. (8RT 5506.) Appellant continued to run, because he wanted to get away from Rosales and the driver. (8RT 5506.) Then the Alero backed up again, and "peeled out" and drove away. (8RT 5506.)

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[19] One second or less elapsed between the time appellant grabbed the gun and it fired. (8RT 5751.)

Appellant walked to the intersection of 112th Street and Prairie Avenue, he saw Garcia standing near the laundromat. (8RT 5507, 5743.) Appellant and Garcia walked down Prairie Avenue, and saw Kalac walking toward them on the same side of the street. (8RT 5508, 5746.) Appellant gave the gun to Kalac, because he was in shock, scared, and confused, and just did not want to have it anymore. (8RT 5508-5509, 5747-5749.)

Appellant left the area right after the shooting because he was not sure if Rosales and his friend had another weapon might come back to look for him and get him, and he did not want to go to jail or be blamed by the police for shooting Rosales. (8RT 5512.) Later, he went to the room where Estrada had moved his property, and told her that he thought Rosales may have been shot. (8RT 5513-5514.) Estrada started crying. (8RT 5514.)

Appellant placed his cell phone and the rest of his personal property in a drawer in the motel room,[20] and lay down on the bed. (8RT 5514.) Estrada drove to her residence because she wanted to see her son. (8RT 5515.) After seeing her son, Estrada was driving

[20] Appellant's cell phone and the rest of his personal property had been left by him at the motel room, and were not introduced as evidence at trial. (8RT 5515.) When appellant was booked later that day, he had only 25 cents with him. (5RT 3913.)

herself and appellant away from her residence when they were stopped by the police, and arrested. (8RT 5515.)

Appellant did not intend pull the trigger, and did not intend for the gun to go off. (8RT 5516.) Appellant was not trying to kill Rosales. (8RT 5516.) Appellant did not take drugs or money from Rosales, or from anyone as a result of the shooting. (8RT 5516.)

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ARGUMENT

I.

THE FINDING ON THE SPECIAL CIRCUMSTANCES ALLEGATION IS NOT RELEVANT TO THE ISSUE OF PREJUDICE BECAUSE THE TRIAL COURT'S ERROR WAS REVERSIBLE PER SE.

The trial court's failure to instruct on malice murder, second degree murder, voluntary manslaughter due to heat of passion arising from adequate provocation, voluntary manslaughter due to imperfect self-defense, and the complete defenses of reasonable self-defense and accident, deprived appellant of his Sixth Amendment rights to jury trial and to present defenses, as well as his Fourteenth Amendment right to personal liberty without proof of each element the charged criminal offense beyond any reasonable doubt. The failure to instruct was accordingly so fundamental that it was reversible *per se*.

A. The Accusatory Pleading.

The amended information alleged, in the language of Penal Code section 187, subdivision (a), that the defendants each "unlawfully, *and* with malice aforethought murdered VICTOR ROSALES, a human being." (3CT 457.) The amended information did *not* mention or separately allege felony murder, an offense which is separately

described in Penal Code section 189, and a statutory crime which does not contain actual malice as an element. (Pen. Code, § 189; see *People v. Dillon* (1983) 34 Cal.3d 441, 465, 472.)

B. Malice Murder And Felony Murder Are Merely Two Different "Theories" Of A Single Offense. The Complete Failure To Instruct On Malice Murder And Its Lesser Included Offenses Is Therefore Reversible Error.

The California Legislature enacted Penal Code sections 187, 188, and 189, in 1872, and those provisions still provide the statutory framework for both malice murder and felony murder. Section 187 defines the crime of murder as the unlawful killing of a human being with malice aforethought. Section 188 defines two types of *actual* malice aforethought; express malice is defined as a "deliberate intention unlawfully to take away the life" of another, while implied malice exists "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." Section 189 is a statutory codification of felony murder.

The felony murder rule first gained recognition in case law in *People v. Milton* (1904) 145 Cal. 169, 170-172. In *Milton* the California Supreme Court recognized that murder consists of two elements: (1) the unlawful killing of a human being, (2) with malice aforethought. The *Milton* Court went on to observe that although malice was an

indispensable element of the crime of murder proscribed in section 187, it need not be independently proved but would be *presumed* where the death arose out of the commission of an underlying felony (145 Cal. at pp. 171-172; emphasis added):

> The murder, under section 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felonies, *and the malice of the abandoned and malignant heart is shown from the very nature of the crime...*

The *Milton* Court thought that section 187 contained two distinct *theories* of first degree murder, premeditated murder and felony murder. (*Id.* at pp. 170-171.) This concept that felony murder was merely an alternative means of proving malice murder with the commission of the underlying felony supplying by presumption the necessary element of malice was thereafter firmly established in case law. (See, e.g., *People v. Witt* (1915) 170 Cal. 104, 107; *People v. Hadley* (1917) 175 Cal. 118, 122; *People v. Denman* (1918) 179 Cal. 497, 499; *People v. Ketchel* (1969) 71 Cal.2d 635, 642; *People v. Washington* (1965) 62 Cal.2d 777, 780.)

In *People v. Witt, supra,* 170 Cal. at pp. 107-108, a judicially created rule of pleading was established for the "single" crime of murder recognized in *Milton*. In substance, the *Witt* Court held that to

adequately plead murder, the accusatory pleading need only allege murder with malice aforethought in the language of section 187, and that no special designation of the theory of felony murder was required. The obvious underlying rationale was that a charge of murder under section 187 necessarily included a charge of felony murder under section 189 because the latter section merely created a presumption of malice. (*Id.* at pp. 107-108; see *People v. Chun* (2009) 45 Cal.4th 1172, 1184 [the felony murder rule "acts as a substitute" for conscious disregard malice for both first and second degree]; *People v. Hansen* (1994) 9 Cal.4th 300, 308 ["The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life"]; *People v. Ketchel, supra,* 71 Cal.2d 635, 641-642 ["In short, the law presumes malice aforethought on the basis of the commission of the felony"]; *People v. Dillon* (1983) 34 Cal.3d 441 73 ["To be sure, numerous opinions of this court recite that malice is 'presumed' by operation of the felony-murder rule" -- footnote omitted.])

The doctrinal underpinning to the pleading rule established in *Witt* was therefore the pre-*Dillon* judicial understanding of felony murder as the *same crime* as premeditated murder, and the logical

conclusion that since malice murder and felony murder were the same crime described and subsumed in Penal Code section 187, a single form of pleading of murder was sufficient.

The felony murder doctrine began to receive substantial criticism by commentators and courts commencing in the mid-1960s. The courts began to recognize that the felony murder doctrine was unnecessary in almost all cases in which it was applied, and that it tended to erode the goal of an enlightened criminal justice system to establish a direct relationship between criminal liability and moral culpability. (See *People v. Chun, supra,* 45 Cal.4th at p. 1188, 1213-1214; *People v. Washington* (1965) 62 Cal. 2d 777, 783.) This recognition gave rise to a judicial recognition that the felony murder doctrine should not be extended beyond its rational and original function.[21] (*Ibid.*)

Felony murder as a basis for imposition of criminal liability was

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[21]The appellate courts have refused to apply the felony murder doctrine in many situations, and "have sought to insure that the 'highly artificial concept' (citation omitted) of strict criminal liability incorporate[d in] the felony murder doctrine be given the narrowest possible application consistent with its ostensible purpose - which is to deter those engaged in felonies from killing negligently or accidentally (citation omitted)." (*People v. Satchell* (1971) 6 Cal.3d 28, 34; see *People v. Washington, supra,* [felony murder not applied were the killing is not committed by the defendant or an accomplice in furtherance of the common purpose]; *People v. Ireland* (1969) 70 Cal.2d 522, 539 [doctrine not applied where the underlying felony is an integral part of the homicide and included in the offense charged]; *People v. Phillips* (1966) 64 Cal.2d 574, 582-584 [doctrine not applied to felony which is not listed in section 189 and which is not inherently dangerous to human life].)

nonetheless buttressed when the California Supreme Court held in *People v. Dillon, supra,* 34 Cal.3d 441, 465, that felony murder was *not* a mere variant of malice murder, with proof of the felony supplying a mandatory presumption of malice, but that section 189 instead actually defined a *separate crime* of felony murder, which was distinct from the offense of malice murder which was separately set forth in section 187.

In *Dillon* the defendant contended that the felony murder rule violated federal due process in two respects. The defendant argued, first, that by permitting a conviction of murder without proof of malice, the felony murder rule allowed conviction of an accused without proof of an element of murder, whereas federal due process requires proof of each element of a crime beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358, 364.) The defendant argued, second, that when a prosecution is conducted on a felony murder theory, it unconstitutionally relieves the prosecution from its burden of proving malice -- an element of murder -- beyond a reasonable doubt because the rule creates a conclusive "presumption" of malice from commission of the underlying felony. (See *Mullaney v. Wilbur* (1975) 421 U.S. 684 [it is denial of due process to shift to accused burden of disproving an element of a crime]; *Sandstrom v. Montana* (1979) 442 U.S. 510

[presumption of intent from proof of unrelated fact is an unconstitutional shifting of the burden of proof].)

The California Supreme Court in *Dillon* rejected the constitutional challenge by specifically holding that the felony murder rule was not a mere device to presume the existence of an element of malice murder, but was instead an entirely separate crime. The *Dillon* Court held that felony murder was a Legislatively established offense, codified in section 189 and having separate elements from malice murder, because "malice aforethought" was *not* an element of felony murder, as it was for the separate crime of premeditated murder defined in section 187. (*Id.* at p. 475.) The *Dillon* Court held that since malice was not an element of felony murder, the two kinds of murder are not the "same" crimes. (*Id.* at p. 476, fn. 23.)

By holding that sections 187 and 189 define different crimes, so that felony murder is an entirely distinct crime and not merely a legal presumption to supply the element of malice to establish a case of premeditated murder, *Dillon* effectively undermined the doctrinal underpinnings of the *Witt* conclusion that felony murder need not be

specifically pleaded because it is the *same crime* as malice murder.[22]

The *Dillon* Court, by undermining the doctrinal basis of *Witt* and its progeny, overruled the pleading rule of *Witt sub silentio*. "[T]he authority of an older case may be as effectively dissipated by a later trend of decision as by a statement expressly overruling it." (*Sei Fujii v. State of California* (1952) 38 Cal.2d 718, 728.)

The proposition that felony murder could not be pleaded under section 187 produced a surfeit of appellate claims that defendants whose convictions rested on felony murder had been deprived of fair notice and convicted of uncharged offenses.[23] In response, the

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[22]The Court of Appeal in *People v. Johnson* (1991) 233 Cal.App.3d 425, 453-457, misread *Dillon* and erroneously concluded that the *Dillon* Court was merely answering the defendant's "narrow equal protection" argument when it concluded that felony murder and malice murder contain different elements. But the Supreme Court's recognition that there are "two kinds" of first degree murder was a central underpinning of *Dillon*. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1116 [recognizing that *Dillon* deleted malice as an element of "the crime" of felony murder]; *People v. Dillon, supra,* 34 Cal.3d at pp. 475-476; Roth & Sundby, *"The Felony Murder Rule: A Doctrine at Constitutional Crossroads,"* (1985) 70 Cornell Law Rev. 446, 470, fn. 145.)

[23] "When a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime, (Citations omitted.) This reasoning rests upon a constitutional basis: 'Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial.' (Citation omitted.)" (*People v. West* (1970) 3 Cal.3d 595, 612; see *People v. Lohbauer* (1981) 29 Cal.3d 364, 368; *In re Hess* (1955) 45 Cal.2d 171, 174-175; *Russell v. United States* (1962) 369 U.S. 749, 765; *Givens v. Housewright* (9th Cir. 1986) 786 F.2d 1378.) As stated in *Cole v. Arkansas* (1948) 333 U.S. 196, 201-202 (internal citations omitted), "no principle of procedural due process is more clearly established than that notice of the

California appellate courts, through a series of decisions, have rejected the *Dillon* conclusion that malice murder and felony murder were separate offenses which must be separately pleaded, and have returned to the pre-*Dillon* doctrine that malice murder and felony murder are merely two different "theories" of the *same statutory offense* set forth in section 187. (E.g., *People v. Bernard* (1994) 27 Cal.App.4th 458, 470; *People v. Wilkins* (1994) 26 Cal.4th 1089, 1097; *People v. Johnson, supra,* 233 Cal.App.3d 425, 453; *People v. Scott* (1991) 229 Cal.App.3d 707, 713; *People v. Crawford* (1990) 224 Cal.App.3d 1, 7; and *People v. Watkins* (1987) 195 Cal.App.3d 257, 265.)

The current position of this Court now appears to be in accord with these latter authorities. In other words, it appears to presently be the view of this Court that malice murder and felony murder are

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specific charge ... It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Thus it was held that failure to specifically plead felony murder, where the trial court instructs on felony murder, the prosecutor argues it, and the jury returns a general verdict, is a denial of due process so virulent that it may fatally infect any resulting conviction. (See *People v. Marshall* (1957) 48 Cal.2d 394, 405-406; *Sheppard v. Rees* (9th Cir. 1989) 909 F.2d 1234, 1237-1238; but see *Schad v. Arizona* (1991) 501 U.S. 624, 636; *Morrison v. Estelle* (9th Cir. 1992) 981 F.2d 425, 428.) "Because of the different forms or varieties of murder, we have acknowledged that an information charging murder without elaboration may not always provide notice sufficient to afford the due process of law guaranteed by the Fourteenth Amendment to the federal Constitution. (*People v. Gallego, supra*, 52 Cal.3d at p. 189; *People v. Murtishaw* (1981) 29 Cal.3d 733, 751, fn. 11.)" (*Ibid.*)

merely two different "theories" of the same offense, and that both may be pleaded by a single averment under section 187. "There is still only a 'single, statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, citing earlier authorities [holding that jury unanimity as to which "type" of murder supports a conviction is unnecessary even though the two "types" of murder have different elements]; see *People v. Taylor* (2010) 48 Cal.4th 574, 623; *People v. Hughes* (2002) 27 Cal.4th 287, 369; *People v. Kipp* (2001) 26 Cal.4th 1100, 1131; *People v. Silva* (2001) 25 Cal.4th 345, 367; *People v. Davis* (1995) 10 Cal.4th 463, 470; *People v. Pride* (1992) 3 Cal.4th 195, 249-250; *People v. Gallego* (1990) 52 Cal.3d 115, 188-189; *People v. Thomas* (1987) 43 Cal.3d 818, 829, fn. 5.)

While this current "re-interpretation" of felony murder as being the "same" crime as malice murder may avoid the due process problem of convicting defendants of an uncharged felony murder under a malice murder pleading, it also necessarily produces the result that a trial court must instruct on malice murder and its lesser-included offenses, even where the prosecution would prefer to proceed solely according to a felony murder "theory."

Since charging allegations under section 187 must now be

deemed to contain charges of both a malice murder "theory" and a felony murder "theory," and since both "theories" are deemed merely to be iterations of a single, unitary offense, the only reasonable conclusion is that a trial court has a federal constitutional *sua sponte* obligation to fully instruct on all the elements of both "theories," as well as on all lesser-included offenses and all defenses to malice murder which are supported by the evidence.

As this Court recently explained in a directly analogous context[24] in *People v. Smith* (2013) 57 Cal.4th 232, 244:

> The rule we affirm today—requiring *sua sponte* instruction on a lesser offense that is necessarily included in one way of violating a charged statute when the prosecution elects to charge the defendant with multiple ways of violating the statute - does not require or depend on an examination of the evidence adduced at trial. The trial court need only examine the accusatory pleading. When the prosecution chooses to allege multiple ways of committing a greater offense in the accusatory pleading, the defendant may be convicted of the greater offense on any theory alleged (citation omitted), including a theory that necessarily subsumes a lesser offense. The prosecution may, of course, choose to file an accusatory pleading that does not allege the commission of a greater offense in a way that necessarily subsumes a lesser offense. But so long as the prosecution has chosen to allege a way of committing the greater offense

[24] In *People v. Taylor* (2010) 48 Cal.4th 574, 623, this Court stated: "Although it is settled that "[s]econd degree murder is a lesser included offense of first degree murder" (citation omitted) we have yet to decide whether second degree murder is a lesser included offense of first degree murder where, as here, the prosecution proceeds only on a theory of first degree felony murder." (Citing *People v. Romero* (2008) 44 Cal.4th 386, 402 and *People v. Wilson* (2008) 43 Cal.4th 1, 16, but adding a "but see" citation to *People v. Anderson, supra,* 141 Cal.App.4th 430.)

> that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense. This allows the jury to consider the full range of possible verdicts supported by the evidence and thereby calibrate a defendant's culpability to the facts proven beyond a reasonable doubt. As our precedent has emphasized, such an approach does not, in purpose or effect, work to the advantage of either the prosecution or the defense. Instead, it serves to protect the jury's truth-ascertainment function. (Citations omitted.)

Where the prosecution alleges murder only under section 187 -- as in this case -- it has necessarily elected to rely on both "theories" of murder, and the failure to instruct on malice murder is error. (*People v. Campbell* (2015) 233 Cal.App.4th 148; *People v. Anderson* (2006) 141 Cal.App.4th 430; cf. *Schad v. Arizona, supra* [unanimity instruction not constitutionally required where, under State law, felony murder and malice murder are deemed to be merely different theories of the same crime of murder]; *People v. Russell* (2010) 50 Cal.4th 1228, 1256 [unanimity instruction not required for alternate theories of premeditated murder and felony murder]; *Green v. United States* (1957) 355 U.S. 184, 194 [acquittal of robbery bars retrial under Double Jeopardy clause of murder conviction where original case tried on both felony murder and malice murder theories]; *People v Mulqueen* (1970) 9 Cal.App.3d 532 (where defendant's murder conviction was supported under

theories of both felony and malice murder, concurrent sentences for murder and underlying felony violated Penal Code § 654.)

C. The Failure To Instruct On All The Elements Of Malice Murder And On Lesser Included Offenses And Defenses To Malice Murder Constitutes Structural Error.

It is now settled that the failure to instruct on only *some* elements of a charged offense requires reversal of the judgment unless the reviewing court concludes beyond any reasonable doubt that the error did not contribute to the verdict. (*Neder v. United States* (1999) 527 U.S. 1, 15; *Hedgpeth v. Pulido* (2008) 555 U.S. 57; *People v. Cummings* (1993) 4 Cal.4th 1233, 1312, fn. 54; *People v. Swain* (1996) 12 Cal.4th 593, 607; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1129; *People v. Perez* (2005) 35 Cal.4th 1219, 1232-1234.)

However, it is equally well settled that the failure to instruct on *all* the elements of an offense is structural error (i.e., requires reversal without assessment of prejudice) because in such a situation case there is no quantitative way to assess the impact of the error. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 294, 309; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-279; *United States v. Gaudin* (1995) 515 U.S. 506, 510-511, 522-523.)

In *Rose v. Clark* (1986) 478 U.S. 570, 579-581, the United States

Supreme Court held that an erroneous instruction which created a rebuttable presumption of malice, which thereby improperly lightened the prosecution's burden of proof, might be harmless if no rational jury could find that the defendant committed the criminal act but did not intend to cause injury - when under the applicable law an intent to cause injury would establish malice. (See also *Carella v. California* (1989) 491 U.S. 263, 265, 267 [erroneous instruction creating a presumption of intent is subject to harmless error analysis if "no rational jury could find the predicate acts but fail to find the fact presumed"].)

In the case at bench, the exclusive use of the felony murder "theory" and instructions supplied the element of malice but a rational jury could have found that the killing did not result from malice. By failing to instruct on malice murder and its elements, the trial court in substance and effect compelled the jury to convict of first degree murder, without a finding of malice, if the jurors wished to punish a homicide which indisputably occurred. This failure created a structural error not subject to harmless error analysis since there was ample evidence that the killing did not arise from a robbery.

In *Arizona v. Fulminante, supra*, 499 U.S. 279, 306-310, the United States Supreme Court distinguished between "trial errors,"

which are subject to the general rule that a constitutional error does not require automatic reversal, and "structural" errors, which "defy analysis by harmless-error standards" and require reversal without regard to the strength of the evidence or other circumstances.) *Fulminante* characterized trial errors as those that occur "during the presentation of the case to the jury, and which may therefore be *quantitatively assessed* in the context of other evidence presented in order to determine whether [the error] was harmless beyond a reasonable doubt." (*Id.* at pp. 307-308.) The *Fulminante* Court defined structural errors, on the other hand, as "structural defects in the constitution of the trial mechanism ... affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (Id. at pp. 309-310.) Examples of structural errors include the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, and denial of the right to a public trial. (Id. at pp. 309-310.) With regard to such structural errors, *Fulminante* explained: " 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as

fundamentally fair.'" (Id. at p. 310, quoting *Rose v. Clark, supra*, 478 U.S. at pp. 578-579.)

Subsequently, the United States Supreme Court has made it clear that at least one species of instructional error constitutes a structural defect that requires reversal without application of harmless error analysis. In *Sullivan v. Louisiana, supra*, 508 U.S. 275, the trial court gave a constitutionally deficient reasonable doubt instruction. In explaining why *Chapman* harmless error analysis cannot be applied to such an error, *Sullivan* stated: "Harmless-error review looks ... to the basis on which 'the jury *actually rested* its verdict.' [Citation.] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 279; italics in the original source.)

Because a constitutionally defective reasonable doubt instruction renders it impossible for the jury to return a verdict of guilty beyond a

reasonable doubt, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt - not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. [Citation.] (*Id.* at p. 280; italics in the original source.)

Mr. Gonzalez's jury was not given the option of weighing the evidence of robbery against the alternative factual scenarios or the evidence of actual malice. Given the three inconsistent and competing versions of fact adduced at trial it is impossible to say "that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough." (*Sullivan v. Louisiana, supra,* 508 U.S. at p. 280; original italics.)

In *People v. Kobrin* (1995) 11 Cal. 4th 416 this Court reasoned that because an error in failure to instruct removed an element of an offense from the deliberative process, there was no "object" upon which harmless error scrutiny could operate, and attempting to infer a finding of that element based upon the instructions that were given would have rested "solely on conjecture, effectively substituting this

court for the jury as the trier of fact." (Id. at p. 429.)

In the case at bench, the failure to instruct on the alternative "theory" of malice murder and its lessers and defenses removed those issues and legal alternatives for conviction from the case, and thus there is no meaningful basis upon which "harmless error scrutiny could operate, and attempting to infer a finding of [those] elements based upon the instructions that were given would ... rest[] "solely on conjecture, effectively substituting this court for the jury as the trier of fact." (*Id.* at p. 429.)

This Court also perceptively observed a further factor which meant that the error was structural. The *Kobrin* Court further noted that the instructional error prevented the defendant from presenting evidence on the issue, thus making it impossible to determine whether the error was harmless beyond a reasonable doubt, because the Court could not assess "'whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" (Id. at p. 430, quoting *Sullivan v. Louisiana, supra*, original italics) *Id.* at p. 430) see also *People v. Cummings, supra*, 4 Cal.4th at pp. 1312-1315 [failure to instruct on 4 of the 5 elements of robbery is reversible without assessment of prejudice].)

In Mr. Gonzalez's case, the failure to instruct deprived the jury of any legal predicate to adduce evidence supporting lesser included offenses to first degree murder, and it deprived the jurors of the option of weighing the competing factual scenarios and concluding that the homicide did not involve malice, or may have involved self-defense or unreasonable self-defense, or may have been the result of an accident.

Accordingly, the failure to instruct was structural error which is not susceptible to harmless error analysis, and the finding on the robbery special circumstances allegation is therefore mere surplusage and affords no legal or factual basis to conclude that the jury would not have returned a more favorable verdict had it been correctly instructed.

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II.

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

The finding on the robbery special circumstances allegation did not make the failure to instruct to be "harmless." The jury was presented with the stark choice of either acquitting appellant of all liability for a homicide which he testified that he committed, or returning the "true finding" on that allegation. In order to convict appellant of any homicide-related offense, it necessarily had to find that it occurred during the commission of a robbery, i.e., it had to return a true finding on the allegation. Nothing in the jury instructions explained to the lay jurors that it had the option of convicting appellant of murder even if it did not find that a robbery had occurred. Nothing in the instructions gave the jurors any option to convict of unpremeditated murder, or to convict of any homicide offense other than felony murder, or to consider Gonzalez's defenses.

Because the jury was limited to this Draconian all-or-nothing choice, the failure to instruct made it likely that "'the jury ... resolve[d] its doubts in favor of conviction.'" (*Beck v. Alabama* (1980) 447 U.S. 625, 634, quoting *Keeble v. United States* (1973) 412 U.S. 205, 208; see

People v. Ramkeesoon (1985) 39 Cal.3d 346, 350; *People v. Wickersham, supra,* 32 Cal.3d at p. 324.)

In *People v. Campbell* (2015) 233 Cal.App.4th 148, the Court of Appeal for the Fourth Appellate District, Division Two, considered a situation which is factually not distinguishable from Mr. Gonzalez's case. The Attorney General argued that true findings on felony-murder special circumstances allegations demonstrated that the murder conviction was based on felony-murder, so that the failure to instruct on malice murder and its lesser-included offenses was harmless. The appellate court, in a well-reasoned and unamimous opinion by Justice Jeffrey King, flatly and convincingly rejected this claim, as follows (*Id.* at pp. 172-173):

> Here, the evidence was clear that there was a homicide and that Fort was the shooter. But, unlike the above cases, 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 Leyva, 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.

The only significant differences between Mr. Gonzalez's case and the *Campbell* case are that Gonzalez testified at trial and provided the only tenable account of how the shooting occurred, and was *acquitted* in special findings of being armed with, and of personal use of a handgun (§ 12022, subd. (a); §§ 12022.53, subds. (b) (c) (d)). Appellant was also *acquitted* by the jury of shooting a handgun at an occupied motor vehicle. (§ 246.) (3CT 644-647.)

The only evidence in the record that appellant fired a handgun was his own testimony to that effect, and it was his account that it fired only when he wrestled the handgun from the victim in self-defense. The only basis for the jury's conclusion that appellant was involved in the homicide could have been appellant's own testimony, and under that account there was no robbery at all. Thus the jury's findings on the handgun allegations and its verdict on the shooting-a-handgun charge were inconsistent with the felony murder verdict as well as the felony-murder special circumstances allegation.

Appellant is aware that he may not use an inconsistent finding or verdict to impeach even related counts on which he might be convicted. (See *People v. Palmer* (2001) 24 Cal.4th 856.) But appellant submits that, by parity of reasoning and as a matter of fundamental fairness, the prosecution should not be permitted to argue that a jury's special finding is a reliable basis to excuse manifestly prejudicial trial court error. As in *People v. Chun, supra,* 45 Cal.4th 1172, 1203-1204, the jury's findings on allegations related to the homicide cut *both* ways, are inconsistent with one another, and cannot be interpreted to reliably reconstruct the jury's conclusions:

> The Attorney General argues that the actual verdict *does* show that the jury did not base its murder verdict on the felony-murder rule but necessarily based it on a valid theory. He notes that the jury *acquitted* defendant of the separately charged underlying crime of shooting at an occupied vehicle. A jury that based a murder verdict solely on felony murder, the Attorney General argues, would not acquit a defendant of the underlying felony. Defendant counters with the argument that the verdict as a whole—finding defendant guilty of murder but *not* guilty of either shooting at or from a motor vehicle—is internally inconsistent. On these facts, it is hard to reconcile this verdict. If defendant did not commit *this* murder by firing at or from a vehicle, how *did* he commit it? There was no evidence the victims were killed or injured by any method other than shooting from *and* at an occupied vehicle. The overall verdict had to have been either a compromise or an act of leniency.
>
> Defendant posits the possibility that one or more jurors

> found him guilty of second degree murder on a felony-murder theory but then agreed to acquit him of the underlying felony either out of leniency or as a compromise, or perhaps simply out of confusion. In that event, defendant suggests, those jurors may simply have believed defendant was guilty of murder on the invalid felony-murder theory without ever considering a valid theory of malice.
>
> Defendant's argument has some force. The acquittal of the underlying felony strongly suggests the jury based its murder conviction on a valid theory of malice but, under the circumstances, we do not believe that it alone does so beyond a reasonable doubt.

The jury in this case made four "special" findings related to the murder conviction. Three of them impeach that conviction because they necessarily rely upon evidence which is inconsistent with a robbery-murder. The fourth (on the special circumstances finding) is inconsistent with the other three "findings" and in all likelihood was the coerced product of the Draconian "all or nothing choice."

Accordingly, the jury's inconsistent finding on the felony-murder special circumstances allegation provides no basis upon which it can be reliably concluded - and certainly not beyond any reasonable doubt - that the trial court's failure to instruct on the expressly charged offense of malice murder, on the lesser-included offenses to malice murder, and on Mr. Gonzalez's defenses was "harmless."

CONCLUSION

The Judgment of the Court of Appeal should be reversed.

Dated: November 15, 2016.

Respectfully submitted,

/s/ Robert Franklin Howell

Attorney for Appellant
Jorge Gonzalez

CERTIFICATE OF COMPLIANCE

I, Robert Franklin Howell, certify that I am the attorney for Appellant Jorge Gonzalez under appointment of the California Supreme Court in No. S234377, and that the attached Appellant's Opening Brief on the Merits contains a total of 12,451 words, as determined by the Microsoft Word word-processing program which was used to prepare it.

Dated: November 15, 2016.

/s/ Robert Franklin Howell

PROOF OF SERVICE BY MAIL

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

I, Robert Franklin Howell, declare: I am the attorney for Jorge Gonzalez in the above-referenced case. My business address is Post Office Box 71318, Las Vegas NV 89170. On November 15, 2016, I served the attached *Gonzalez's Opening Brief On The Merits* in the above-entitled action by placing a true copies thereof, enclosed in sealed envelopes, with first class postage thereon prepaid, in the United States mail at Las Vegas, Nevada, addressed as follows:

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Executed at Las Vegas, Nevada, on November 15, 2016. I declare under penalty of perjury that the foregoing is true and correct.

Robert Franklin Howell

PROOF OF ELECTRONIC SERVICE

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

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

On November 10, 2016, I served the attached *Gonzalez's Opening Merits Brief* by transmitting a true copy via electronic mail to each of these e-mail addresses:

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Executed at Las Vegas, Nevada on November 15, 2016. I declare under penalty of perjury that the foregoing is true and correct.

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