SUPREME COURT OF THE STATE OF CALIFORNIA

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

No. S234377

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

GONZALEZ'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

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

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

Gonzalez argued in his Opening Merits Brief that the trial court's error was not subject to harmless error analysis but instead was reversible *per se*, so that the jury's finding on the special circumstances allegation was irrelevant. (Gonzalez's Opening Merit's Brief, hereinafter cited as GOMB, at pp. 41-47.) Although the Attorney

ARGUMENT

I.

THE FINDING ON THE SPECIAL CIRCUMSTANCES ALLEGATION IS NOT RELEVANT TO THE ISSUE OF PREJUDICE BECAUSE THE TRIAL COURT'S REFUSAL TO INSTRUCT ON MALICE MURDER AND ITS LESSER INCLUDED OFFENSES WAS STRUCTURAL ERROR.

In his Opening Brief, Mr. Gonzales asserted that the trial court's refusal to instruct on malice murder was structural error, so that reversal is required without consideration of prejudice. Gonzalez cited and relied upon numerous cases, including *People v. Cummings* (1993) 4 Cal.4th 1233, in which this Court held that a trial court's failure to instruct on 4 of the 5 elements of the charged robbery constituted structural error.

Since Mr. Gonzalez's Opening Brief On The Merits was filed, this Court addressed the question whether the failure to instruct on the elements of a charged crime "can *ever* be found harmless." (Slip opn. at p. 1; italics added.) This Court in *Merritt* concluded that, because the omitted instructions in that particular case pertained only to elements of the crime which were not only undisputed but also expressly conceded by defense counsel, the error was not structural because the error "did not vitiate the finding on the only *contested* issue at trial: defendant's

identity as the perpetrator." (Slip opn. at p. 12; italics in the original.)

It is extremely important to recognize and iterate that this Court in *Merritt* did not hold that a failure to instruct on the elements of a charged crime could categorically never be found to constitute structural error. (Slip opn. at p. 13; italics in the original):

> We agree with the dissent that an instructional error or omission that amounts to the *total* deprivation of a jury trial would be structural error, that is, reversible per se. (Dis. opn., *post* at p. 5.) That is not remotely what occurred here. Both attorneys described the elements of robbery to the jury, and did no accurately and completely. (See discussion, *post*, at p. 15.) The error did not vitiate three of the jury's findings: (1) that defendant acted with the mental state required for robbery, (2) that he used a firearm, and (3) that he was the perpetrator. Defendant received a full and fair jury trial, with complete and correct instructions, on the question of identity, the only contested issue at trial.

The *Merritt* case thus suggests that the determination whether an instructional error is "structural" is a determination that must be made not by identifying the generic type of error involved, but instead by determining the impact of the error on the result, on a case-by-case basis. There are several problems with this approach.

The first theoretical problem raised by *Merritt* is that, a matter of history and precedent, appellate courts prior to *Merritt* treated the determination whether an error is "structural" *not* by determining the impact which it had on the particular case, but by assessing whether it

was the type of error which belongs to the general category or "limited class" of errors which affect the "framework within which the trial proceeds." (*Johnson v. United States* (1997) 520 U.S. 461, 468, quoting *Arizona v. Fulminante* (1991) 499 U.S. 279, 310) so that it is often "difficult" to "assess the effect of the error." (*United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, 149, fn. 4; see *Johnson, supra*, 520 U.S. at 468-469 (citing cases in which the United States Supreme Court has determined a type of error falls into that "limited class," including *Gideon v. Wainwright* (1963) 372 U.S. 335 [deprivation of counsel]; *Tumey v. Ohio* (1927) 273 U.S. 510 [lack of impartial trial judge]; *McKaskle v. Wiggins* (1984) 465 U.S. 168 [right of self-representation at trial]; *Waller v. Georgia* (1984) 4676 U.S. 39 [right to public trial]; and *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

As this Court recently recognized in *People v. Mendoza* (2016) 62 Cal.4th 856, 900: "The [United States Supreme Court] traditionally takes a categorical rather than a case-by-case approach to defining constitutional error it designates as structural. (Citation omitted.)" When an error falls within one of these "categories," the United States Supreme Court holds the error to be "structural" without first conducting an assessment of the prejudicial effect of the particular error, but

instead by merely determining that it is type of error which "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." (*Neder v. United States* (1999) 527 U.S. 1, 9; see *Rose v. Clark* (1986) 478 U.S. 570.)

In this context, an error which deprives the accused of his Sixth Amendment right to have a jury determine his guilt or innocence of the charged offense makes the trial "fundamentally unfair[1]," and in such a case the question of harmlessness is "irrelevant" to the determination whether the error is structural. (*Gonzalez-Lopez, supra*, 548 U.S. 140, 148, fn. 4; see *Sullivan v. Louisiana, supra*, 508 U.S. 275, 281 ["the jury trial guarantee [is] a 'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function]; *People v. Blackburn* (2015) 61 Cal.4th 1113 [trial court's failure to obtain a jury trial waiver is reversible *per se*]; *United States v. Harbin* (7th Cir. 2001) 250 F.3d 532, 543 [denial of jury trial is

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[1] In a series of cases decided since *Neder*, the United States Supreme Court has consistently emphasized that the Sixth Amendment right of trial by jury is an important part of the structure of all criminal trials. (See *Jones v. United States* (1999) 526 U.S. 227, 245 [discussion of historical roles of judge and jury]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 477 [jury and not judge must adjudicate elements of charged crime]; *Ring v. Arizona* (2002) 536 U.S. 584, 608 [jury and not judge must weigh and determine death penalty factors]; *Crawford v. Washington* (2004) 541 U.S. 36 [barring use of testimonial hearsay under Confrontation Clause]; *Blakely v. Washington* (2004) 542 U.S. 296 [judge may not impose sentence based on facts not found by jury].)

reversible *per se*]; Carter, *The Sporting Approach to Harmless Error in Criminal Cases: The Supreme Court's "No Harm, No Foul" Debacle in Neder v. United States* (2001) 21 Am.J.Crim.L. 229, 239 ["A fundamentally fair trial includes the right to a jury verdict on all elements of the crime"]; Fairfax, *Harmless Constitutional Error and the Institutional Significance of the Jury* (2008) 76 Fordham L.Rev. 2027, 2030-2031 [failure to instruct on elements of crime "works a different and more profound constitutional injury to the jury and to the very structure of the Constitution"].)

Gonzalez submits that under this traditional "class designation" approach, the failure of a trial court to instruct on any of the elements of malice murder -- (a) in a case in which both the malice murder theory and the felony murder are pleaded; and (b) in which there is conflicting evidence which might support juror findings on either theory, but not on both; and (c) in which only one of the two theories is submitted for the jury's consideration and decision, constitutes "structural error." It was certainly "unfair" to submit only the felony murder theory in this case, since it deprived Gonzalez of his Sixth Amendment right to jury trial, and abridged his Fourteenth Amendment right to proof of each element of the charged crime of malice murder beyond a reasonable doubt.

Furthermore, the error made the trial "an unreliable vehicle for determining guilt or innocence" since it precluded the jury from returning a verdict of only second degree murder, or of lesser offenses to the charged crime of malice murder, and stripped the jurors of their power to consider whether Gonzalez's complete defenses of self-defense and accident might apply so as to produce an acquittal.

A related problem with *Merritt's* case-by-case approach is that under it the reviewing court examines the prejudicial effect of the error, and if the court concludes that it can determine whether the error did or did not actually prejudice the defendant, then the error will not be deemed "structural" so that the harmless error analysis in which it has already just already engaged is considered to be the appropriate standard to be applied. In other words, and in more colloquial terms, the *Merritt* approach is analogous to the fluffy tail wagging the dog to which it is attached -- it requires a reviewing court to use an unsettled standard of review to engage in harmless error analysis on a case-by-case basis, at least in the instructional error cases, for the purpose of determining whether a harmless error standard of review should even be employed. The *Merritt* case-by-case approach to determining whether the structural error standard applies is merely a circular

application of harmless error analysis, masquerading as a determination of the standard of appellate review.

In any event, even if the type of case-by-case analysis approved and applied in *Merritt* is also applied to Mr. Gonzalez's case, the refusal to instruct must nevertheless be deemed to constitute "structural error."

The *Merritt* case bears no resemblance to the legal and factual situation presented by this case, in which the trial court not only failed to instruct on any of the elements of malice murder, the crime with which Mr. Gonzalez was expressly charged, but also failed even to instruct the jurors that they had the option of convicting of other homicide-related offenses, even if they should conclude that no robbery or attempted robbery had occurred, and further failed to instruct on complete and partial defenses which the jury could have found to be proven, had it been given the opportunity to do so.

As Mr. Gonzalez discussed at length in his Opening Merits Brief, a charge under section 187 alleges malice murder, although by judicial decision the prosecution is permitted under such an allegation to proceed in addition under the alternate theory of felony murder, so long as the felony is one of those set forth in section 189. (GOMB at pp. 29-40.) But a conviction of first degree murder based on malice murder

requires jury findings of premeditation, deliberation, and malice, whereas none of those findings are necessary for a conviction under a felony murder theory. Conversely, a finding of first degree murder under a felony murder theory requires only a finding that the homicide occurred during the commission of a qualifying felony (see § 189), which is a determination that is unnecessary for conviction under a malice murder theory. See CALCRIM Nos. 520, 521, 540A.

The jury in Mr. Gonzalez's case, however, was never informed (by jury instruction, argument of counsel, or otherwise) that it had the option of weighing the evidence according to a malice murder theory. It was given no hint that it could reject a finding of robbery and yet convict appellant of some variant of criminal homicide other than felony murder, such as malice murder or one of its several lesser-included offenses. The jury was also never advised that it could consider the defenses of self-defense and accident, or the partial defenses of imperfect self defense, or heat of passion on sufficient provocation.

The jury was instead given instructions under which, in order to return *any* criminal conviction, it was compelled to find that the homicide occurred during the course of a robbery.

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A. The Existence Of A Plan Or Attempt To Rob Was Not Uncontested Or Expressly Conceded In This Case.

This is not a case, as was the critical situation in *Merritt*, in which the facts of the crime were conceded, or undisputed, so that the omission of instructions bore only on immaterial matters and could be jettisoned or regarded as being legal surplusage. As Mr. Gonzalez reported in his Opening Merits Brief (at pp. 6-28.), in this case there were three disputed and irreconcilable versions of fact, and the selection by a jury was critical since it would produce starkly different legal consequences, as explained below. The wholesale failure to give instructions under which the jurors could consider the charged crime of malice murder, as well as its lesser included offenses and the complete and partial defenses supported by the trial evidence, made the trial a sham and a mockery of justice, and perforce was "structural."

The jurors could have returned guilty verdicts of malice murder, or of voluntary or involuntary manslaughter, or could have acquitted based on self-defense or the doctrine of accident, had it been given the appropriate jury instructions. Because each of these verdicts would have been supported by at least one of the following versions of the evidence, and because the felony murder theory was not conceded or established without evidentiary conflict, the omitted jury instructions

cannot be deemed to be mere surplusage for purposes of determining whether the error was structural, under *Merritt*.

1. Theory One: *Murder By Ambush - No Robbery.*

The first factual scenario was presented solely through the unsworn, out-of-court testimony of Alejandro Ruiz, who was Rosales's driver and bodyguard. Although this evidence was adduced by the prosecution, *in this version, there was no robbery or attempted robbery.* Instead, Ruiz claimed that at the request of Victor Rosales, he picked up Rosales and drove him to the corner of Prairie Avenue and 112th Street so that Rosales could meet his girlfriend, Michelle Estrada. (3RT 2792.) According to Ruiz, he was parking his car at the curb when Estrada and two males emerged from behind some palm trees, and one of the men walked up and shot Rosales. (3RT 2793; 4RT 3030.)

Under Ruiz's account, there was no averment or mention of Rosales having any drugs, or of any plan to sell drugs, to anyone. Under Ruiz's account, the shooting was an ambush, and nothing more.

2. Theory Two: *Murder In The Course Of Robbery.*

The prosecution's second, and inconsistent theory was that the shooting and homicide was carried out for the purpose of robbing Rosales of drugs. This theory was supported only by the inconsistent

testimony of a single witness, admitted drug addict Anthony Kalac.

Kalac testified that he was in a nearby hotel room with Gonzalez, Estrada and Alfonso Garcia a few hours prior to the shooting, and heard them discuss how they could obtain drugs. Kalac testified that everyone in the room was talking and watching television, when Kalac thought that he heard them discussing something "along the lines of finding someone that they could get dope from, basically," but Kalac did not know "exactly what was said."[2] (6RT 4257, 4258.)

Kalac left the hotel room for a short time in an unsuccessful attempt to meet with his customary heroin dealer, but when his dealer failed to appear he returned to the motel room, where he thought that there was conversation to the effect that no one had any money, and they were trying to figure out how to borrow money or to get someone to "front" them some drugs. (6RT 4261, 4372; 7RT 4875.)

Kalac testified that he heard Estrada say that she knew someone "that they could come up on," although he admitted that he was not sure exactly what she said. (6RT 4262, 4373, 4374.) Kalac

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

understood that the phrase "come up on" meant "to rob basically."[3] (6RT 4262.) Gonzalez, Gomez, and Estrada were primarily speaking Spanish, which Kalac did not understand, and he was continuing to watch television, and so did not participate in their discussions.[4] (6RT 4374-4375, 4416.) Kalac admitted that he was a "drug addict" and that at the time, his "one and only concern was to get high." (6RT 4422; see 6RT 4428-4429.)

Kalac reported that Gonzalez was talking on his own cell phone when Estrada used the phrase "come up on,"[5] and although Kalac did not hear "specifically what they were saying," he thought that the

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[3] Kalac testified that he heard the phrase "come up on" hundreds of times in the past when other people were talking about robbery. (6RT 4263; 7RT 4863.) Kalac did not report that anyone used the phrase "come up on" during an extensive police interview conducted prior to trial. (7RT 5188.) Kalac claimed that the phrase was one which he used to describe his own prior robberies of drug dealers, although the words "never physically came out of [his] mouth." (7RT 4864, 4870, 4874.) Kalac had "no clue" how many drug dealers he had robbed, and refused to identify even the calendar years in which those robberies occurred. (7RT 4871-4872.)

[4] A homicide detective later interviewed Kalac and asked him: "In reality, you don't know what they were actually planning at the time?" Kalac responded: "I don't know what they were doing." (6RT 4375.) Kalac conceded that he did not see a gun prior to the shooting, and did not hear anyone mention one. (6RT 4413, 4414.)

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

"general subject" of the conversations was "robbing this gentleman that [Estrada] spoke of."[6] (6RT 4264.)

Estrada asked Kalac to give her money, and promised him that they would give him heroin in exchange. (6RT 4266-4267.) Kalac gave her what he had, which was about $28 or $29. (6RT 4267.)

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

Kalac testified that Garcia said that he would go along and be the "lookout for the robbery."[7] (6RT 4273, 4411; 7RT 4882, 4883.)

There was *no* other evidence that anyone planned a robbery of anyone, or stated any intention to rob Rosales.

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[6] Kalac thought that Estrada said something "along the lines of it being an ex-boyfriend who had been physical with her." (6RT 4265.) Kalac did not know "exactly what she was saying," but concluded that she must be talking about robbing her assailant because she mentioned "the physical abuse, the black eye." (6RT 4266.) There was no evidence that Rosales had ever abused Estrada, or was the person to whom she was referring.

[7] At the preliminary hearing, Kalac testified that Garcia had agreed to be the lookout, *not* for a shooting but for "the drug transaction." (6RT 4412.)

3. Theory Three: *Shooting During Drug Purchase.*

The third alternative, and inconsistent set of facts presented to the jurors was that the shooting was not planned or intended by any defendant, but instead occurred when victim Rosales was surprised when he arrived at the laundromat and saw Gonzalez instead of Estrada approach the car. Rosales pulled out a gun, which surprised Gonzalez in turn, who grabbed the gun to defend himself, and it was accidentally fired in the struggle over control of it. This scenario was supported not only by the trial testimony of Gonzalez, but also by all of the available physical evidence:

Kalac testified that he heard Estrada tell Rosales on the telephone that she would come down from the hotel room and meet Rosales at the laundromat. (6RT 4270, 4271-4272; 7RT 4890.) At trial, Gonzalez testified that the plan changed because the hotel manager told them to leave because there were too many people in the room, so Estrada had to pack their bags and put them in her car, and drive down the street to a different hotel. (8RT 5494-5495, 5536, 5539; see also 6RT 4277; 7RT 4359, 4377-4378.)

Gonzalez explained that he had purchased drugs from Rosales in the past, so he did not expect that there would be any problems if

he - instead of Estrada - met Rosales to complete the drug purchase. (8RT 5476, 5479, 5522-5530, 5535.)

When Gonzalez approached the car at the curb, however, he noticed that Rosales was staring angrily at him ("mad-dogging"). (8RT 5500, 5545, 5547, 5712.) Gonzalez crouched down and leaned against the car to talk to Rosales, who was reclined in his seat and leaning to his right. (8RT 5501, 5502) But Rosales did not respond, and instead continued to "mad-dog" appellant. (8RT 5501.)

When Gonzalez asked if he should go get Estrada, Rosales responded by raising a gun in his right hand. (8RT 5501, 5504, 5550-5551, 5713-5714.) Gonzalez reacted from fear and immediately grabbed the gun, which unexpectedly fired in the course of the struggle over it. (8RT 5501, 5551-5554, 5715-5724, 5735, 5739-5740, 5751.)

Gonzalez did not know that Rosales had been shot, so he turned and ran away, because he was afraid and wanted to escape from Rosales and the driver of the car. (8RT 5506, 5511.)

Gonzalez's testimony was corroborated by all of the available physical evidence. An autopsy surgeon found "stippling," which is an abrasion caused by the discharge of gunshot residue, on Rosales's

right hand and wrist. (5RT 3649, 3655, 3959-3961, 3973.) A bullet taken from Rosales's body was "most consistent with a .22 long rifle caliber." (5RT 3954, 3955; see 5RT 3985.) An expended cartridge case found inside Ruiz's car, on the passenger-side floorboard, was "consistent with the bullet recovered at the autopsy." (4RT 3088, 3112-3114; 5RT 3955; 7RT 4930-4934.)

Gonzalez testified that he did not take drugs or money from Rosales, and that he had not intended to kill him. (8RT 5516.)

B. These Three Inconsistent Factual Scenarios Support Different Legal Theories Which Produce Significantly Different Consequences.

There were, thus, three different and inconsistent factual scenarios presented to the jurors, and they would produce three different legal conclusions concerning Mr. Gonzalez's culpability, depending upon which evidence the jurors believed:

1. Ambush but no robbery or attempted robbery.

Ruiz testified that he and Rosales were ambushed by someone who approached the car and opened fire, without any prior discussion or feigned attempt to purchase or sell drugs. If Ruiz's unsworn, out-of-court account were believed by the jurors, then it could have

returned a verdict of first degree, malice murder, but it could not have logically returned a verdict of felony murder.

2. Felony murder based on attempted robbery.

The felony murder theory, supported by the inconsistent and dubious testimony of Anthony Kalac, was the only theory of murder submitted to the jury. Thus, if the jurors desired to punish the defendants for any crime, they logically had to return a true finding on the special circumstances-robbery allegation, which they did. However, they also rejected all of the gun-use and gun-arming allegations, and those findings are consistent only with Gonzalez's testimony that it was Rosales who brought and raised a gun, and initiated the confrontation that led to his death.

3. Homicide resulting from accident or self-defense.

This third theory is inconsistent with Ruiz's account, since it is premised on Gonzalez's testimony that he did not ambush anyone and that it was Rosales who brought the gun into play. This third theory is also inconsistent with that of Kalac, since Gonzalez testified that he had not planned or attempted to rob anyone, and that instead all that anyone planned was a drug purchase.

The third theory is also the only one which is consistent with, and corroborated by, the physical evidence recovered from Ruiz's vehicle and at the autopsy.

This third factual scenario, i.e. that it was Rosales who brought the gun to the site and that the shooting occurred when a struggle over it ensued, is also the only scenario which is consistent with the jury's rejection of the prosecution's gun arming and use allegations.

It is therefore highly probable that the jury returned its special circumstances finding only because it had no other option if it wished to make logical and consistent fact findings, and punish the three drug-using defendants for the killing that indisputably did occur.

The omitted instructions were therefore essential in order for Mr. Gonzalez to receive a jury determination of the charged offense, of the legal partial defenses, and of the full defenses supported by his own testimony. The denial to Mr. Gonzalez of his Sixth Amendment right to jury trial must be considered to be as "structural error," if a jury is still to be considered a part of the "structure" of a criminal trial.

The "true" finding on the special circumstances allegation is therefore irrelevant, and the error requires reversal.