IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

A trial court's failure to instruct a jury on lesser included offenses of malice murder supported by the evidence is not necessarily rendered harmless by the jury's true finding on a felony-murder special circumstance allegation. The California Constitution requires the entire record to be examined, and the special circumstance finding is only one factor to be considered. In a case where first degree felony murder is the only theory of murder on which a jury is instructed, and the jury returns a guilty verdict and a consistent true finding

on a felony-murder special circumstance, it cannot be ascertained without examining other portions of the record whether the jury necessarily resolved adversely to the defendant factual questions that would have been posed by instructions on the lesser included offenses. Where an element of the charged offense "remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." (*Keeble v. United States* (1973) 412 U.S. 205, 212-213 [36 L.Ed.2d 844, 93 S.Ct. 1993].)

Here, the only theory presented to the jury was first degree felony murder based on the commission or attempted commission of a robbery. Although the jury had the option of convicting appellants of first degree felony murder without returning true findings on the robbery-murder special circumstance, it nevertheless initially had to make the impermissible all-or-nothing choice between acquittal and conviction of felony murder. The jury's true findings on the robbery-murder special circumstance were consistent with its verdicts finding each appellant guilty of "felony murder committed in the perpetration of, or attempt to perpetrate robbery." (4CT 644, 646; 3SCT 644-647; 9RT 7202, 7204-7205.) These findings alone, however, do not demonstrate that the jury necessarily rejected any theory that would have supported a finding on a lesser included offense because the jury was never asked to consider whether appellants planned, intended or attempted to commit an offense other than a robbery.

ARGUMENT

I.

THE JURY'S TRUE FINDINGS ON THE ROBBERY-MURDER SPECIAL CIRCUMSTANCE ALLEGATION DO NOT AUTOMATICALLY RENDER HARMLESS THE TRIAL COURT'S ERROR IN FAILING TO INSTRUCT ON THE LESSER INCLUDED OFFENSES OF MALICE MURDER SUPPORTED BY THE EVIDENCE BECAUSE THE JURY DID NOT NECESSARILY RESOLVE ADVERSELY TO APPELLANTS THE FACTUAL QUESTIONS POSED BY THE OMITTED INSTRUCTIONS

A. Introduction

Respondent contends that the true finding on the felony-murder special circumstance "demonstrates that the jury necessarily rejected any theory that the killing was anything other or less than first degree felony murder," and therefore it renders harmless any error of the trial court in failing to instruct on lesser included offenses and defenses. (ABM 21.) In presenting its argument respondent affords too much significance to the felony-murder special circumstance finding, because it is only one factor to be considered in assessing prejudice which necessarily entails evaluating the entire record.

Contrary to respondent's assertion, the jury's true findings as to all appellants on the felony-murder special circumstances do not demonstrate that it necessarily rejected other theories of liability for the homicide since it was never given the option of considering any theory other than felony murder

based on the perpetration or attempted perpetration of a robbery. The true findings on the robbery-murder special circumstance allegations were merely consistent with the jury's first degree felony murder verdicts, and thus they do not render harmless per se, the trial court's failure to instruct on lesser included offenses. Should this Court hold otherwise, the very purpose of the rule requiring sua sponte instructions on lesser included offenses supported by the evidence would be undermined, and the holding would fail to conform to the entire record review mandated by the California Constitution for instructional error.

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

In *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*), this Court concluded:

> [T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. We further determine, in line with recent authority, that such misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome. (Cal. Const., art. VI, § 13; [*People v.*] *Watson, supra*, [(1956)] 46 Cal.2d 818, 836.) Accordingly, we overrule the

Sedeno standard of reversal in this context.[1]

(19 Cal.4th at p. 165.)

Respondent points out that following *Breverman*, "this Court has continued to find harmless error . . . 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." (ABM 23.) It argues that once the *Sedeno* rule has been satisfied - that it has been "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." (ABM 27.) Respondent, however, relies on a diluted version of the *Sedeno* rule which is not supported by *any* authority.

The *Sedeno* rule articulated by this Court provides:

> [I]n some circumstances it is possible to determine that although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was *necessarily resolved adversely* to the defendant under other, properly given instructions. In such

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[1] *People v. Sedeno* (1974) 10 Cal.3d 703 (*Sedeno*).

> cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury.

(10 Cal.3d at p. 721, emphasis added.)

By removing "necessarily" from the phrase "necessarily resolved adversely," respondent misinterprets the *Sedeno* rule. Based on respondent's interpretation, every time a court fails to instruct a jury on a lesser included offense supported by substantial evidence and the jury convicts the defendant of the greater offense the error would be deemed harmless per se. But that is not the rule articulated in *Sedeno* or by this Court in any subsequent decision.

In *People v. Brown* (2016) 245 Cal.App.4th 140, Division Four of the First Appellate District explained:

> [I]n assessing prejudice, "it does not matter that the jury chose to convict the defendant of the greater offense over acquittal or that the defendant was convicted of the greater offense on sufficient evidence." (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1335 [56 Cal.Rptr. 3d 455].) To hold otherwise would undermine the very purpose of the sua sponte rule. (*People v. Breverman* (1998) 19 Cal.4th 142, 178, fn. 25 [77 Cal.Rptr. 2d 870, 960 P.2d 1094].)

(Cal.App.4th at p. 156.)

The court in *People v. Campbell* (2015) 233 Cal.App.4th 148, 167 (*Campbell*), noted that in *People v. Flood* (1998) 18 Cal.4th 470 (*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. (*People v. Flood, supra*, at p. 490, italics added.)" The *Campbell* court further stated:

> 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.

(233 Cal.App.4th at p. 167.)

Respondent complains that the *Campbell* court took the above-quoted language out of context, because in *Flood* the court was addressing "the harmless error standard to be applied to instructional errors that effectively remove an element of a crime from the jury's consideration," and the issue in *Campbell* was the failure to instruct on lesser included offenses. (ABM 25-26.) But *Breverman* established that the standard of prejudice articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), is to be applied in noncapital cases where the trial court erred by failing to instruct, or instruct fully, on lesser included offenses (19 Cal.4th at p. 165), and its holding has not been overruled. (See e.g. *People v. Blackburn* (2015) 61 Cal.4th 1113, 1136.)

The *Breverman* court made it patently clear that a *Watson* analysis

requires the reviewing court to evaluate the entire record. (19 Cal.4th at pp. 149, 165.) It pointed out that article VI, section 13 of the California Constitution "requires that in cases of 'misdirection of the jury,' an appellate court must examine the 'entire cause, including the evidence,' to determine if a 'miscarriage of justice' occurred." (*Breverman, supra*, at p. 176.) Further, it explained that a *Watson* "posttrial review focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result." (*Id.* at p. 177.)

Respondent cites 10 decisions in which this Court "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." (ABM 24, citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328 (*Castaneda*); *People v. Lancaster* (2007) 41 Cal.4th 50, 85-86 (*Lancaster*); *People v. Prince* (2007) 40 Cal.4th 1179 (*Prince*); *People v. Elliot* (2005) 37 Cal.4th 453, 476 (*Elliot*); *People v. Horning* (2004) 34 Cal.4th 871, 906 (*Horning*); *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 (*Koontz*);

People v. Seaton (2001) 26 Cal.4th 598, 665 (*Seaton*); *People v. Lewis* (2001) 25 Cal.4th 610, 646 (*Lewis*); *People v. Earp* (1999) 20 Cal.4th 826, 885-886 (*Earp*); and *People v. Price* (1991) 1 Cal.4th 324, 464 (*Price*).) As illustrated below, in seven of these cases the opinion reflects that the jury was instructed on more than one type of murder (*Castaneda, Prince, Elliot, Horning, Koontz, Seaton, Lewis,* and *Earp*); in one opinion it is strongly implied (*Price*); and in another opinion it is ambiguous (*Lancaster*), but in finding the error harmless the *Lancaster* court relied on another case where the jury was given alternative theories for finding the defendant guilty of murder. None of these cases establish that a true finding on a felony-murder special circumstance alone categorically renders harmless a trial court's error in failing to instruct on a lesser included offense.

As discussed in appellant's opening brief on the merits, in *Castaneda, Elliot, Earp, Horning,* and presumably in *Koontz,* the jury was instructed on both felony murder and premeditated murder. (OBM 45-54.) That fact was extremely important because it allowed this Court to attach significance to a felony-murder special circumstance finding for purposes of analyzing the instructional error for prejudice. (OBM 45-54.) Additionally, as set forth below, in *Castaneda, Elliot, Earp,* and *Horning,* the jury found more than one special circumstance allegation true, which left no question under the facts of each case that the jury necessarily found that the defendant was guilty of first

degree murder. And in *Koontz*, although only one special circumstance was alleged and found true, the jury also found the defendant guilty of robbery - the predicate offense for the felony murder - so it was clear that the jury found the homicide to be felony murder.

In *Castaneda*, *supra*, the defendant was convicted of first degree murder, kidnapping, sodomy, commercial burglary, and robbery, with special circumstance findings that the murder was committed while the defendant was engaged in the commission or attempted commission of burglary, kidnapping, sodomy, and robbery. (51 Cal.4th at pp. 1301-1302.) In concluding that any error in failing to instruct on second degree murder was harmless, this Court found that the verdicts and multiple special circumstance findings clearly showed that the jury concluded that the homicide occurred during the commission of one of the felonies. (*Id.* at p. 1328.)

The defendant in *Elliot, supra*, was tried under three different theories of first degree murder - felony murder, murder by torture, and premeditated malice murder. (37 Cal.4th at p. 465.) This Court held that any error in failing to instruct on the elements of second degree murder was harmless because the jury found the defendant guilty of both first degree murder and attempted robbery, and also found true torture-murder and attempted robbery special circumstances. (*Id.* at p. 475.)

In *Earp, supra*, the defendant was convicted of first degree murder

with three felony-murder special circumstances. (20 Cal.4th at p. 845.) His jury had been instructed on premeditated and deliberate murder, felony murder, and express malice second degree murder. (*Id.* at pp. 884-885.) The defendant argued on appeal that the court prejudicially erred by failing to instruct on implied malice second degree murder and involuntary manslaughter. This Court concluded that the trial court's failure to instruct on implied malice second degree murder was harmless because the true findings on two of the three felony-murder special circumstances showed that the jury necessarily found that the killing constituted first degree murder. (*Id.* at p. 885.)

The trial court's failure to instruct on second degree murder was found harmless in *Horning, supra*, because the jury had been instructed on both first degree premeditated murder and first degree felony murder, and its verdict finding the defendant guilty of first degree murder in conjunction with its true findings on robbery *and* burglary special circumstances allowed this Court to conclude that the jury necessarily found the offense to be first degree felony murder. (34 Cal.4th at p. 906.)

And in *Koontz, supra*, the defendant was convicted of first degree murder with a robbery-murder special circumstance, second degree robbery, kidnapping for the purpose of robbery, and vehicle taking, with personal firearm use enhancements. (27 Cal.4th at pp. 1053-1054.) On appeal he

challenged the sufficiency of evidence to support his robbery conviction, his first degree murder conviction on theories of both premeditation and felony murder, and the robbery-murder special circumstance. (*Id.* at pp. 1078-1079.) He also contended that the trial court erred by failing to instruct the jury on the lesser included offenses of voluntary manslaughter based on a sudden quarrel or heat of passion, and voluntary manslaughter based on unreasonable self-defense. (*Id.* at pp. 1085.) This Court rejected the defendant's challenges to the sufficiency of evidence to support his convictions. (*Id.* at pp. 1080-1082.) Because of insufficient evidence of provocation, this Court found that the trial court was not required to instruct on voluntary manslaughter based on a sudden quarrel or heat of passion. (*Id.* at p. 1086.) It also found that any error in failing to instruct on voluntary manslaughter based on unreasonable self-defense was harmless because the jury's finding on the robbery-murder special circumstance showed that the first degree murder conviction was based on a determination that the killing occurred during the commission of a robbery. (27 Cal.4th at pp. 1086-1087.) Such a conclusion was possible due to the fact the defendant had been convicted of the predicate offense of robbery in addition to the robbery-murder special circumstance, and this Court found sufficient evidence to support the robbery and special circumstance.

None of the other five cases cited by respondent support its contention that a true finding on a felony-murder special circumstance alone renders

harmless any error in failing to instruct on lesser included offenses of malice murder. In each case there were factors in addition to the special circumstance finding that allowed this Court to conclude that any instructional error was harmless. Such factors include instructions on more than one theory of murder, multiple special circumstances findings, and a conviction on the predicate offense.

In *Prince, supra*, the defendant was convicted of six counts of first degree murder, five counts of burglary, one count of rape, with true findings on one rape-murder special circumstance allegation and one multiple-murder special circumstance allegation. (40 Cal.4th at p. 1189.) The jury was instructed on both premeditated malice murder and first degree felony murder. (*Id.* at p. 1262.) On appeal the defendant claimed the trial court erred by failing to instruct on second degree murder. (*Id.* at p. 1264.) This Court concluded there was overwhelming evidence of premeditation and an absence of substantial evidence to support a second degree murder instruction. (*Id.* at p. 1266.) It also found that even if the trial court erred by failing to instruct on the lesser included offense it would have been harmless, because the evidence supporting first degree murder was strong and there was insubstantial evidence to support second degree murder verdicts. (*Id.* at p. 1268.) This Court noted that as to five of the charged murders the jury had convicted the defendant of burglary, which "strongly indicate, in view of the facts underlying the crimes,

that the jury believed defendant had committed five felony murders." (*Ibid.*) Further, the jury found that one of the murders was committed by the defendant in the course of a rape or attempted rape, which showed that the jury determined the offense was a felony murder. (*Ibid.*)

The defendant in *Seaton, supra*, was convicted of murder with true findings on both robbery and burglary special circumstances. (26 Cal.4th at p. 626.) The jury was instructed on first degree felony murder, premeditated and deliberate murder, second degree express malice murder, and voluntary manslaughter based on heat of passion. (*Id.* at pp. 659, 664, 672.) On appeal Seaton argued that the trial court erred by denying his request to instruct the jury on voluntary manslaughter based on imperfect self-defense. The *Seaton* Court found that the defendant's testimony contradicted such a theory, and any conceivable error from failing to give the instruction was harmless because the jury found both burglary and robbery special circumstance allegations to be true which constituted felony murder. (*Id.* at p. 664-665.)

In *Lewis, supra*, the defendant was convicted of one count of first degree murder, with true findings on a robbery-murder special circumstance and a burglary-murder special circumstance, two counts of robbery, one count of burglary, and one count of attempted murder. (25 Cal.4th at p. 623.) The jury had been instructed on first degree felony murder, second degree implied malice murder, burglary, robbery, and on theft as a lesser included offense of

robbery and burglary. The *Lewis* court noted that the jury's verdicts finding the defendant guilty of robbery and burglary and its true findings on both special circumstance allegations reflected that the jury had rejected the defendant's version of events, and thus any error in failing to give the lesser included offense instructions was harmless. (*Id.* at p. 646.)

The defendant in *Price, supra*, was convicted of two counts of first degree murder, and as to the murder of Elizabeth Hickey, it found burglary-murder and multiple-murder special circumstances true. The defendant was also convicted of robbery, burglary, and other offenses. (1 Cal.4th at p. 376.) The opinion implies that the jury was instructed on premeditated murder because it states that the prosecutor's theory was that the beating of Hickey was done deliberately and with the intent to kill. (*Id.* at p. 441.) On appeal the defendant argued that the trial court erred by failing to instruct the jury on voluntary manslaughter as a lesser included offense for the killing of Hickey. This Court held that any error was necessarily harmless due to the jury's finding on the burglary-murder special circumstance allegation which showed that the killing of Hickey was felony murder. (*Id.* at p. 464.) Although in finding the error harmless the *Price* court focused exclusively on the felony-murder special circumstance, it should be noted that *Price* was decided more than six years before *Breverman* when the *Sedeno* standard of near-automatic reversal still applied when a trial court erred by failing to instruct on a lesser

included offense.

In *Lancaster, supra*, the defendant was convicted of first degree murder with a kidnapping-murder special circumstance. On appeal he contended that the trial court erred by denying the defense request to instruct on second degree murder. (41 Cal.4th at p. 85.) The trial court refused to give the instruction after concluding there was no evidence to support a finding that the victim had voluntarily left his home. (*Ibid.*) This Court held that the jury's true finding on the kidnapping-murder allegation showed the jury had necessarily rejected the defense theory for a second degree murder instruction. The defendant argued that the jury's finding on the special circumstance allegation was not conclusive on that point because the jury had not been given the option of "alternative possible verdicts." (*Id.* at p. 85.) This Court disagreed and stated, "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 the defendant of first degree murder without special circumstances.' (*People. v. Horning, supra*, 34 Cal.4th at p. 906.)" (*Lancaster, supra*, 41 Cal.4th at pp. 85-86.) The *Lancaster* opinion does not reflect whether the jury was instructed on premeditated malice murder, but its reliance on *People v. Horning, supra,* where the jury was instructed on both premeditated first degree malice murder and first degree felony murder, suggests that the jury was so instructed.

None of the 10 cases relied on by respondent support its assertion that a special circumstance finding alone allows a reviewing court to determine that a trial court's error in failing to instruct on lesser included offenses was necessarily harmless. Instead, these cases make clear that the evidence, the jury's verdicts and findings, along with the instructions given, must be considered together in ascertaining whether prejudice has been established under *Watson*.

Respondent asserts that "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," because the verdicts and findings "necessarily demonstrate what" the jury would have done. (ABM 27.) But when the jury is offered only one theory of murder, its guilty verdict and consistent felony-murder finding merely imply, rather than establish, that the jury resolved adversely to the defendant the factual issues posed by the omitted lesser included offense instructions. In such a case it is impossible to assess prejudice under *Watson* without reviewing other relevant portions of the record.

C. The Jury's True Findings on the Robbery-Murder Special Circumstance Allegations as to All Appellants Do Not Establish That the Factual Questions Posed by the Omitted Lesser Included Offense Instructions Were Necessarily Resolved Adversely to Appellants

1. Under a Proper *Sedeno* Analysis the Trial Court's Error in Failing to Instruct on Lesser Included Offenses Supported by the Evidence Was Not Necessarily Harmless

It is respondent's position that by finding the robbery-murder special circumstance allegations true as to all appellants, the jury necessarily resolved adversely to appellants the factual questions posed by the omitted instructions. More specifically, respondent contends that because the jury was properly instructed on the special circumstance allegations, its true findings thereon render any error in failing to instruct on the lesser included offenses "necessarily harmless." (ABM 30.) Respondent points out that the special circumstance instructions required the jury to not only reaffirm that Rosales was killed during the course of a robbery or attempted robbery, but to make the additional finding that "appellants shared an intent to commit robbery that was independent of the killing," and therefore if the jury had any doubt that the killing of Rosales was a felony murder, they would have found the special circumstance allegations to be not true. (*Ibid.*) But because the jury was not instructed on malice murder, and the robbery-murder special circumstance finding was entirely consistent with its felony-murder verdicts, the jury would

have had no reason to reject the special circumstance allegations once it decided to convict appellants of felony murder even if it entertained doubts as to whether appellants intended to obtain the drugs from Rosales through the use of force or fear.

An examination of the evidence establishes that appellants planned a meeting with Rosales for the purpose of obtaining illegal drugs from him. What was not clear, however, was how they intended to procure the drugs. While there was some evidence suggesting appellants intended to rob Rosales, there was other evidence intimating they intended to steal the drugs without using force or fear. There was also some evidence appellants may have intended to purchase drugs from Rosales, or ask Rosales to "front" them the drugs. (See OBM 38-39.) Based on the evidence adduced at trial, the fact that the jury found the robbery-murder special circumstance true does not establish that the jury would have necessarily reached the same verdict and finding if it had been given the option of convicting appellants of one or more lesser included offenses.

Contrary to respondent's argument (ABM 32), the special circumstance allegation did not remove the jury from its position of having to make a choice between conviction of the greater offense and acquittal, because the jury could not make a finding on the special circumstance until after it decided to convict appellants of "first degree felony murder." Once the jury

decided to convict appellants of felony murder, it may have felt compelled to find the robbery-murder special circumstance allegations true because robbery-murder was the only theory of liability provided to the jury and argued by the prosecutor.

Respondent argues, consistent with the Court of Appeal's opinion, that appellants could not have been prejudiced by the trial court's failure to instruct the jury on *first degree malice murder* because it would have merely provided the jury with an alternate way of convicting appellants of first degree murder. (ABM 30-31.) As argued in appellant's opening brief on the merits, if the jury had been instructed on premeditated malice murder it would have been able to find appellants guilty of first degree murder without finding the special circumstance allegation to be true. (OBM 53.) Respondent acknowledges this point, but asserts that under the instructions given "the jury was expressly authorized to find appellants guilty of first degree murder without a special circumstance." (ABM, fn. 6.)

Although there was nothing to prevent the jury from returning guilty verdicts without true findings on the robbery-murder special circumstance allegations, the fact remains that the jury was only asked to return a verdict on a theory of "felony murder, committed in the perpetration of, or attempt to perpretrate [sic] robbery." (See 4CT 644-645; 3SCT 644.) The jury was not given the option of simply convicting appellants of "first degree murder." If

the jury had been provided with this alternative to first degree felony murder, along with an instruction on first degree malice murder, true findings on the special circumstance would have been a clear indication that the jury determined the homicide was first degree felony murder. But because the jury was left with the all-or-nothing choice between convicting appellants of first degree felony murder and acquittal, its true findings on the robbery-murder allegations are ambiguous for purposes of determining whether prejudice resulted from the absence of instructions on lesser included offenses supported by the evidence.

It is also respondent's position that because the prosecution did not proceed on a theory that the murder was premeditated and deliberate, or committed with malice, appellants could not have suffered prejudice from the court's failure to instruct the jury on first degree malice murder. (ABM 31.) Regardless of whether appellants were prejudiced by the absence of such an instruction, it is nevertheless significant because it prevents a reviewing court from concluding that the true findings on the robbery-murder allegations *necessarily* rendered harmless any error in failing to instruct on *lesser included offenses* supported by the evidence.[2] In order to hold appellants responsible for the homicide of Rosales, the jury had to convict appellants of "felony

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[2] There was some evidence that appellants committed first degree premeditated murder or second degree malice murder. (See 3RT 2792-2793; 4RT 3032, 3054; 6RT 4265-4266.)

murder, committed in the perpetration of, or attempt to perpetrate robbery," which required it to base its verdict on a finding that appellants at least planned and attempted to commit the underlying felony of robbery. Considering the evidence, instructions given, and verdicts and findings rendered, it cannot be concluded that the jury necessarily considered the factual question of whether the homicide occurred during the commission or attempted commission of an offense other than a robbery and that it rejected such an alternative theory on its merits.[3] Therefore the jury's true findings on the robbery-murder special circumstance does not automatically render harmless the trial court's error in failing to instruct on malice murder or any lesser included offense or defense thereto.

Respondent proclaims that the true finding on the special circumstance allegation reflects that the jury "necessarily rejected" Gonzalez's testimony along with other "scant" evidence that suggested appellants intended to obtain drugs by a means other than a robbery. (ABM 31-32.) In doing so respondent does not acknowledge that the jury necessarily accepted a portion of Gonzalez's testimony as its verdicts reflect it believed Rosales was shot with

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[3] Respondent also contends that the true finding on the robbery-murder allegation "obviated any finding that the killing was committed in self-defense or by accident, as those defense theories do not apply to felony murder." (RB 31.) This assertion is also flawed because of the fact the jury was not instructed on malice murder or any lesser included offenses of malice murder.

his own gun. (4CT 644-645; 3SCT 644-645.) Based upon the entire record, including Gonzalez's testimony in which he admitted shooting Rosales, the jury's verdicts and findings definitively show only that it held appellants responsible for the death of Rosales.

Relying on *Elliot, supra*, 37 Cal.4th 453, *Castaneda, supra*, 51 Cal.4th 1292, and *Seaton, supra*, 26 Cal.4th 598, respondent declares that the true findings on the robbery-murder special circumstance precluded the jury from convicting appellants of any lesser offense of first degree murder. (RB 32-33.) But it was the instructions given, rather than the verdicts rendered, that prevented the jury from convicting appellants of any offense other then first degree felony murder. The three cases cited by respondent do not support its assertion because in each case the jury was instructed on more than one type of first degree murder, the jury found more than one special circumstance allegation to be true, and as a result, it could be concluded that the jury found the charged homicide to be first degree murder.

Focusing on the fact that a special circumstance allegation as to an accomplice requires a finding that the defendant either intended to kill or acted with reckless indifference to human life, respondent asserts that as to appellant and Garcia, the jury "necessarily rejected any theory" that they only intended to commit an offense that would have supported a verdict of second degree implied malice murder or involuntary manslaughter. (ABM 33.) Once again

respondent ignores the fact that the true finding on the robbery-murder special circumstance was entirely consistent with the only theory of murder provided to the jury, and thus it is unknown if the jury simply rubberstamped its true findings on the allegation so as to render findings consistent with its felony murder verdicts.

2. The Fact That the Jury Was Not Instructed on First Degree Malice Murder Precludes a Finding That the Factual Issues Posed by the Omitted Lesser Included Offense Instructions Were Necessarily Resolved Adversely to Appellants

Adopting the perspective of the Court of Appeal in the instant case, respondent argues that the reasoning in *Campbell, supra*, 233 Cal.App.4th 148, is flawed, and the fact that appellants' jury was not instructed on first degree malice murder in addition to felony murder does not discredit the special circumstance finding for purposes of the *Sedeno* rule. (ABM 34.) Respondent insists that providing a jury with alternative theories of first degree murder does not prevent a jury from making "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." (*Ibid.*) Although it is true that instructing a jury on both first degree malice murder and felony murder will not necessarily prevent a jury from convicting a defendant of a greater offense than one proven by the evidence, in a case where both instructions are given and a jury

finds a felony-murder special circumstance to be true, the finding will strongly suggest that the jury necessarily resolved adversely to the defendant factual issues posed by the omitted lesser included offenses.

Respondent contends that "the decisive aspect of the holding in *Horning* obtains regardless of whether the 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.' (*People v. Horning, supra*, 34 Cal.4th at p. 906.)" (ABM 34.) But in appellants' case, the jury was not allowed to simply return a guilty verdict on "first degree murder" without special circumstances. Instead, it had the choice of finding appellants guilty or not guilty of "felony murder, committed in the perpetration of, or attempt to perpretrate [sic] robbery." (4CT 644-645; 3SCT 644.) Once the jury decided to convict appellants of felony murder, it was essentially compelled to find the robbery-murder special circumstance true, because felony murder based on the commission or attempted commission of a robbery was the sole theory presented to the jury.

In respondent's view, this Court's decisions in *Castaneda*, *Horning*, *Elliot*, *Koontz*, and *Earp,* demonstrate that the *Campbell* court's interpretation of *Horning* is wrong, and the fact that the juries in those cases were instructed on first degree malice murder is not a factor that meaningfully distinguishes

them from appellants' case. (ABM 35.) This argument is disingenuous, because it was the very fact that the jury was also instructed on first degree malice murder that allowed this Court to interpret the true findings on the special circumstance allegations as showing that the jury necessarily found that the charged killings constituted first degree murder. In appellants' case, the jury returned verdicts finding appellants guilty of "felony murder" committed during the commission or attempted commission of a robbery, and it was not instructed on first degree malice murder or given the option of simply finding appellants guilty of first degree murder. (4CT 644-645; 3SCT 644.)

Respondent cites other cases decided by this Court which it submits illustrate that *Campbell* misinterpreted *Horning*. (ABM 35-36, citing *Lancaster, supra*, 41 Cal.4th 50, and *People v. Taylor* (2010) 48 Cal.4th 574 (*Taylor*). In *Lancaster*, as previously discussed, the opinion merely suggests that the jury was instructed on first degree malice murder as an alternative to felony murder. The implication that the jury received such an instruction arises not only because this Court relied on *Horning* (*Lancaster, supra*, at pp. 85-86), but also from the fact that the *Horning* court referred to the jury's verdict as one finding the defendant guilty of "first degree murder." (*Horning, supra*, 34 Cal.4th at p. 879, 906.) And in *Lancaster*, this Court noted that the jury had the option of convicting the "defendant of *first degree murder* without special circumstances." (*Lancaster*, at p. 85, emphasis added.) This is in

sharp contrast to appellants' case where the jury was only asked to reach a verdict on felony murder committed in the perpetration or attempted perpetration of a robbery.

In *Taylor,* the defendant was convicted of first degree murder, forcible rape of an elderly victim while engaged in a residential burglary, forcible oral copulation, residential burglary, and first degree robbery, with true findings on rape, oral copulation, and burglary special circumstance allegations. (48 Cal.4th 574 at p. 585.) As to the murder charge, the jury was only instructed on first degree felony murder. (*Id.* at p. 623.) On appeal the defendant argued that the trial court erred by failing to instruct on second degree implied malice murder. (*Ibid.*) This Court found no error because there was an absence of substantial evidence to support instructing the jury on the lesser offense. (*Id.* at p. 624.) It also rejected the defendant's claim that the failure to instruct on the lesser offense violated his federal constitutional rights and that the jury had been put into a situation where it was forced to make the impermissible "all-or-nothing choice" between acquittal and capital murder. (*Id.* p. 625.)

Respondent points out that the *Taylor* court relied on *Horning* in explaining 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.'" (ABM 36, citing *Taylor* at pp. 623-625.) Unlike *Taylor*, appellants' case was not a capital one, and there was substantial evidence to support instructing the jury on certain lesser included offenses of first degree malice murder. But more importantly, in *Taylor*, the jury found the defendant guilty of first degree murder and three predicate offenses, and it rendered true findings on three separate felony-murder special circumstances. (48 Cal.4th at p. 585.) The jury's findings in conjunction with its verdicts and the evidence left no question that it had concluded beyond a reasonable doubt that the homicide was a felony murder. (*Id.* at pp. 624-625.) Respondent's reliance on *Taylor* is therefore misplaced.

In arguing that the omission of a first degree malice murder instruction was essentially meaningless in appellants' case, respondent insists that its position is supported by "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." (ABM 36-37, citing *People v. Huynh* (2012) 212 Cal.App.4th 285, 312, 315 (*Huynh*).)[4] Although *Huynh*

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[4] Respondent also directs this Court to *People v. Valdez* (2004) 32 Cal.4th 73, 111, where this Court found no error in a trial court's failure to instruct on theft as a lesser included offense of robbery, where the defendant was not charged with robbery, but robbery was the predicate offense for the felony murder charge as well as for the felony-murder special circumstance allegation. This Court noted that in such a context, where the issue was whether the court had a sua sponte duty to give the instruction, it made little or no difference that the jury was not instructed on any theory of murder other than felony murder. (*Ibid.*)

cites *Castaneda*, *Huynh* is a decision from Division One of the Fourth District Court of Appeal. The defendant in *Huynh* was charged with "murder" "in violation of Penal Code section 187(a)," but prosecuted solely on a theory of felony murder. (*Huynh, supra*, 212 Cal.App.4th at p. 312.) He was convicted of first degree felony murder, two counts of sodomy of an intoxicated person, and two counts of oral copulation of an intoxicated person, with true findings on two felony-murder special circumstance allegations - that the murder was committed during the commission of sodomy and during the commission of oral copulation. (*Id.* at p. 290.) On appeal the defendant argued that the court erred by failing to instruct on second degree implied malice murder. (*Id.* at p. 311.)

The Court of Appeal found there was no evidence supporting the lesser offense. (*Huynh, supra*, 212 Cal.App.4th at p. 315.) It noted that even if the instruction had been warranted by the evidence, the failure to instruct on the lesser offense would have been harmless because the jury's true findings on the two special circumstance allegations showed that it necessarily found the defendant guilty of first degree felony murder. (*Id.* at p. 315.) Appellant submits that the dual findings on the felony-murder special circumstances in *Huynh*, along with the guilty verdicts on the two predicate felonies, allow a conclusion that cannot be reached in her case, because if the *Huynh* jury had any doubt that the defendant committed felony murder it would not have

returned true findings on two different special circumstances and convicted the defendant of both predicate offenses.

3. The Jury's Felony Murder Verdicts Essentially Compelled It to Render True Findings on the Robbery-Murder Special Circumstance Allegations Even If It Had Any Doubt as to Appellants' Guilt of a Robbery or Attempted Robbery

Respondent disputes appellant's assertion that once the jury decided to convict appellants of felony murder it was essentially compelled to find the robbery-murder special circumstances true even if it harbored doubt as to appellants' guilt of the predicate offense for the felony murder. (ABM 37-38.) Contrary to respondent's representation, such a conclusion is not "dubious." As noted by this Court and acknowledged by respondent, the elements of felony murder and a robbery special circumstance "coincide." (ABM 38, citing *Elliot, supra*, 37 Cal.4th at p. 476, and *Castaneda, supra*, 51 Cal.4th at p. 1328.) Therefore a jury that found appellants responsible for the death of Rosales, but entertained doubt as to their guilt of a robbery or attempted robbery, likely believed it was necessary to find the robbery special circumstances true in order to avoid revealing its uncertainty to the court. Such a jury, given only the choice between acquittal and convicting appellants of felony murder committed in the perpetration or attempted perpetration of a

robbery, would presumably realize the necessity of returning special circumstance findings consistent with its verdicts. (See *Campbell, supra*, 233 Cal.App.4th at p. 172.)

The jury was correctly instructed in CALCRIM No. 730 that the felony-murder special circumstance required proof "that the defendant intended to commit robbery independent of the killing," rather than being "merely part of or incidental to the commission of the murder." (4CT 629-630; 8RT 5808-5809.) It was also properly instructed in CALCRIM No. 703 that as to a defendant who was not the actual killer, it was necessary for the prosecution to prove the following: "1. The defendant's participation in the crime began before or during the killing; 2. The defendant was a major participant in the crime; AND 3. When the defendant participated in the crime, he or she acted with reckless indifference to human life." (4CT 622-623; 8RT 5800-5801.) Respondent contends that because these components of the felony-murder special circumstance are not part of the felony murder offense, the jury would not have been "compelled" to find the special circumstance allegations true merely because it found appellants guilty "of the substantive offense." (ABM 39.) But a jury who harbored doubt as to whether appellants committed the predicate offense and nevertheless decided to convict them of felony murder

has already ignored the court's instructions.[5] Therefore the jury's felony murder guilty verdicts and its true findings on the felony-murder special circumstance do not necessarily demonstrate that the jury resolved adversely to appellants the factual questions that would have been posed by the omitted lesser included offense instructions.

Respondent claims "there is no reason to presume the jury ignored" the court's instruction in CALCRIM No. 700 that the beyond a reasonable doubt standard applied to the felony-murder special circumstance, and that the jury had to separately consider the special circumstance as to each defendant. (ABM 39.) But as long ago recognized by the United States Supreme Court, when a jury is not instructed on any lesser included offenses and "the defendant is plainly guilty of some offense," if the jury has doubts about an element of the charged offense there is a "substantial risk" that rather than acquitting the defendant it will likely find the defendant guilty of the charged offense. (*Keeble v. United States, supra,* 412 U.S. 205, 212-213.) This Court has also repeatedly recognized that in such a situation the jury may render a verdict that is contrary to the evidence. (See e.g., *People v. Eid* (2014) 59 Cal.4th 650, 657; *People v. Smith* (2013) 57 Cal.4th 232, 239-240; *Breverman,*

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[5] In CALCRIM No. 700, the jury was instructed that if it found a defendant guilty of first degree murder it had to decide whether the prosecution had proved beyond a reasonable doubt that the special circumstance was true, and that it was required to "consider each special circumstance separately for each defendant." (4CT 621; 8RT 5800.)

supra, 19 Cal.4th 142, 155, 161; *People v. St. Martin* (1970) 1 Cal.3d 524, 533.)

If a jury renders a guilty verdict on a charged offense in a case where it was unable to conclude that the prosecution had proven the elements of the offense beyond a reasonable doubt, it is incontrovertible that the jury would have had to ignore some of the court's instructions. Based on the evidence in appellants' case, combined with the instructions given and verdicts rendered, it cannot be concluded that the jury actually followed the court's instructions and necessarily resolved adversely to appellants the factual questions that would have been posed by the erroneously omitted lesser included offense instructions. Regardless of the fact the jury was correctly instructed on the robbery-murder special circumstance, the jury's true findings on the special circumstance do not alone mandate a finding that appellants were not prejudiced by the absence of instructions on lesser included offenses.

4. This Court's Opinion in *Ramkeesoon* Supports Appellants' Position That They Were Prejudiced by the Trial Court's Failure to Instruct on Lesser Included Offenses of Malice Murder

Respondent contends that appellant's reliance on *People v. Ramkeesoon* (1985) 39 Cal.3d 346 (*Ramkeesoon*), is misplaced, pointing out that there the issue was after-formed intent to steal, while in appellants' case the issue was

whether Gonzalez used force or fear in attempting to take drugs from Rosales. (ABM 41-42.) Respondent acknowledges that in appellants' case "the omitted lesser included offense instructions would have posed the question of whether appellants used force or fear to accomplish or attempt the taking," but it points out that the force or fear element was included in the robbery instruction given to the jury.[6] (ABM 42.)

The first problem with respondent's argument is that it fails to recognize that the amount of force required for a robbery is something greater than the amount of force necessary to effectuate the seizing of the property. (*People v. Morales* (1975) 49 Cal.App.3d 134, 139 (*Morales*), citing *People v. Church* (1897) 116 Cal. 300.) Snatching an item from an unresisting person does not constitute robbery (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1258-1259), nor does an incidental touching caused by a pickpocket while extracting a wallet from the pocket of his victim. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, disapproved on another point in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2).

Moreover, in concluding that the jury had not been "presented with the factual question posed by the omitted theft instructions," the *Ramkeesoon* court cited *Morales, supra*, 49 Cal.App.3d 134, which is instructive in appellants'

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[6] In CALCRIM No. 1600, the jury was instructed that one of the elements of a robbery is that "the defendant used force or fear to take the property or to prevent the person from resisting." (4CT 617; 9RT 5796-5797.)

case. (*Ramkeesoon, supra*, 39 Cal.3d at p. 352.) In *Morales*, the jury was instructed on first degree felony murder and robbery, but the trial court declined the defense request for instructions on second degree felony murder and grand theft from the person. (49 Cal.App.3d at p. 138.) The defendant was convicted of first degree felony murder and robbery, and the reviewing court found the jury had not necessarily resolved adversely to the defendant the question that would have been posed by the erroneously omitted instruction on grand theft from the person - whether in snatching the victim's purse the defendant used sufficient force to constitute robbery. (*Id.* at pp. 137, 141.) The *Morales* court explained, "Because it was obvious to the jury that defendant had committed some sort of theft crime, the failure to instruct on the lesser offense effectively precluded consideration of whether defendant used sufficient force to be guilty of robbery." (*Id.* at p. 141, fn. 4.) The Court of Appeal reversed the judgment, noting that if a properly instructed jury found the defendant committed grand theft rather than a robbery, it would not be able to convict the defendant of felony murder, but it could find the defendant guilty of involuntary manslaughter based on the commission of a noninherently dangerous felony committed without due caution and circumspection. (*Id.* at pp. 143-146.) The rationale of *Morales* applies equally to appellants' case, even though appellants were charged with a robbery-murder special circumstance instead of the underlying felony of robbery. Respondent does

not discuss or even acknowledge *Ramkeesoon's* approval of *Morales*.

Respondent points out that the *Ramkeesoon* court distinguished the facts therein from those in *People v. Miller* (1974) 43 Cal.App.3d 77 (*Miller*), where the defendant was charged with robbery, and the issue on appeal was whether the court erred by failing to instruct on the lesser included offense of theft. (*Id.* at pp. 79-81.) Defense evidence supported a finding that the defendant obtained property by trickery, a form of theft. The jury was given three verdict options - guilty of first degree robbery, guilty of second degree robbery, and acquittal. (*Id.* at p. 84.) The Court of Appeal held that although the trial court erred by not instructing on theft, the error was not prejudicial. (*Ibid.*) It explained:

> The fact that the jury chose a first degree verdict rather than a second degree verdict 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. The verdict rendered, in light of the instructions given, shows that the jury considered and "rejected the evidence tending to prove the lesser offense . . . ." (*People v. Sedeno, supra* at p. 721.) Under the instructions given, the jury did consider the material issues presented by the evidence. The verdict shows that the jury disbelieved appellant's testimony. Neither the failure to instruct on theft nor the prosecutor's remark contributed to the verdict.

(*Miller, supra*, 43 Cal.App.3d at p. 84.)

Respondent implies that the *Miller* court found harmless error only because of the jury's verdict on first degree robbery. (ABM 42.) But as

illustrated above, the Court of Appeal also considered the evidence and other instructions given. Respondent asserts that *Ramkeesoon* applies to appellants' case "only to the extent it approved of *Miller*, under which any error here was harmless." (ABM 43.) But *Miller* actually supports appellant's position that the reviewing court is required to examine the entire record to ascertain whether prejudice resulted from the trial court's error in failing to instruct on lesser included offenses. And perhaps even more important is *Ramkeesoon's* approval of *Morales*, which is fatal to respondent's position.

In *Ramkeesoon*, this Court held as to the robbery and murder counts, the absence of lesser included offense instructions left the jury with "an 'unwarranted all-or-nothing choice.'" (39 Cal.3d at p. 352, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 324.) This Court explained:

> The omission of the theft instructions practically guaranteed robbery and felony-murder convictions since defendant had admitted taking Mullins' property and robbery was the only available theft offense. The findings of robbery and murder did not necessarily resolve the factual question of whether the intent to steal was formulated after defendant had inflicted the fatal blows because the jury was never required to decide specifically whether defendant had formed the intent to steal after the assault. The jury was simply given the standard instructions which list the elements of robbery (CALJIC No. 9.10) and felony murder (CALCIC No. 8.21). Accordingly, the error in failing to instruct on theft and larceny cannot be deemed harmless.

(*Ramkeesoon*, 39 Cal.3d at pp. 352-353.)

Here, as to the murder charge, appellants' jury was left in the position

of having to make an impermissible "all-or-nothing choice," between acquittal and conviction of first degree felony murder based on the commission or attempted commission of a robbery. Because appellants planned to obtain drugs from Rosales, and Gonzalez admitted he was responsible for shooting Rosales during the drug transaction, the situation was similar to *Ramkeesoon* where the absence of lesser included offense instructions practically ensured that the jury would convict appellants of the greater offense. The jury's felony murder verdicts and robbery-murder special circumstance findings did not necessarily resolve adversely to appellants the factual issue of whether appellants intended to use force or fear in procuring the drugs from Rosales. Therefore the jury's true findings on the robbery-murder special circumstance does not render harmless per se, the court's error in failing to instruct on the lesser included offenses of second degree implied malice murder and involuntary manslaughter based on the commission of a noninherently dangerous felony.

5. The *Sedeno* Rule Cannot Be Applied in Isolation by Only Examining the Jury's Finding on a Felony-Murder Special Circumstance

If this Court were to adopt respondent's position that the instructional error was necessarily harmless under the *Sedeno* rule, every time a trial court erred by failing to instruct a jury on a lesser included offense of malice murder,

and the jury convicted the defendant of first degree murder with a felony-murder special circumstance, the error would be deemed harmless per se without any consideration of the evidence or any other part of the record. Such a holding would be inconsistent with the purpose of the rule requiring a trial court to instruct on lesser included offenses supported by the evidence, which is to protect the jury's function to ascertain the truth. (*People v. Eid, supra*, 59 Cal.4th at p. 657; *Breverman, supra*, 19 Cal.4th at p. 155.) As articulated by this Court, "'This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.'" (*People v. Smith, supra*, 57 Cal.4th at p. 240, citing *People v. Birks* (1998) 19 Cal.4th 108, 112.) This rule also prevents the jury from reaching a verdict that is "contrary to the evidence." (*Breverman, supra*, at p. 161.)

The *Campbell* court was correct in concluding that the *Sedeno* rule "cannot be applied without consideration of the factual context and the other instructions given to the jury." (233 Cal.App.4th at p. 172.) As demonstrated above, and as recognized in *Campbell*, it is necessary for purposes of harmless error analysis to examine the evidence, defenses presented, instructions given, along with the verdicts and findings returned by the jury. (*Ibid.*) Respondent contends that the strength of the evidence of the underlying felony is irrelevant

as long as the jury's special circumstance finding is supported by sufficient evidence, yet it does not cite any supporting authority. (ABM 46.) The *Campbell* court, however, disagreed with respondent's position, finding the strength of such evidence to be an important factor in determining whether the jury's true finding on the felony-murder special circumstance allegation "necessarily means that the jury would have found defendant guilty of felony murder if it had been instructed on lesser offenses." (233 Cal.App.4th at pp. 172-173.) The *Sedeno* rule therefore cannot be applied in isolation by only looking at a jury's felony-murder special circumstance finding.

The California Constitution also prohibits such a narrow application of the *Sedeno* rule. In *Breverman, supra*, 19 Cal.4th 142, this Court noted:

> As we have explained in several recent decisions, the California Constitution, unlike its federal counterpart, contains a provision specifically addressed to the issue of reversible error. It provides that "[n]o judgment shall be set aside" for various kinds of error in the conduct of the trial, including "misdirection of the jury" and "improper admission or rejection of evidence," unless "an examination of the *entire cause, including the evidence*" indicates that the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13, italics added.) This provision was "'added by the electorate of this state for the specific purpose of *abrogating* the preexisting rule that had treated any substantial error as reversible per se.'" ([*People v.*] *Wims, supra*, [(1995)] 10 Cal. 4th 293, 314, quoting *People v. Cahill* (1993) 5 Cal. 4th 478, 501 [20 Cal.Rptr. 2d 582, 853 P.2d 1037] (*Cahill*), original italics.)

(19 Cal.4th at p. 173.)

Respondent takes issue with appellant's assertion that if this Court

holds that the robbery-murder special circumstance finding alone renders the trial court's error in failing to instruct on lesser included offenses harmless per se, a court would be able to ignore its obligation to instruct on lesser included offenses supported by the evidence. (ABM 47.) According to respondent, no likelihood exists that trial courts would disregard their duty to instruct on lesser included offenses based on a chance the jury will return a finding that renders the error harmless, and "an unbiased trial court would have no motive to do so." (*Ibid.*) But as this Court recently recognized, "Certainly, a jury trial is a difficult undertaking. There is much to think about and much to do, often under considerable pressure. But the instructions are an important part of the process and care should be taken to ensure that they are correct and actually given." (*People v. Merritt* (2017) __ Cal.5th __, 2017 Cal. LEXIS 1792.) Regardless of whether a trial court acts in good faith when it errs by failing to instruct on lesser included offenses, the rule requiring such instructions is so important and essential to ensuring an accurate verdict that it must be routinely enforced.

Application of the *Sedeno* rule in the manner advocated by respondent would likely result in numerous cases where the defendant would stand convicted of first degree murder based on a theory of felony murder even though the jury entertained doubt that the defendant committed the predicate felony. Adopting the view of *Campbell* requiring an evaluation of the entire

record would prevent such an unjust result, and it would also comply with the requirements set forth in article VI, section 13 of the California Constitution.

D. The Instructional Error Was Not Harmless Under *Watson* and Reversal of Appellant's Conviction is Required

Characterizing the evidence of appellants' intent to commit robbery as "compelling," respondent argues that if the jury had been instructed on any lesser included offenses, it is not reasonably probable that appellants would have been convicted of any lesser included offense. (ABM 44-46.) As discussed in appellant's opening brief on the merits, there was substantial evidence to support instructions on second degree implied malice murder and involuntary manslaughter based on the commission of a felony not inherently dangerous to human life (OBM 38-40), and the trial court clearly erred by failing to give those instructions. (*People v. Smith, supra*, 57 Cal.4th 232, 239-240; *People v. Birks, supra*, 19 Cal.4th at p. 112.) For the same reasons, evidence of appellants' intent to commit robbery was relatively weak, and there was a reasonable chance that if the jury had been properly instructed on the lesser included offenses it would have reached a verdict more favorable to appellants. (*People v. Mower* (2002) 28 Cal.4th 457, 484; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715; *People v. Watson, supra*, 46 Cal.2d 836-837.)

If this Court finds that the robbery-murder special circumstance finding

did not render any instructional error harmless, respondent requests that the matter be remanded for the Court of Appeal to determine whether there was instructional error, and if so, whether it was prejudicial. (ABM 47-48.) Such a remedy is unnecessary, because as shown above, based on the record it is evident instructional error occurred and the *Watson* standard of prejudice has been met. Accordingly, this Court should reverse appellant's conviction and the judgment of the Court of Appeal.

CONCLUSION

Based upon the foregoing argument and authority, as well as on that presented in appellant's opening brief on the merits, the decision of the Court of Appeal, as well as appellant's conviction, should be reversed.

Dated: April 11, 2017

Respectfully Submitted;

Valerie G. Wass
Attorney for Appellant
Erica Michelle Estrada

WORD COUNT CERTIFICATE

I certify that the foregoing brief uses a 13-point Times New Roman font and that the computer-generated word count for this document is 10,188 words, which does not include the cover, tables, or this certificate.

Dated: April 11, 2017

Valerie G. Wass

DECLARATION OF SERVICE

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

I, Valerie G. Wass, declare as follows:

I am an active member of the State Bar of California and am not a party to this cause. My business address is 556 S. Fair Oaks Avenue, Suite 9, Pasadena, California, 91105. On April 11, 2017, I deposited in a mailbox regularly maintained by the United States Postal Service at Santa Barbara, California, in the county in which I reside, a copy of the attached REPLY BRIEF ON THE MERITS (of appellant Erica Michelle Estrada), in a sealed envelope with postage fully prepaid, addressed to each of the following:

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My electronic service address is wass100445@gmail.com. On April 11, 2017, I transmitted a PDF version of the same document described above by electronic mail to the parties identified below using the e-mail service addresses indicated:

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

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 11th day of April, 2017, at Santa Barbara, California.

VALERIE G. WASS