# In the Supreme Court of the State of California

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**JORGE GONZALEZ, et al.,**<br>**Defendants and Appellants.** | Case No. S234377 |



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



## ANSWER BRIEF ON THE MERITS

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## ISSUE PRESENTED

Did the jury's finding of a felony-murder special circumstance render harmless any error in 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?

## SUMMARY OF ARGUMENT

The instructional error at issue is neither structural, nor one of federal constitutional magnitude. Rather, it is subject to the California Constitution's standard for assessing trial court error under *People v. Watson* (1956) 46 Cal.2d 818, 836. Here, the jury's true finding on the felony-murder special-circumstance allegation demonstrated that the jury necessarily resolved the factual issues that would have been posed by instructions on malice murder, the lesser included offenses of malice murder, and defenses to malice murder, adversely to appellants under other proper instructions. The jury's finding thus rendered any error in omitting these instructions harmless under the more rigorous standard for assessing harmless error set forth in *People v. Sedeno* (1974) 10 Cal.3d 703, which necessarily satisfies *Watson.*

After finding appellants guilty of first degree felony murder, the jury separately and independently found that appellants killed Victor Rosales in the course of committing a robbery or attempted robbery. Because robbery-murder is necessarily first degree murder, the jury's finding on the special-circumstance allegation not only precluded it from convicting appellants of any lesser offense, but also demonstrated that the jury necessarily rejected any theory that might have supported a finding of a lesser offense, such as that appellants intended only a consensual drug transaction or nonviolent theft when they carried out their plan to meet with Rosales. Similarly, by finding the special-circumstance allegation true, the

jury necessarily resolved the factual issues that would have been posed by instructions on self-defense and accident, as such defense theories are inapplicable to felony murder.

Contrary to appellants' assertion, providing the jury with the option of convicting appellants of first degree murder under an alternative theory would not have avoided the danger of an improper "all-or-nothing" choice between acquitting appellants or convicting them of first degree murder. Moreover, regardless of whether the jury was instructed with multiple theories of first degree murder or only a single theory, it was always free to reject the special-circumstance allegation. Nor are appellants correct in asserting that the jury's special-circumstance finding was essentially compelled by its guilty verdicts as to felony murder. Once the jury convicted appellants of felony murder, there could be no temptation to convict merely to avoid an acquittal, leaving the jury free to find the special-circumstance allegation not true if the jury had a reasonable doubt as to the supporting evidence. Not only was the jury instructed to consider the special-circumstance allegation separately from the substantive charged offenses under the beyond-a-reasonable-doubt standard, but it was instructed that the special circumstance required separate and additional findings not required for the substantive offense of felony murder. There is no reason to believe the jury disregarded these instructions.

Nor was this a situation in which the jury rendered inconsistent verdicts which undercut the reliability of the verdicts and special circumstance finding. The jury's guilty verdicts on felony murder, true finding on the felony-murder special-circumstance allegation, acquittal on shooting at an occupied motor vehicle, and not true findings on the firearm allegations, are entirely consistent with the version of events presented by prosecution witness Anthony Kalac: appellants intended and, at a

minimum, attempted to commit an unarmed robbery of Rosales, but killed the victim in the process, most likely with the victim's own gun.

Accordingly, any error in failing to instruct on malice murder, its lesser offenses, and defenses thereto was harmless under the *Sedeno* standard. Alternatively, if this Court disagrees that the special circumstance finding rendered any instructional error harmless, the case should be remanded to the Court of Appeal to determine whether such instructions were warranted at all, and whether any error in failing to give such instructions was harmless because it is not reasonably probable, based on the evidence, that appellants would have achieved a more favorable result had the instructions been given.

## STATEMENT OF FACTS AND THE CASE

### A. Trial Court Proceedings

Appellants Erica Estrada, Alfonso Garcia, and Jorge Gonzalez were charged with murder in violation of Penal Code[1] section 187, subdivision (a). The information alleged that appellants "did unlawfully, and with malice aforethought murder" Rosales. Gonzalez was also charged with shooting at an occupied motor vehicle (§ 246). The information alleged as to all appellants that a principal was armed with a firearm in the commission of the murder (§ 12022, subd. (a)(1)), and the murder was committed in the commission of a robbery (§ 190.2, subd. (a)(17)). It was alleged as to Gonzalez that he personally used and discharged a firearm,

[1] Unless otherwise stated, all further statutory references are to the Penal Code.

causing death or great bodily injury in the commission of both crimes (§ 12022.53, subds. (b)-(d)). (3CT 456-459; 3SCT 456-459.)[2]

The trial evidence established the following. On October 6, 2009, Anthony Kalac, Jennifer Araujo, and Garcia walked to the Crystal Inn at the intersection of 112th Street and Prairie, where they planned to use methamphetamine with Estrada and Gonzalez, who were in a room facing a laundromat on Prairie. (4RT 3304-3306, 3315, 3318-3320; 5RT 4016-4017; 6RT 4430-4431; 7RT 4839, 4865.) Kalac had already used heroin that day, but because he was an addict at the time, it did no more than take away his withdrawal symptoms. (5RT 4010-4015; 6RT 4257, 4434.) Kalac, who testified at trial under a grant of use immunity, was friends with Garcia. He had never met the others before. (5RT 4008-4010, 4012; 7RT 4860-4862, 4889.) Garcia told Kalac that Estrada was Gonzalez's girlfriend. (6RT 4252-4253.)

Kalac sat on the couch by himself while appellants discussed how they could obtain methamphetamine even though they did not have any money. (6RT 4254-4261; 7RT 4866, 4875, 4886.) At some point, Kalac left to meet his drug dealer at a gas station to buy heroin with the approximately $30 he had on him. His dealer did not show up, so he returned to the hotel room and sat on the couch. (6RT 4259-4261, 4369-4370; 7RT 4836.)

A few minutes after Kalac returned, Estrada suggested to Garcia and Gonzalez that they "come up on" her ex-boyfriend, Victor Rosales,[3] who was a drug dealer and had been abusive toward her. (6RT 4261-4262, 6RT

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[2] "SCT" refers to the three-volume supplemental clerk's transcript. Additionally, respondent will refer to Gonzalez's opening brief as "JGAOB," Garcia's opening brief as "AGAOB," and Estrada's opening brief as "EAOB."

[3] Estrada did not use Rosales's name.

4265-4266, 4357.) Gonzalez became agitated upon hearing about the abuse. (6RT 4265.) According to Kalac, to "come up on" meant "to rob." However, when he had "come up on," or "robbed," drug dealers, he did so by snatching their drugs and running, without using violence. (6RT 4262-4263, 4375; 7RT 4864, 4872-4873, 4886.) Appellants also used other words and phrases, aside from "come up on," to make it clear that they were planning a robbery. (7RT 4843-4844.) All three appellants participated in the planning discussion, ultimately deciding to order a total of $200 to $250 of methamphetamine and heroin from Rosales, despite their lack of money. (6RT 4264, 4266; 7RT 4834, 4836, 4841-4844, 4882-4883, 4886.) Garcia said he would be the "lookout" for the robbery. (6RT 4273, 4411-4413; 7RT 4844-4847, 4882.) Kalac unwillingly complied with a request from Estrada and Gonzalez that he give them his money so they could pay for another hotel room and, in exchange, they would give him the heroin they got from the robbery. (6RT 4266-4267; 7RT 4866-4867, 4884-4885.) He did not intend to assist or facilitate the robbery. (6RT 4375.)

Estrada told everyone in the room to be quiet while she called Rosales so he would not hear people in the background. (6RT 4270.) Estrada told Rosales she would meet him in 30 minutes at the laundromat across the street from the hotel. (6RT 4270-4272.) At 2:06 p.m., Garcia and Gonzalez left the hotel room and walked toward Prairie. (4RT 3325-3330, 3333-3337; 6RT 4272.) As soon as they left, Estrada started packing up the room, saying they were going to move to a cheaper hotel next door. (6RT 4275-4276.) As she did so, she called Rosales and asked how far away he was. She then made or received another call and told someone that Rosales was 10 to 15 minutes away. (6RT 4275-4276, 4398-4399.)

At 2:21 p.m., Estrada, Kalac, and Araujo drove a few minutes in Estrada's car to another hotel on Prairie, where Estrada rented a room.

(4RT 3325-3330, 3338, 3341; 5RT 3988-3990; 6RT 4275-4278, 4359; 7RT 5106, 5120-5121, 5127.) Once inside the room, Estrada made or received another phone call, and told the person on the line that she would be there in two minutes. (6RT 4401.) Araujo and Estrada left, leaving Kalac alone in the hotel room. (6RT 4279.)

Kalac walked outside, onto Prairie, looking for Garcia and intending to go home, if he did not see him. (6RT 4279.) Estrada's car was gone. (6RT 4279.) As Kalac began walking down Prairie, he saw Garcia and Gonzalez walking quickly on the other side of the street. (6RT 4280-4281.) Garcia crossed the street and approached Kalac. Gonzalez continued in the direction he and Garcia had been walking, on the other side of the street. (6RT 4281.) Garcia told Kalac to hurry up and go with him to the second hotel. Garcia seemed very nervous and said something to the effect of, "Things went bad." (6RT 4282, 4381, 4421; 7RT 4844.) Garcia and Kalac went to the hotel room, where Garcia changed his clothes. He and Kalac then walked to Garcia's house. (6RT 4282-4283.) Throughout the events, Kalac never saw a gun. (6RT 4357.)

Meanwhile, Alejandro Ruiz pulled up to Rosales's house, which was about a two-minute drive from 112th and Prairie. Rosales was in the passenger seat. Ruiz told Rosales's sister Liliana that Rosales had been shot. (3RT 2479-2480, 2482-2483, 2493; 7RT 5140.) Liliana asked who shot Rosales, and Ruiz said, "Erica. Erica." (3RT 2484.) Ruiz, who appeared shocked, nervous, and upset, repeated in Spanish, "The girlfriend, the girlfriend," or, "It was Erica." (3RT 2483, 2508-2509, 2514, 2705-2706, 2715-2716.)

Someone called 911 at 2:36 p.m., and officers arrived within five minutes. (3RT 2739, 2742-2744, 2788; 4RT 3062.) When asked what had happened, Ruiz excitedly said: Rosales had called him around 1:00 p.m. and asked for a ride; Ruiz agreed and picked Rosales up about 15 minutes

later; while in the car, Rosales told Ruiz that his girlfriend Erica had called him and asked to meet for lunch; they were to meet at a laundromat on the corner of Prairie and 112th Street; as they drove on 112th Street and approached Prairie, Rosales told Ruiz to park along the curb; Ruiz complied; a gray car drove past them and parked in front of them, lightly colliding with Ruiz's car; suddenly Estrada and two Hispanic men emerged from behind two large palm trees; Estrada pointed at Rosales; one of the men walked up to the passenger side of Ruiz's car, pulled out a gun, and fired a single shot at Rosales from about three feet away; the shooter then walked around the car and tried to pull Ruiz out; and Ruiz, fearing for his life, accelerated and drove away. (3RT 2790-2793; 4RT 3032, 3062.)

Rosales was taken by ambulance to a hospital where he died of a single gunshot wound to the chest. The bullet's trajectory was an approximately 45-degree downward angle from Rosales's right to left, and entering from the front. (3RT 2490-2491, 2510-2511, 2528, 2707, 2753-2755; 5RT 3648, 3654, 3657-3659.) Forensic findings indicated that the gun was fired from within two feet of Rosales's right wrist and more than two feet from his chest. (5RT 3649, 3655, 3658-3659, 3664, 3959-3964, 3969, 3984-3985; 6RT 4356.) Rosales did not have any injuries to his face or defensive injuries on his hands or body. (5RT 3650-3652, 3666.) Rosales had methamphetamine and amphetamine in his system. (5RT 3656.)

Estrada and Gonzalez were arrested in Estrada's car near her house that night. (3RT 2797-2799; 4RT 3018, 3062, 3064-3065.) Gonzalez had 25 cents on him. (5RT 3913.) He also had a California driver's license, a watch, a wallet, and a scarf. (5RT 3913-3914.) Gunshot residue was found on Gonzalez's hands, but not on Estrada's. (5RT 3618-3627.) Garcia was arrested on December 17, 2009, at his house, after he attempted to flee. (5RT 3992-3997; 8RT 5440-5441.)

Phone records established numerous calls leading up to the time of the shooting amongst Rosales and appellants, who used Araujo's phone as well as a phone Garcia owned under a false name. (4RT 3357, 3364-3371; 5RT 3928; 7RT 4932-49364.) No phone calls were made between 2:29 and 2:37. (4RT 3371-3372.)

During a recorded jailhouse phone call, Estrada told her aunt that she used Araujo's cell phone to call Rosales. Estrada explained, "I called private though." (4CT 540-541; 6RT 5199; 7RT 5127-5128; see 7RT 5109.) Estrada also told her aunt that Ruiz had inaccurately described what she was wearing at the scene of the shooting; she did not deny she was at the scene. (4CT 544-545; 6RT 4299; 7RT 5109-5110.)

Gonzalez was the only appellant who presented evidence at trial, which included his own testimony. According to Gonzalez, he and Estrada had had sexual relations, but they were not in a romantic relationship, he knew about her relationship with Rosales, and he was not jealous. (8RT 5480-5481.) Prior to the October 6 incident, Gonzalez had met Rosales twice for drug transactions. The first time, Rosales gave Gonzalez a discount because he ordered through Estrada. (8RT 5478-5479, 5522-5529.)

At the Crystal Inn on October 6, Kalac appeared high and sometimes seemed to be falling asleep. (8RT 5475, 5486, 5711.) Gonzalez asked Estrada to call Rosales and order some methamphetamine. (8RT 5475-5476, 5534.) Estrada did not say that Rosales abused her. She said the father of her child, who was not Rosales, abused her. (8RT 5489.) There was never a discussion about not having money or about robbing Rosales. (8RT 5472, 5476, 5486, 5494, 5711.) In fact, Gonzalez had about $165 on him. (8RT 5471-5472, 5756-5761.) Kalac said he wanted some heroin. First he asked for $50 worth, then said he only had $30. Estrada said she could get Kalac $50 worth of heroin for $30. (8RT 5485.) Estrada called

Rosales to order the drugs. Gonzalez did not hear the whole conversation because he made a phone call to a friend. (8RT 5484-5486, 5493, 5534.)

At some point, the hotel manager called the room and told them to leave because there had been too many people going in and out of the room. Everyone discussed moving to the hotel down the street. (8RT 5535-5536.) After some time, Estrada told Gonzalez to meet Rosales at the laundromat to buy the drugs, while she moved their belongings to another hotel. (8RT 5494-5495, 5498, 5537.) Gonzalez asked Garcia to go with him to keep him company, and Garcia agreed. Appellants did not say anything about using a lookout. (8RT 5496-5497, 5537-5539.) Gonzalez did not plan to rob Rosales. (8RT 5472, 5494.)

Rosales never showed up at the laundromat, but Gonzalez found him sitting in the passenger seat of a car parked on the street. (8RT 5499-5500, 5540-5541.) Gonzalez approached the car alone. (8RT 5507-5508, 5546.) When Gonzalez got close enough to Rosales, he repeatedly greeted him, but Rosales did not respond. (8RT 5500-5501.) Ruiz, the driver, looked "high" or nervous, so Gonzalez asked if they wanted him to get Estrada. (8RT 5501, 5550.) Rosales raised a gun with one hand. (8RT 5501, 5504, 5545, 5550-5552, 5713-5715.) Fearing for his life, Gonzalez grabbed the gun and twisted it, while leaning into the car. He and Rosales struggled, with Gonzalez gaining control of the gun. (8RT 5501-5504, 5551-5554, 5715-5721.) Ruiz then reached under the seat. (8RT 5504.) Gonzalez turned away with the intent of getting away from the car. But as he twisted, the gun accidentally went off. (8RT 5505, 5722-5725.) Gonzalez was not looking at the car when the gun fired, so he did not know Rosales had been shot. (8RT 5511.) He did not approach Ruiz. (8RT 5517.) He feared Ruiz or Rosales had another weapon. (8RT 5512.)

Gonzalez ran away with the gun, then walked through a side entrance into the laundromat. When he saw Ruiz drive away, he went back

outside to the front of the laundromat and saw Garcia. He told Garcia, "Come on," and they began walking down Prairie at a fast pace. (8RT 5506-5508, 5741-5742, 5744.) Gonzalez put the gun in his pocket. (8RT 5747.) He was scared and in shock. When he saw Kalac walking toward them, he handed the gun to Kalac without saying anything. (8RT 5508-5509, 5747-5749.) A friend drove by, pulled over, and gave Gonzalez and Garcia a ride. (8RT 5509.) Gonzalez got out at 105th Street. He gave the friend $70 and asked him and Garcia to give it to Estrada with instructions to get them another hotel room. Gonzalez walked a little farther, then made some calls. He heard sirens and assumed Rosales had been shot. His friend picked him up and took him to a third hotel, where Estrada had rented a room. (8RT 5511-5513.) Estrada cried when he told her that he thought Rosales had been shot. (8RT 5513-5514.) Later, Gonzalez and Estrada went to her house, where they were arrested. Gonzalez had left his phone and money in a drawer at the hotel. (8RT 5514-5515.)

At trial, the prosecution proceeded solely on the theory of felony murder, and the jury was instructed on that theory alone. Appellants were found guilty of felony murder in the commission of a robbery.[4] The jury separately found the robbery-murder special-circumstance allegation true as

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[4] Gonzalez alleges that 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." (JGAOB 1-2.) He is incorrect. The verdict states, "We, the jury in the above-entitled action, find the defendant, JORGE GONZALEZ, GUILTY of the crime of FELONY MURDER, COMMITTED IN THE PERPETRATION OF, OR ATTEMPT TO PERPRETRATE [*sic*] ROBBERY, a violation of PENAL CODE SECTION 187(A), a FELONY, as charged in count 01 of the INFORMATION." (3SCT 644.) The verdict forms for Estrada and Garcia likewise expressly state that appellants were convicted of felony murder, committed in the perpetration or attempted perpetration of a robbery. (4CT 644-645.)

to each appellant. The jury acquitted Gonzalez of shooting at an occupied motor vehicle, and found all of the firearm allegations not true as to all appellants. (4CT 644-649; 3SCT 644-648.)

### B. Court of Appeal Proceedings

On appeal, appellants claimed the trial court prejudicially erred by failing to instruct the jury on first degree murder with malice aforethought, second degree murder, involuntary manslaughter, imperfect self-defense, voluntary manslaughter due to heat of passion, self-defense, and accident. In arguing there was sufficient evidence to support giving these instructions, appellants mainly relied on Gonzalez's version of events and Kalac's testimony that the phrase "come up on" could mean a nonviolent theft, as opposed to a robbery where the taking is accomplished by force or fear. Respondent argued, among other things, that the evidence did not warrant the instructions, and any error was harmless both because it was not reasonably probable, based on the evidence, that appellants would have achieved a more favorable result had the instructions been given, and because the jury's true finding on the special-circumstance allegation demonstrated that the jury necessarily resolved the factual issues posed by the omitted instructions adversely to appellants under other proper instructions.

In a published opinion, the Court of Appeal held that any error in failing to instruct on malice murder was necessarily harmless because appellants could not have been prejudiced by the failure to provide the jury with alternative means of finding them guilty of first degree murder. (*People v. Gonzalez* (2016) 246 Cal.App.4th 1358, 1380.) The court declined to decide whether the evidence warranted instruction on the lesser included offenses or defenses, deciding instead that any error in failing to

give such instructions was harmless. (*Id.* at pp. 1380-1381.) Specifically, the court held that because the jury found appellants guilty of felony murder, any error in failing to instruct on self-defense and accident, which do not apply to felony murder, was harmless. (*Ibid.*) The court also held that, under this Court's precedent, the jury's felony-murder verdict and true finding on the felony-murder special circumstance demonstrated that the jury resolved the factual issues related to the lesser included offenses adversely to appellants. (*Id.* at p. 1381, 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, and *People v. Earp* (1999) 20 Cal.4th 826, 886.) The court rejected the holding in *People v. Campbell* (2015) 233 Cal.App.4th 148, that *Earp*, *Koontz*, and *Elliot* were distinguishable because the juries in those cases were instructed on premeditated murder. The court noted again that "an instruction on premeditated and deliberate murder would have done no more than allow the jury to convict appellants under another theory of first degree murder." (*People v. Gonzalez*, *supra*, at pp. 1381-1382.)

## ARGUMENT

### I. THE JURY'S ROBBERY-MURDER SPECIAL-CIRCUMSTANCE FINDING RENDERED HARMLESS ANY ERROR IN FAILING TO INSTRUCT ON MALICE MURDER AND ITS LESSER INCLUDED OFFENSES, AS WELL AS SELF-DEFENSE AND ACCIDENT, BECAUSE THE JURY RESOLVED THE FACTUAL QUESTIONS THAT WOULD HAVE BEEN POSED BY THE OMITTED INSTRUCTIONS ADVERSELY TO APPELLANTS

The jury's true finding on the special-circumstance allegation as to all appellants demonstrates that the jury found the killing was committed while appellants were engaged in the commission of robbery or attempted

robbery. This finding, which is independent of the jury's felony murder verdicts, demonstrates that the jury necessarily rejected any theory that the killing was anything other or less than first degree felony murder. Accordingly, the jury's special-circumstance finding renders any error in failing to give the omitted lesser included offense and defense instructions harmless.

### A. Error in Failing to Instruct on Lesser Included Offenses And Defenses Is Necessarily Harmless Where the Jury Otherwise Resolved the Factual Question Posed by the Omitted Instructions Adversely to the Defendant

#### 1. Where the Jury Adversely Resolves the Factual Issues That Would Have Been Posed by Omitted Instructions, the Error Is Harmless under *Sedeno* And, Therefore, *Watson*

Pursuant to a trial court's duty to instruct on the general principles of law governing the case, the court must sua sponte instruct on lesser included offenses of the charged offense where there is substantial evidence the defendant may be guilty of the lesser offense, but not the greater. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Instructing a jury on lesser included offenses for which there is substantial evidence protects the jury's "'truth-ascertainment function'" and the interests of both parties, as "the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, [and] a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense." (*Breverman*, *supra*, at p. 155; *People v. Sedeno* (1974) 10 Cal.3d 703, 716.) In the context of a jury presented with an unwarranted "all-or-nothing" choice between acquittal or conviction of a greater offense than that which the evidence may show, this Court has held that it cannot be presumed that the jury followed the court's reasonable doubt instructions: "A jury

instructed on only the charged offense might be tempted to convict the defendant of a greater offense than that established by the evidence rather than acquit the defendant altogether, or it may be forced to acquit the defendant because the charged crime is not proven even though the evidence is sufficient to establish a lesser included offense." (*People v. Eid* (2014) 59 Cal.4th 650, 657, internal quotation marks and citations omitted.)

Under prior case law, *People v. Modesto* (1963) 59 Cal.2d 722, 730-731, error in failing to give lesser included offense instructions warranted by the evidence was considered necessarily prejudicial. However, this Court has determined that "experience during the decade since *Modesto* has demonstrated that adherence to that rule is neither necessary to assure defendants their right to jury consideration of all material issues presented by the evidence nor required to avoid prejudice." (*People v. Sedeno*, *supra*, 10 Cal.3d at pp. 720-721.) The *Sedeno* Court therefore held that, where "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions . . . 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." (*Id.* at p. 721.) Over 20 years later, the Court disapproved of *Sedeno*'s "standard of near-automatic reversal for this form of error." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 149.) Instead, the Court held, an error in failing to instruct on lesser included offenses warranted by the evidence is one of state law only, and is therefore subject to the state law standard for determining prejudice set forth in the California Constitution. (*Ibid.*) Under this standard, the failure to give lesser included offense instructions is harmless unless an examination of the entire record, including the evidence, demonstrates that it is reasonably probable the

defendant would have achieved a more favorable result had the instructions been given. (*Ibid.*; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Despite *Breverman*'s statement that error in failing to instruct on lesser included offenses is to be reviewed "exclusively" under *Watson* (*Breverman*, *supra*, 19 Cal.4th at p. 178), this Court has continued to find harmless error in this context where the *Sedeno* rule is met (i.e., the jury resolved the factual question posed by the omitted instructions adversely to the defendant under other, properly given instructions), without reference to *Watson* or engaging in an analysis of whether it is reasonably probable the defendant would have achieved a more favorable result had the instructions been given. (E.g., *People v. Horning*, *supra*, 34 Cal.4th at p. 906; *People v. Lewis* (2001) 25 Cal.4th 610, 646; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1267-1268 [finding any error in failing to instruct on second degree murder harmless because evidence in support of such theory was "insubstantial" so it was not reasonably probable the absence of the instructions affected the outcome, and, separately, because the jury's special-circumstance findings negated a finding of second degree murder]; *People v. Beames* (2007) 40 Cal.4th 907, 928-930 [jury's true finding on torture-murder special circumstance rendered harmless under *Sedeno* any error in failing to instruct on lesser included offenses, and separately, any error in failing to instruct on second degree unpremeditated murder with express malice was harmless under *Breverman* and *Watson* in light of the evidence].) Implicit in this approach is the recognition that where the *Sedeno* rule is met, the *Watson* standard will necessarily be satisfied. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 898-899 [where the jury resolved the factual question posed by the omitted language adversely to defendant, it was not reasonably probable defendant would have achieved a more favorable result had the instruction been modified to include the language].) Indeed, the Court has held that where the *Sedeno* rule is met,

the instructional error is harmless "under any standard of prejudice." (*People v. Wright* (2006) 40 Cal.4th 81, 98-99; *People v. Castaneda*, *supra*, 51 Cal.4th at p. 1328 [jury's felony-murder special-circumstance finding rendered any error in failing to instruct on second degree murder harmless beyond a reasonable doubt].)

Consistent with *Breverman* and *Sedeno*, this Court has repeatedly held that the error in failing to instruct on lesser included offenses to malice murder is harmless where the jury's true finding on a felony-murder special circumstance demonstrates that it adversely resolved the factual issue posed by such instructions. (E.g., *People v. Castaneda*, *supra*, 51 Cal.4th at p. 1328; *People v. Lancaster* (2007) 41 Cal.4th 50, 85-86; *People v. Prince*, *supra*, 40 Cal.4th at p. 1268; *People v. Elliot*, *supra*, 37 Cal.4th at p. 476; *People v. Horning*, *supra*, 34 Cal.4th at p. 906; *People v. Koontz*, *supra*, 27 Cal.4th at pp. 1086-1087; *People v. Seaton* (2001) 26 Cal.4th 598, 665; *People v. Lewis*, *supra*, 25 Cal.4th at p. 646; *People v. Earp*, *supra*, 20 Cal.4th at pp. 885-886; *People v. Price* (1991) 1 Cal.4th 324, 464.) Moreover, this Court has applied the *Sedeno* rule in other contexts where a warranted instruction was omitted, even where the Court declined to determine whether such error was subject to *Watson* or the beyond-a-reasonable-doubt harmless error standard for federal constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (E.g., *People v. Jones* (2013) 57 Cal.4th 899, 966 [error in failing to instruct on definition of malice aforethought as part of malice murder instructions was "necessarily harmless under any standard" in light of jury's true finding on felony-murder special circumstance]; *People v. Wright*, *supra*, 40 Cal.4th at pp. 98-99 [declining to decide whether *Watson* or *Chapman* applies to error in failing to instruct on an affirmative defense, as any error was harmless under either standard because the *Sedeno* rule was met].) Accordingly, any error in failing to give the instructions at issue

in this case is necessarily harmless if the jury resolved the factual questions posed by the omitted instructions adversely to appellants under other proper instructions. Appellants' attempts to identify other harmless error standards are unavailing.

Relying on *People v. Campbell*, *supra*, 233 Cal.App.4th at page 167, Garcia argues that even if a jury's determination of the factual issue presented by an omitted instruction demonstrates that it resolved the issue adversely to the defendant, this fact is not determinative, but merely relevant to a harmless error analysis under *Watson*. However, as Respondent has explained, under *Breverman*, *supra*, 19 Cal.4th at p. 149, the *Watson* test remains the ultimate harmless error standard, but because the *Sedeno* standard is more stringent than *Watson*, the latter test need be applied only if recourse to *Sedeno* does not resolve the question. In proposing this alternative standard, the *Campbell* court misapplied language from *People v. Flood* (1998) 18 Cal.4th 470: "In *People v. Flood* . . . the Supreme 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." (*Campbell*, *supra*, 233 Cal.App.4th at p. 167, quoting *People v. Flood*, 18 Cal.4th at p. 490; see also *Campbell*, *supra*, at p. 167 ["In light of *Flood* and *Breverman*, it is clear that while a jury's determination on a factual issue under other instructions is relevant to determining whether an instructional error is harmless, it does not *categorically* establish that the error was harmless; the court must still determine whether, based on an examination of the entire record, it is reasonably probable that the error affected the outcome."].)

However, the *Campbell* court took the quoted language from *Flood* out of context; the actual language in *Flood* does not stand for the

proposition advocated by the *Campbell* court. *Flood* addressed the harmless error standard to be applied to instructional errors that effectively remove an element of a crime from the jury's consideration. The Court pointed out that prior decisions had held that the failure to instruct on an element of a crime was reversible per se, unless the *Sedeno* rule or one of a limited number of other exceptions was met. (*Flood, supra*, 18 Cal.4th at pp. 482-486.) Application of *Sedeno* and other exceptions, the *Flood* Court explained, meant that the reviewing court "is engaging in a type of harmless error analysis that is entirely inconsistent with a rule of automatic reversal." (*Id.* at p. 490.) To eliminate that inconsistency, the Court held:

> Rather than perpetuating an ostensible reversible-per-se rule that is riddled with exceptions meant to delineate circumstances in which such instructional error categorically may be deemed harmless—a rule that is fundamentally inconsistent with the language and purpose of the specific California constitutional harmless error provision embodied in article VI, section 13, of the California Constitution—we hold . . . that the prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable prejudicial error test embodied in article VI, section 13.

(*Ibid.*, citing *Watson*, *supra*, 46 Cal.2d at pp. 836-837.)

Thus, *Flood* did not undermine the *Sedeno* test as a means for assessing harmless error arising out of the failure to instruct fully on the elements of charged offenses. Instead, *Flood* removed any residual doubt as to whether the failure to instruct on an element of a crime should be considered as reversible per se, and emphasized that reversible error must be assessed underthe *Watson* standard. As explained, however, the Court has since employed the *Sedeno* rule to find instructional error harmless without engaging in a typical *Watson*-related weighing of the evidence,

because where the *Sedeno* rule is met, the error is necessarily harmless under *Watson*. In other words, once it is determined that the jury resolved the factual issue posed by the omitted instruction adversely to the defendant, there is simply no need to examine the record further for a reasonable probability as to what the jury would have done if given the omitted instruction. The jury's verdicts and findings *necessarily demonstrate* what it would have done.

### 2. The Failure to Instruct on Malice Murder, Its Lesser Offenses, And Its Defenses Is Not Structural And Does Not Involve the Federal Constitution

Gonzalez erroneously asserts that the failure to instruct the jury on both malice murder and felony murder violates federal due process guarantees. More specifically, he argues that because malice murder and felony murder are theories of the same offense of first degree murder under section 187, "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 lesser-included offenses and defenses to malice murder which are supported by the evidence." (JGAOB 29-39.) He further contends that the failure to give these instructions was structural error because the court thereby "removed those issues and legal alternatives for conviction from the case" such that there is "no meaningful basis" or "object" upon which a harmless error analysis could operate, and any harmless error analysis would necessarily be based on conjecture. (JGAOB 41-47.) These arguments fly in the face of this Court's longstanding decisions, and find no support in federal Supreme Court authority.

First, Gonzalez does not explain how the sua sponte obligation to instruct on malice murder and its lesser included offenses and defenses derives from the federal Constitution. In fact, this Court has held that the

obligation to instruct on lesser included offenses derives solely from state law, and the erroneous failure to give such instructions is not structural error, but is subject to the California standard for assessing prejudice. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 176 ["error in failing sua sponte to instruct, or to instruct fully, on a lesser included offense is not a fundamental structural defect in the mechanism of the criminal proceeding"]; see also *id.* at pp. 165, 168-173.) Moreover, the Court has held that the *Sedeno* rule applies to error in failure to fully instruct on malice murder. (*People v. Jones*, *supra*, 57 Cal.4th at p. 966.) And although this Court has declined to decide whether the failure to instruct on an affirmative defense violates the federal Constitution (*People v. Salas* (2006) 37 Cal.4th 967, 984), it has held that such error is subject to harmless error analysis, and may be deemed harmless where the *Sedeno* rule is met. (*People v. Wright*, *supra*, 40 Cal.4th at pp. 98-99; see *People v. Stewart* (1976) 16 Cal.3d 133, 141.) This Court has thus made clear that the type of instructional errors at issue in this case are not structural. Appellant Gonzalez offers no good reason for this Court to reconsider, much less repudiate, its precedent.

Further, the United States Supreme Court has never held that the failure to instruct on an alternative theory of an offense, an affirmative defense, or a lesser included offense in a noncapital case involves any federal constitutional right, much less constitutes structural error.[5] (*People*

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[5] *Keeble v. United States* (193) 412 U.S. 205 [93 S.Ct. 1993, 36 L.Ed.2d 844], is not to the contrary. (See JGAOB 48-49.) There, the Supreme Court held that a federal noncapital defendant was entitled to an instruction on a lesser included offense "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." (*Keeble*, *supra*, 412 U.S. at p. 208.) That holding, however, was based on the Federal Rules of Criminal Procedure, not on any constitutional requirement. (*Ibid.*)

*v. Breverman*, *supra*, 19 Cal.4th at p. 165-170 [The Supreme Court's "decisions leave substantial doubt that the federal Constitution confers *any* right to lesser included offense instructions in noncapital cases. They provide no basis whatever for a conclusion that the federal charter would require such instructions, as does California," and "this court has explicitly recognized that the California rule requiring sua sponte instructions on lesser included offenses suggested by the evidence is independent of federal law."]; see *Gilmore v. Taylor* (1993) 508 U.S. 333, 343-344 [113 S.Ct. 2112, 124 L.Ed.2d 306] [reiterating the rule that instructional errors of state law generally do not state a claim under the federal Constitution, and rejecting a claim that "the right to present a defense includes the right to have the jury consider it, and that confusing instructions on state law which prevent a jury from considering an affirmative defense therefore violate due process"]; see also *Windham v. Merkle* (9th Cir. 1998) 163 F.3d 1092, 1106 [failure of a state trial court to instruct on lesser included offenses in a noncapital case does not present a federal constitutional question].) Indeed, the omission of these types of instructions is exactly the type of trial error that lends itself to harmless error analysis. (See *United States v. Marcus* (2010) 560 U.S. 258, 263 [130 S.Ct. 2159, 176 L.Ed.2d 1012] ["'structural errors' are 'a very limited class' of errors that affect the '"framework within which the trial proceeds"'"]; *People v. Mendoza* (2016) 62 Cal.4th 856, 900 [reciting United States Supreme Court precedent that "[o]nly '"a very limited class of errors"' is considered structural and requires automatic reversal," and "[s]uch errors 'defy analysis by "harmless-error" standards'"].) The "object" upon which such harmless analysis may be based includes the jury's verdicts and findings. Engaging in harmless error analysis under *Sedeno* in this situation does not involve speculation; it involves an objective examination of the factual issues presented by the

omitted instructions, the issues presented by the instructions actually given, and the jury's resulting verdicts and findings.

### B. By Finding the Robbery-Murder Special-Circumstance Allegation True as to All Appellants, the Jury Necessarily And Adversely Resolved the Factual Questions Posed by the Omitted Instructions

#### 1. Under *Sedeno*, Any Error Here Was Harmless

Applying this Court's longstanding precedent here, the jury's finding on the robbery-murder special circumstance renders any instructional error necessarily harmless. The trial court properly instructed the jury on the robbery-murder special circumstance, having made it clear that the jurors must consider the special circumstance separately and make their finding beyond a reasonable doubt. (4CT 621 [CALCRIM No. 700], 629-630 [CALCRIM No. 730].) Further, a true finding on the special circumstance not only required that the jury reaffirm that Rosales was killed in the course of a robbery or attempted robbery, but it also required the jury to separately find that all appellants shared an intent to commit robbery "independent of the killing," such that if "the defendant only intended to commit murder and the commission of the robbery was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved." (4CT 435-436 [CALCRIM No 730].) If the jurors had any doubt that Rosales's killing was a felony murder, they would have rejected the special-circumstance allegation. Instead, by finding the special-circumstance allegation true as to each appellant, the jury necessarily found that the killing was first degree felony murder, i.e., a killing committed while engaged in the commission of robbery or attempted robbery. Thus, any error in failing to instruct on first degree malice murder was necessarily harmless because, as the Court of Appeal found, appellants cannot have

suffered any prejudice from the trial court's failure to provide the jury with another means of finding appellants guilty of first degree murder—especially given that the prosecution had made no attempt to prove malice, much less premeditation and deliberation. Notably, appellants Garcia and Estrada do not specifically argue otherwise, but instead focus on the lack of lesser included offense instructions.[6]

Moreover, the jury's special-circumstance finding obviated any finding that the killing was committed in self-defense or by accident, as those defense theories do not apply to felony murder. (See *People v. Cavitt* (2004) 33 Cal.4th 187, 197 ["The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony."]; *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 ["ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is justified"]; *People v. Loustaunau* (1986) 181 Cal.App.3d 163, 170 [accident, self-defense, and imperfect self-defense do not apply to felony murder].)

The special-circumstance finding also demonstrates that the jury necessarily rejected Gonzalez's version of events, in which a robbery was

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[6] Estrada does argue that if the jury had been instructed on first degree malice murder, it could have found appellants guilty of first degree murder without a special circumstance. (EAOB 53.) However, as will be explained, the jury's verdict of felony murder did not compel it to find the felony-murder special circumstance true. Thus, even without instruction on first degree malice murder, the jury was expressly authorized to find appellants guilty of first degree murder without a special circumstance.

not contemplated, as well as the scant other evidence which Garcia and Estrada claim suggested they intended only a consensual drug transaction or a nonviolent theft. (See EAOB 39-43, 58; AGAOB 28-32; *People v. Lewis*, *supra*, 25 Cal.4th at p. 646 [any error in failing to instruct the jury on manslaughter was harmless where the jury's verdicts of guilty on robbery and burglary, and its true findings on related special-circumstance allegations, showed the jury necessarily rejected defendant's version of events].) If the jury had convicted appellants of felony murder because it succumbed to the temptation of convicting them of a greater offense than that established by the evidence, rather than acquitting them altogether, in the face of an improper "all or nothing" choice (*see People v. Eid*, *supra*, 59 Cal.4th at p. 657), there was no such temptation when the jury turned to the special circumstance deliberations. Nevertheless, the jury, having been instructed not to consider "penalty or punishment in any way when deciding whether a special circumstance, or any other charge, has been proved" (4CT 626 [CALCRIM No. 706]), found that Rosales's fatal shooting "and the robbery or attempted robbery were part of one continuous transaction," that the perpetrator and aiders and abettors intended to commit the robbery before or at the time of the shooting, and that commission of the underlying felony was not "merely part of or incidental to the commission of that murder" (4CT 629-630 [CALCRIM No. 730]).

Accordingly, the jury's special-circumstance finding precluded it from convicting appellants of any offense lesser than first degree murder. *People v. Elliot*, *supra*, 37 Cal.4th 453, is instructive. There, this Court emphasized that "[t]he jury also was directed that the felony-murder special circumstance is not established if the attempted robbery was merely incidental to the commission of the murder," before holding that the jury's special-circumstance finding rendered any instructional error harmless:

"As the elements of felony murder and the special circumstance coincide, the true finding as to the attempted-robbery-murder special circumstance establishes here that the jury would have convicted defendant of first degree murder under a felony-murder theory, at a minimum, regardless of whether more extensive instructions were given on second degree murder." (*Id.* at p. 476; see also *Castaneda*, *supra*, 51 Cal.4th at p. 1329 ["the jury's finding that the killing was committed while defendant was engaged in the commission or attempted commission of the crimes of burglary, sodomy, and robbery precluded the jury from finding that the murder was of the second degree"]; *People v. Seaton*, *supra*, 26 Cal.4th at p. 665 [jury's true finding on burglary-murder and robbery-murder special circumstances demonstrated that the killing was not manslaughter, even if defendant acted in unreasonable self-defense].)

Not only that, but as to Garcia and Estrada, the special-circumstance finding demonstrates that the jury found they either intended to kill Rosales or acted with reckless indifference to human life by knowingly engaging in criminal activity that they knew involved a grave risk of death. (CALCRIM No. 703 [Special Circumstances: Intent Requirement for Accomplice after June 5, 1990—Felony Murder]; *People v. Banks* (2015) 61 Cal.4th 788, 794, 801.) Thus, the jury necessarily rejected any theory that Garcia and Estrada intended only a consensual drug deal or nonviolent theft which might have supported verdicts of second degree murder or involuntary manslaughter. Accordingly, any error in failing to instruct on malice murder, its lesser included offenses, and its defenses was harmless because the jury necessarily decided the factual questions posed by those omitted instructions adversely to appellants under other properly given instructions.

### 2. The Fact That Appellants' Jury Was Not Instructed on First Degree Malice Murder Does Not Remove This Case from the *Sedeno* Rule

Relying on the reasoning in *People v. Campbell*, *supra*, 233 Cal.App.4th 148, Estrada and Garcia attempt to distinguish this case from the long line of cases in which this Court has applied the *Sedeno* rule on the ground that in those cases, the jury was instructed on first degree malice murder in addition to felony murder. (EAOB 35, 46-53; AGAOB 40; see *Campbell*, *supra*, at pp. 167-168, citing *Castaneda*, *supra*, 51 Cal.4th at p. 1328, *Horning*, *supra*, 34 Cal.4th at p. 906, *Elliot*, *supra*, 37 Cal.4th at p. 476, *Koontz*, *supra*, 27 Cal.4th at p. 1078, and *Earp*, *supra*, 20 Cal.4th at p. 884.) However, as the Court of Appeal found here, this factual distinction is not required by the *Sedeno* rationale and does little if anything to implement its holding. When lesser offense instructions are warranted, giving the jury a choice between alternative *theories* of first degree murder does not remove the jury from the impermissible "all-or-nothing" choice between acquittal or convicting a defendant of a crime greater than that of which he or she may be guilty. Thus, there is no reason to credit a special-circumstance finding where a jury was instructed on alternative theories of first degree murder, but not where it was instructed on only one theory. Indeed, the decisive aspect of the holding in *Horning* obtains regardless of whether a jury was instructed on alternative theories of first degree murder or only first degree felony murder: "If the jury had had any doubt that this was a felony murder, it did not have to acquit but could have simply convicted defendant of first degree murder without special circumstances." (*Horning*, *supra*, at p. 906.) As shown above, appellants' jury was given precisely that option.

Estrada and the *Campbell* court misinterpret *Horning* as suggesting that the inclusion of a first degree malice murder instruction in addition to a

felony murder instruction is determinative for the harmless error inquiry. (EAOB 50-51; see *Campbell*, *supra*, 233 Cal.App.4th at p. 168 [finding that the language in *Horning* "suggested" a distinction between cases in which the jury is instructed on felony murder only and those in which the jury is instructed on felony murder as well as first degree malice murder].) However, *Horning* did not suggest that the instructional error there would not have been harmless if the jury had been instructed solely on felony murder. The *Horning* Court simply pointed out that if the jury had any doubt as to felony murder, it could have found the defendant guilty of first degree murder without finding the felony-murder special circumstance true. This is true regardless of whether the jury was instructed on malice murder.[7] "It is axiomatic that cases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

Further, other cases from this Court demonstrate that Estrada's and the *Campbell* court's interpretation of *Horning* is incorrect. For example, in *People v. Lancaster*, *supra*, 41 Cal.4th 50, the Court found that the jury adversely resolved the factual question that would have been posed by

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[7] *Horning* cited two decision in support of its holding—*People v. Lewis*, *supra*, 25 Cal.4th 610, and *People v. Price*, *supra*, 1 Cal.4th 324—but neither case found that instruction on an alternative theory of first degree murder in addition to felony murder was part of the harmless error inquiry. (*See People v. Lewis*, *supra*, at p. 644 ["The trial court instructed the jury on first degree felony murder and second degree implied-malice murder. [Citations.] But the court refused defense counsel's request to instruct on the definition of manslaughter and, more specifically, on involuntary manslaughter based on commission of a lawful act that might produce death, without due caution and circumspection."]; *People v. Price*, *supra*, at p. 464 [the trial court's failing to instruct on voluntary manslaughter as a lesser included offense was necessarily harmless in light of jury's special-circumstance finding that the defendant killed in the perpetration of burglary because it meant the killing was necessarily felony murder].)

second degree murder instructions when it found true the kidnapping-murder special-circumstance allegation. The defendant argued on appeal that the jury's special-circumstance finding was not conclusive as to whether the jury had rejected the factual theory on which a second degree murder instruction would have rested, because the finding "was reached in the absence of alternative possible verdicts." (*Id.* at p. 85.) The Court found that, "as in *People v. Horning*, '[i]f the jury had had any doubt that this was a felony murder, it did not have to acquit but could have simply convicted defendant of first degree murder without special circumstances.' [Citation.]" (*Id.* at pp. 85-86.) Nowhere in the Court's analysis did it rely upon the fact that the jury was instructed on premeditated murder. In fact, the opinion does not even specify if the jury was instructed on that alternative theory of first degree murder. Likewise, in *People v. Taylor* (2010) 48 Cal.4th 574, the Court cited *Horning* in support of its explanation that a jury instructed *only* on felony murder has three options: (1) finding the defendant not guilty; (2) convicting the defendant of a capital offense by finding the special circumstance true; or (3) "convicting defendant of first degree felony murder but finding not true the special circumstance allegations that made him death eligible." (*Taylor*, *supra*, at pp. 623-625.)

Accordingly, the fact that the juries in *Castaneda*, *Horning*, *Elliot*, *Koontz*, and *Earp* were instructed on first degree malice murder does not meaningfully distinguish those cases from this case. In each of these cases, including this one, the jury may have been faced with an all-or-nothing choice between acquittal and first degree murder, but it was also given the choice of finding first degree murder *without* finding a special circumstance. The true finding on the felony-murder special-circumstance allegation in each case demonstrated that the jury necessarily found the killing to be first degree murder, and it would not have found that the killing constituted any offense less than first degree murder. Thus, the fact

that the instant jury was not instructed on first degree malice murder does not meaningfully distinguish this case from this Court's long line of authority in which a jury's felony-murder special-circumstance finding rendered harmless any error in failing to instruct on lesser included offenses. (See *People v. Huynh* (2012) 212 Cal.App.4th 285, 312, 315 [relying on *Castaneda* to find that the jury's true finding on the felony-murder special-circumstance allegations rendered any error in failing to instruct on second degree murder harmless beyond a reasonable doubt in a case in which the jury was not instructed on any theory of first degree murder other than felony murder]; see also *People v. Valdez* (2004) 32 Cal.4th 73, 111 [cases holding that a court need not instruct on theft as a lesser included offense of robbery where robbery is not charged but is only alleged as the underlying predicate felony for a felony-murder charge are applicable in a case where the jury was instructed only on felony murder; fact that prior cases involved instruction on first degree malice murder "is of little or no significance"].)

### 3. The Guilty Verdicts on the Felony Murder Charges Did Not Compel a True Finding on the Special-Circumstance Allegation

Appellants nevertheless argue, again relying on *Campbell*, that the special-circumstance finding cannot be credited because once the jury opted to find appellants guilty of felony murder over acquittal, it was essentially obligated to find the robbery-murder special circumstance true. (JGAOB 49-50; EAOB 33-35, 53; AGAOB 36-38; see *Campbell*, *supra*, 233 Cal.App.4th at pp. 168, 172 ["when, 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"].) Neither appellants nor the *Campbell* court provide any reasoning or foundation for this dubious conclusion. In fact, there is no reason the jury here would have felt obligated to find the felony-murder special circumstance true simply because it found appellants guilty of felony murder. This is especially true in light of the court's instructions that the jurors must consider the special circumstance separately and make their finding beyond a reasonable doubt, and they may not consider "penalty or punishment in any way" when making the special circumstance determination. (4CT 621, 626 [CALCRIM Nos. 700, 706].)

This Court has noted that the elements of felony murder and the special circumstance "coincide," such that a special-circumstance finding demonstrates the jury would have found the substantive offense even if instructed on lesser offenses of malice murder. (*Elliot*, *supra*, 37 Cal.4th at p. 476; accord, *Castaneda*, *supra*, 51 Cal.4th at p. 1328.) However, the reverse is not true: a jury's finding of guilt on felony murder does not necessarily entail a jury's true finding on a felony-murder special circumstance. Specifically, as the jury here was instructed, the felony-murder special circumstance, unlike felony murder, required proof that the defendant intended to commit the felony independent of the killing and that the commission of the felony was not merely part of or incidental to the commission of the murder. (4CT 614-616, 629-630 [CALCRIM Nos. 540A, 540B, 730]; *People v. Moore* (2011) 51 Cal.4th 386, 408; *Horning*, *supra*, 34 Cal.4th at pp. 904, 907-908; *People v. Andreasen* (2013) 214 Cal.App.4th 70, 80-82; see *People v. Harden* (2003) 110 Cal.App.4th 848, 861-865 [explaining that this Court's precedent establishes that the independent felonious intent requirement creates a distinction between felony murder and the felony-murder special circumstance, even though a jury need not be instructed on the requirement where there is insufficient

evidence that the felony was merely incidental to the murder]; *People v. York* (1992) 11 Cal.App.4th 1506, 1511 [guilt verdicts on felony murder and underlying felony offense were not inconsistent with the jury's not true finding on the felony-murder special circumstance where the jury was instructed the special circumstance required finding that the felony was not merely incidental to the murder].)

Moreover, as the jury here was also instructed, unlike felony murder, the special circumstance, as applicable to an accomplice like Garcia or Estrada, required the jury to find that either the accomplice intended to kill or: (1) the accomplice's participation in the crime began before or during the killing; (2) the accomplice was a major participant in the crime; and (3) when the accomplice participated in the crime, he or she acted with reckless indifference to human life. (4CT 622-623 [CALCRIM No. 703]; *People v. Clark* (2016) 63 Cal.4th 522, 615-616.) Thus, the felony-murder special circumstance required the jury to make additional findings not required as to the substantive offense of felony murder. The jury therefore was not "compelled" to find the special-circumstance allegation true simply because it convicted appellants of the substantive offense.

Additionally, as stated above, the jury was instructed that it must consider the special circumstance separately and that the beyond-a-reasonable-doubt standard applied to the special circumstance. (4CT 621 [CALCRIM No. 700].) There is no reason to presume the jury ignored this instruction under some misguided belief that in order to perserve its guilty verdict as to felony murder, it also had to find the felony-murder special circumstance true. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 926 [it is presumed jurors are "'intelligent and capable of understanding and applying the court's instructions'"]; *People v. Gray* (2005) 37 Cal.4th 168, 217 [absent contrary indication in the record, a jury is presumed to understand and follow the court's instructions].) Unlike the all-or-nothing

situation a jury faces when confronted with the choice between first degree murder and acquittal, by the time a jury considers the felony-murder special circumstance, it has already found the defendant guilty of felony murder. The potential "temptation" to ignore the instructions simply no longer obtains. (See *People v. Eid, supra*, 59 Cal.4th at p. 657.) Instead, the jury is in a position to objectively evaluate whether the special circumstance, with its separate elements from the substantive offense, has been proven beyond a reasonable doubt. (Cf. *People v. Sakarias* (2000) 22 Cal.4th 596, 621 ["even if we assume the jury might have convicted defendant of robbery despite believing the element of taking by force was not proven, we cannot assume the jury, unconvinced a robbery had occurred, would have gone on to find true a capital murder allegation simply because it was not given the option of convicting defendant of theft"]; *People v. Turner* (1990) 50 Cal.3d 668, 693 ["even if the jurors were willing to convict defendant of robbery despite their belief he was guilty only of theft, we cannot imagine they would employ this reluctant verdict to support findings of *first degree murder* and *death eligibility* under a robbery-murder special circumstance"]; *id.* at p. 693, fn. 8 [in the impermissible "all-or-nothing" scenario, the usual presumption that jurors follow instructions does not apply, but once jurors have made the choice within the all-or-nothing scenario and move on to other verdicts and findings, "there seems no reason to believe, as defendant suggests, that such jurors will suddenly regain their technical probity and render strictly consistent verdicts on all other issues, whatever the consequences"].) Neither appellants nor *Campbell* establish that once a jury convicts on felony murder, it is "essentially compelled" to find the felony-murder special circumstance true. Here, the jury's special-circumstance finding, made pursuant to complete and accurate instructions on the special circumstance, is entitled to full credit.

In sum, by finding the special-circumstance allegation true, the jury necessarily found that the killing was felony murder and thereby resolved adversely to appellants the factual questions that would have been posed by instructions on malice murder, lesser included offenses of malice murder, self-defense, and accident. If the jury had any doubt that Rosales's killing was felony murder, and only convicted appellants to avoid acquitting them, that motivation would not apply to the special-circumstance allegation, but rather would provide a strong basis for rejecting it. Any instructional error was therefore harmless.

#### 4. Appellants' Reliance on Cases Involving After-Formed Intent Is Misplaced

Garcia and Estrada argue that under *People v. Ramkeesoon* (1985) 39 Cal.3d 346, the failure to instruct on lesser included offenses based on appellants' theft theory was prejudicial. (EAOB 53-54, 58-59; AGAOB 48-51.) In fact, *Ramkeesoon* undermines appellants' position because their jury, unlike Ramkeesoon's, was fully and accurately instructed on all the elements of robbery without the need of a theft instruction. In *Ramkeesoon*, the defendant, who was charged with robbery as a separate offense, requested instructions on larceny and theft as lesser included offenses of robbery on the basis of his testimony that he did not form the intent to steal the victim's property until after he killed the victim. (*Ramkeesoon*, *supra*, at p. 350.) The trial court denied the request. (*Ibid.*) The defendant was convicted of first degree murder and robbery, with findings that he used a deadly weapon. (*Id.* at p. 348.) This Court found that there was sufficient evidence to require the lesser offense instruction. (*Id.* at pp. 348, 351.) Because *Ramkeesoon* predated *Breverman*, the Court determined that error could be harmless only if the *Sedeno* rule was met, and found that the failure to instruct on theft was prejudicial because absent that instruction, "the jury was never required to decide specifically whether defendant had

formed the intent to steal after the assault." (*Id.* at pp. 351-352.) The Court held that the error was therefore prejudicial and required reversal of the robbery conviction as well as the murder conviction, which was presumed to have been based on a theory of robbery-murder. (*Id.* at pp. 352-353 & fn. 2.)

In *Ramkeesoon*, the omitted theft instruction was prejudicial because the jury was not otherwise asked to determine *when* the defendant formed the intent to steal. This issue distinguishes *Ramkeesoon* from the instant case, where the instructions on robbery and felony murder (as well as on the special circumstance) accurately informed the jury as to the requirement that the necessary intent be formed prior to, or at the same time as, the taking. (4CT 614-618, 629-630.) In contrast, the omitted lesser included offense instructions would have posed the question of whether appellants used force or fear to accomplish or attempt the taking—an element included in the robbery instructions as well. In fact, the *Ramkeesoon* Court acknowledged that the failure to instruct on after-formed intent presents a different scenario, by distinguishing that case from *People v. Miller* (1974) 43 Cal.App.3d 77. (*Ramkeesoon*, *supra*, 39 Cal.3d at p. 352, fn. 3.) In *Miller*, the defendant was charged with robbery, but there was no issue as to the timing of the defendant's intent. Instead, the issue was whether the defendant used force or fear to accomplish the taking as the victim testified, or whether he used only trickery as he had testified. (*Miller*, *supra*, 43 Cal.App.3d at pp. 79-80, 81.) The *Miller* court found the error in failing to give a theft instruction harmless under the *Sedeno* rule because the jury's verdict of first degree robbery over second degree robbery "shows that the jury believed the victim's testimony that appellant committed an armed robbery, and rejected appellant's testimony that he committed a lesser offense." (*Id.* at pp. 83-84.) The *Ramkeesoon* Court held that the after-formed-intent issue "is in contrast to the situation in *People v. Miller*,"

where force or fear was the omitted issue. (*Ramkeesoon*, *supra*, at p. 352, fn. 3.) The *Ramkeesoon* Court also approved *Miller*'s holding that the failure to instruct on theft was harmless in light of the jury's first degree robbery finding. (*Ibid.*)

In general, the timing of the defendant's intent to steal relative to the timing of the killing is relevant to the theft-or-robbery issue because it informs the determination of whether force or fear was used. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055-1056 ["If intent to steal arose only after the victim was assaulted, the robbery element of stealing by force or fear is absent."].) However, the *Ramkeesoon* Court drew a clear distinction between these two related factual issues. In doing so, the *Ramkeesoon* Court rejected the argument appellants make here, i.e., that *Ramkeesoon*'s holding applies where the omitted factual issue was solely about force or fear and not the timing of intent.[8] Thus, *Ramkeesoon* is applicable to this case only to the extent that it approved of *Miller*, under which any error here was harmless.

Here, the factual question that would have been posed by instructions on second degree murder and involuntary manslaughter—which Estrada and Garcia claim were warranted on the ground that there was evidence they planned only a theft and not a robbery—had nothing to do with the timing of appellants' intent to steal from Rosales. Instead, as in *Miller*, the factual question would have been whether appellants used force or fear to steal or attempt to steal the drugs. (See *Castaneda*, *supra*, 51 Cal.4th at p. 1331 [theft is a lesser included offense of robbery, with robbery having the additional element of force or fear].) This factual

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[8] For the same reasons, there is no relevance to Estrada's examination of cases after *Ramkeesoon* dealing with the issue of instructing a jury on theft as a lesser included offense of a charged robbery based on evidence of after-formed intent. (See EAOB 55-59.)

question was posed by the correct and complete instructions on the robbery-murder special circumstance, and the jury resolved the issue adversely to each appellant by finding the special-circumstance allegation true. As explained, these special-circumstance findings were made outside the context of an all-or-nothing choice between acquittal and conviction of a greater offense than that which the evidence may have shown, and the findings were not mandated by the jury's felony-murder verdicts. Accordingly, any error in failing to instruct on the lesser included offenses was harmless because the jury resolved the factual issue posed by the omitted instructions adversely to appellants in another context.

### 5. Appellants Have Made No Compelling Argument for Removing this Case from the *Sedeno* Rule

Garcia argues that this Court's precedent applying *Sedeno* is distinguishable because in the Court's prior cases, the evidence established that the defendants intended and committed the underlying felonies, whereas here the evidence of appellants' intent to commit robbery was unclear. (AGAOB 41, 48; see *Campbell*, *supra*, 233 Cal.App.4th at pp. 169-172.) Respondent maintains that the evidence of appellants' intent to commit robbery was compelling. Kalac's testimony and the hotel surveillance video established that: appellants planned a robbery, not a theft, and they used words and phrases other than "come up on" to describe the robbery (6RT 4261-4264, 4375; 7RT 4834, 4841-4844, 4882-4883, 4886); appellants lured Rosales to the scene under the premise that Estrada was going to buy drugs from him (6RT 4266, 4271-4272; 7RT 4836); Estrada ensured everyone in the room was quiet when she called Rosales, stating that she did not want him to know she was with other people (6RT 4270); Garcia offered to act as a "lookout" (6RT 4273, 4411-4413; 7RT 4844-4847, 4882), which would have been unnecessary, if not counter-productive, for a "snatch and grab" theft; and Garcia and Gonzalez both

went to meet Rosales (4RT 3325-3330, 3333-3337; 6RT 4272), which was unnecessary if they intended only a consensual drug transaction, and which demonstrated their intent to use at least intimidation to obtain the drugs. Phone records established that appellants used Araujo's phone and a phone Garcia had under a false name to stay in contact with each other and Rosales at the relevant times (4RT 3357, 3364-3372; 5RT 3928; 7RT 4932-4937), and Estrada admitted during the incriminating jailhouse phone call that she made attempts to avoid having the calls traced back to her (4CT 540-541; 6RT 5199; 7RT 5127-5128; see 7RT 5109).

Moreover, Gonzalez's testimony lacked credibility. It simply did not make sense that Estrada would arrange a consensual transaction with Rosales across the street from the Crystal Inn, when she planned an imminent move to a second hotel, especially since she and Gonzalez had engaged in a drug transaction with Rosales in front of the second hotel in the past (8RT 5478-5479, 5526-5529). Nor did it make sense that Estrada, who had a relationship with Rosales and supposedly received free or discount drugs from him, would not meet Rosales herself after arranging the meeting, if a consensual drug transaction was truly planned. It did not make sense that Gonzalez would ask Garcia to keep him company, but then leave the hotel without him. (8RT 5537-5539.) It did not make sense that after becoming frustrated from waiting so long for Rosales (8RT 5499, 5540-5541), Gonzalez would not call Estrada and tell her to make other arrangements. It did not make sense that Rosales would try to shoot Gonzalez without provocation, and appellants offered no motive for his doing so. There was also no reasonable explanation for why Gonzalez gave the gun to Kalac, whom he did not know, without saying anything to him, when Garcia and Estrada were nearby. Nor was it reasonable that Gonzalez would not follow-up with Kalac about the gun. And it did not make sense that Gonzalez would leave his money at a hotel, but bring his wallet, or that

he would leave his phone there since he testified that he used his phone obsessively (8RT 5493-5494). Based on the evidence, is not reasonably probable that the jury would have found appellants guilty of any lesser included offenses. Accordingly, the evidence that appellants planned a robbery was overwhelming, and the cases on which respondent relies are not distinguishable on this ground.

In any event, most of this Court's relevant harmless error decisions do not mention, much less rely upon, the strength of the evidence of the underlying felonies. Instead, the cases simply hold that a jury's finding on a felony-murder special circumstance demonstrates that the jury resolved the factual questions that would have been posed by lesser included offense instructions adversely to the defendants, such that any error in failing to instruct on such offenses was necessarily harmless. Indeed, where a jury's finding is supported by sufficient evidence, it should not be discredited simply because the supporting evidence is not overwhelming or because evidence in other cases was stronger. In other words, the strength of the evidence of the underlying felony does not and should not invalidate a jury's felony-murder special-circumstance finding that is made pursuant to proper instructions and is supported by sufficient evidence. Garcia's attempt to factually distinguish the controlling cases fails.

Gonzalez argues that the jury's special-circumstance finding is unreliable and therefore cannot be used in a harmless error analysis, because the finding and conviction of felony murder are inconsistent with his acquittal on shooting at an occupied motor vehicle and the not-true findings on the firearm allegations. (JGAOB 50-52.) In fact, the jury's findings and verdicts are consistent with Kalac's version of events: appellants were unarmed when they initially planned to rob Rosales, but during the course of the robbery or attempt one of them shot Rosales, likely with the victim's firearm. Under this scenario, all three appellants

were guilty of special-circumstance felony murder, but no principal carried a firearm or had a firearm available for use in connection with the murder, and Gonzalez did not intentionally, willfully, and maliciously use or shoot a firearm. (See CALCRIM Nos. 965 [Shooting at Inhabited House or Occupied Motor Vehicle], 3115 [Armed with Firearm], 3146 [Personally Used Firearm], 3150 [Personally Used Firearm: Intentional Discharge and Discharge Causing Injury or Death].) There is nothing inconsistent about the jury's verdicts and findings.

Lastly, Estrada postulates that if this Court holds that the special-circumstance finding alone rendered any instructional error harmless, it will provide an incentive for trial courts to disregard their duty to instruct on lesser included offenses where warranted by the evidence because they know a special-circumstance finding will render that error harmless. (EAOB 36.) This policy argument is misguided because it implies that trial courts want to provide incomplete or one-sided instructions, and ignores the presumption that courts regularly perform their duty. (Evid. Code, § 664.) There is simply no likelihood courts will disregard their instructional duties on the chance the jury will make a finding that renders that neglect of duty harmless. Indeed, an unbiased trial court would have no motive to do so, and Estrada has pointed to no evidence that such a neglect of duty has become a problem in the more than four decades since *Sedeno* was decided.

### C. Even If the Special Circumstance Alone Did Not Render Any Instructional Error Harmless, Reversal of Appellants' Convictions Is Not Warranted

Should this Court find that the special circumstance did not render any instructional error harmless, the appropriate remedy is to remand the case to the Court of Appeal for further proceedings. In finding any instructional error harmless, the Court of Appeal declined to decide

whether the failure to give the instructions constituted error. (*People v. Gonzalez*, *supra*, 246 Cal.App.4th at p. 1380.) Thus, the issue of whether instructions on lesser included offenses of malice murder, self-defense, and accident were warranted by the evidence in the first instance is still outstanding and must be resolved. Likewise, the Court of Appeal declined to decide whether any error in failing to give the instructions was harmless under *Watson* based on the relative strength of the evidence, and this Court's grant of review did not implicate this separate issue. In other words, even if this Court holds that the special circumstance alone did not render any instructional error harmless under *Sedeno*, the Court of Appeal still must decide whether the error was harmless on the ground that based on the evidence, it is not reasonably probable appellants would have achieved a more favorable result had the instructions been given. (See *People v. Prince*, *supra*, 40 Cal.4th at pp. 1267-1268 [any error in failing to give lesser included offense instruction was harmless under *Sedeno* due to a special-circumstance finding and, separately, under *Watson* due to the weakness of the evidence supporting a lesser offense]; *People v. Beames*, *supra*, 40 Cal.4th at pp. 928-930 [same].)

## CONCLUSION

Respondent requests that any instructional error be deemed harmless and the Court of Appeal's judgment be affirmed. In the alternative, this Court should remand the matter to the Court of Appeal for further proceedings on the issues of whether the omitted instructions were required at all, and whether any failure to give them was harmless in light of the evidence presented.

Dated: February 13, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,971 words.

Dated: February 13, 2017

XAVIER BECERRA
Attorney General of California

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## DECLARATION OF SERVICE

Case Name: ***People v. Jorge Gonzalez, et al.***

No.: **S234377**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 14, 2017, I served the attached **ANSWER BRIEF ON THE MERITS,** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On February 14, 2017, I caused the original and 13 copies of the **RESPONDENT'S ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDEX OVERNIGHT CARRIER, Tracking # 022329**

On February 14, 2017, I caused one electronic copy of the **RESPONDENT'S ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 14, 2017, at Los Angeles, California.

| L. Luna | L. Luna |
|---|---|
| Declarant | Signature |

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