In the Supreme Court of the State of California

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

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

ANSWER BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
MICHAEL R. JOHNSEN
Supervising Deputy Attorney General
LOUIS W. KARLIN
Deputy Attorney General
ROBERTA L. DAVIS
Deputy Attorney General
State Bar No. 223015
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-4920
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Robin.Davis@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

ISSUE PRESENTED

Did the jury's finding of a felony-murder special circumstance render harmless any error in the trial court's failure to instruct on murder with malice aforethought, lesser included offenses of murder with malice aforethought, and defenses to murder with malice aforethought?

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

STATEMENT OF FACTS AND THE CASE

A. Trial Court Proceedings

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[4] Gonzalez alleges that the jury "returned a verdict of first degree murder which did not specify whether it was based on malice murder or felony murder, and made no reference to robbery." (JGAOB 1-2.) He is incorrect. The verdict states, "We, the jury in the above-entitled action, find the defendant, JORGE GONZALEZ, GUILTY of the crime of FELONY MURDER, COMMITTED IN THE PERPETRATION OF, OR ATTEMPT TO PERPRETRATE [*sic*] ROBBERY, a violation of PENAL CODE SECTION 187(A), a FELONY, as charged in count 01 of the INFORMATION." (3SCT 644.) The verdict forms for Estrada and Garcia likewise expressly state that appellants were convicted of felony murder, committed in the perpetration or attempted perpetration of a robbery. (4CT 644-645.)

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

B. Court of Appeal Proceedings

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

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

give such instructions was harmless. (*Id.* at pp. 1380-1381.) Specifically, the court held that because the jury found appellants guilty of felony murder, any error in failing to instruct on self-defense and accident, which do not apply to felony murder, was harmless. (*Ibid.*) The court also held that, under this Court's precedent, the jury's felony-murder verdict and true finding on the felony-murder special circumstance demonstrated that the jury resolved the factual issues related to the lesser included offenses adversely to appellants. (*Id.* at p. 1381, citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328, *People v. Elliot* (2005) 37 Cal.4th 453, 476, *People v. Horning* (2004) 34 Cal.4th 871, 906, *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087, and *People v. Earp* (1999) 20 Cal.4th 826, 886.) The court rejected the holding in *People v. Campbell* (2015) 233 Cal.App.4th 148, that *Earp*, *Koontz*, and *Elliot* were distinguishable because the juries in those cases were instructed on premeditated murder. The court noted again that "an instruction on premeditated and deliberate murder would have done no more than allow the jury to convict appellants under another theory of first degree murder." (*People v. Gonzalez*, *supra*, at pp. 1381-1382.)

ARGUMENT

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

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

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

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

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

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

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

Under prior case law, *People v. Modesto* (1963) 59 Cal.2d 722, 730-731, error in failing to give lesser included offense instructions warranted by the evidence was considered necessarily prejudicial. However, this Court has determined that "experience during the decade since *Modesto* has demonstrated that adherence to that rule is neither necessary to assure defendants their right to jury consideration of all material issues presented by the evidence nor required to avoid prejudice." (*People v. Sedeno*, *supra*, 10 Cal.3d at pp. 720-721.) The *Sedeno* Court therefore held that, where "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions . . . the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding that only the lesser offense was committed has been rejected by the jury." (*Id.* at p. 721.) Over 20 years later, the Court disapproved of *Sedeno*'s "standard of near-automatic reversal for this form of error." (*People v. Breverman*, *supra*, 19 Cal.4th at p. 149.) Instead, the Court held, an error in failing to instruct on lesser included offenses warranted by the evidence is one of state law only, and is therefore subject to the state law standard for determining prejudice set forth in the California Constitution. (*Ibid.*) Under this standard, the failure to give lesser included offense instructions is harmless unless an examination of the entire record, including the evidence, demonstrates that it is reasonably probable the