

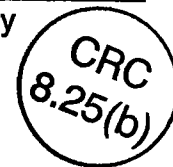
SUPREME COURT  
**FILED**

NOV 14 2016

IN THE SUPREME COURT OF CALIFORNIA

Jorge Navarrete Clerk

Deputy



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

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

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**APPELLANT ALFONSO GARCIA'S  
OPENING BRIEF ON THE MERITS**

---

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**ISSUE PRESENTED FOR REVIEW**

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

### STATEMENT OF THE CASE

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

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

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

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

### **STATEMENT OF FACTS**

#### **Prosecution Case**

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

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<sup>1</sup> While affirming the judgments of conviction, the court of appeal directed the superior court to delete all parole revocation fines from the abstracts of judgment.

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

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

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

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

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

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

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

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

*Testimony of Anthony Kalac, The Prosecution's Star Witness*

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

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

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

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

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

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

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

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



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

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

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

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

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

*Defendant Jorge Gonzalez's Case*<sup>3</sup>

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

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

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<sup>3</sup> Neither appellant Garcia nor co-defendant Erica Estrada presented evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

## ARGUMENT

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

#### *A. Summary of Argument*

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

This Court has also recognized, however, that in some circumstances it is possible to determine that, although an instruction on a lesser included offense was erroneously omitted, the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions, which in turn shows that the omission of the missing instruction was harmless.

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

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

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

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

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

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

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

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