IN THE SUPREME COURT OF CALIFORNIA

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

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

APPELLANT ALFONSO GARCIA'S REPLY BRIEF ON THE MERITS

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APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
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APPELLANT ALFONSO GARCIA'S OPENING BRIEF ON THE MERITS

ARGUMENT

I. RESPONDENT'S CLAIM THAT THE EVIDENCE SHOWS THAT APPELLANTS WERE PLANNING A ROBBERY, AND NOT MERELY A THEFT, IS BASED IN PART ON A MISREPRESENTATION OF ANTHONY KALAC'S TESTIMONY

In its account of Anthony Kalac's testimony at trial, respondent notes correctly that, "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." (ABM at p. 13.)

Respondent continues, however, with the claim that, "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.)" (ABM at p. 13.) Later, in the argument section of its brief, respondent repeats this claim as evidence that appellants were planning a robbery, not merely a theft: "Respondent maintains that the evidence of appellants' intent to commit robbery was compelling. Kalac's testimony . . . established that: appellants planned a robbery, not a theft, *and they used words and phrases other than 'come up on' to describe the robbery* (6RT 4261-4264, 4375; 7RT 4834, 4841-4844, 4882-4883, 4886) . . . ." (ABM at p. 44 [emphasis added].)

But Kalac never stated what these other words were, because he could not remember: "There were other words. I can't remember exactly what it was." (7R.T. 4844.) Nowhere in the parts of the record cited by respondent --or anywhere else in the record-- does Kalac ever testify that appellants planned the use of force or fear of force. His only testimony was that they planned to 'come up on' Rosales, and the meaning of that term remained ambiguous. (6R.T. 4261-4264 [Kalac understands 'to come up

on' to mean 'to rob'], 4375 [same]; 7R.T. 4834 [Kalac "can't remember" any details of the plan] 4841-4844 [same], 4882-4883 [Garcia offered to act as lookout during the robbery], 4886 [to 'come up on' means to rob because that is what Kalac himself used to do].)

Respondent's claim that "the evidence of appellants' intent to commit robbery was compelling" in part because appellants "used words and phrases other than 'come up on' to describe the robbery" (ABM at p. 44) is therefore misleading because it implies that Kalac understood the difference legally between robbery and grand theft from the person. As respondent acknowledges, Kalac's own testimony clearly established that he did not. (ABM at p. 13.)

As this Court long ago observed: "Grabbing or snatching property from the hand has often been held to be grand larceny, and not robbery." (*People v. Church* (1897) 116 Cal. 300, 303; see *id.* at p. 304 ["Under the evidence disclosed by the record as to the facts occurring at the immediate time of the taking, the jury should not have been deprived of the right to find the defendant guilty of grand larceny, if they so saw fit"]; see also *People v. Wright* (1996) 52 Cal.App.4th 203, 210 ["When *actual* force is present in a robbery, at the very least it must be a quantum more than that

which is needed merely to take the property from the person of the victim, and is a question of fact to be resolved by the jury taking into account the physical characteristics of the robber and the victim"]; *People v. Morales* (1975) 49 Cal.App.3d 134, 140-141 ["Such careful scrutiny by us is compelled by the extreme importance of this issue in the context of this case. The alleged use of force by defendant served not merely to raise the theft offense to a robbery; it was also the sole basis for imputing to defendant the malice for first degree murder. The trial court therefore erred in failing to instruct on the lesser included offense of grand theft. Such error deprived the defendant of his constitutional right to have the jury determine every material issue presented by the evidence" (footnote omitted)]; *People v. Miller* (1974) 43 Cal.App.3d 77, 81 [failure to instruct jury on lesser included offense of theft was error in view of evidence that defendant employed 'Jamaican Switch' to trick victim out of his money].)

Indeed, Kalac's description of his own previous 'robberies' fits neatly within this Court's description long ago of the type of conduct that falls within the ambit of Penal Code section 487: "[W]e think its obvious purpose was to protect persons and property against the approach of the pick-pocket, the purse-snatcher, the jewel abstracter, and other thieves of

like character who obtain property by similar means of stealth or fraud, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession—such as . . . held or carried in the hands . . ." (*People v. McElroy* (1897) 116 Cal. 583, 586.)

Respondent describes the evidence that appellants were planning a nonviolent theft as "scant." (ABM at p. 32.) Yet respondent struggles to come up with a robbery scenario that is both plausible and consistent with the jury's verdicts and findings: "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." (ABM at pp. 10-11.) As respondent would have it, then, Gonzalez proceeded unarmed to the meeting with Rosales with the intent of using force or fear of force to steal the drugs he wanted without paying for them. Garcia's alleged offer to act as a lookout suggests that his role was different, but even assuming that both intended the use of force or fear, they were unarmed and on foot, going up against a drug dealer who was in a car, armed with a gun, and accompanied by a driver. How does that work? Contrary to respondent's claim, an attempted snatch-and-run gone wrong seems a more plausible

scenario given the circumstances as the jury apparently saw them. In any event, it was up to the jury to decide which plan had been proven beyond a reasonable doubt. The jury here, however, was never given the choice.

Thus, as respondent initially acknowledges, and contrary to respondent's subsequent claim, it is unclear from Kalac's testimony whether appellants were planning a robbery or theft from the person, and respondent's attempt to portray Kalac's testimony as confirmation that appellants were planning a robbery is a mischaracterization of the evidence in this case.[1]

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[1] A second mischaracterization of the trial testimony is respondent's claim that, "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. [Citation.] He *did not intend* to assist or facilitate the robbery." (ABM at p. 13 [emphasis added].) There was no evidence whatsoever of any threats or intimidation or that Kalac protested or otherwise expressed reluctance or disapproval of the plan before handing over his money. Kalac testified that he gave appellants his money knowing full well what they were planning and what he stood to receive in return. Notwithstanding whatever private reservations he claimed at trial to have harbored, there was no evidence that his participation in the plan was anything other than consensual.

II. RESPONDENT'S CLAIM THAT A DOUBTFUL JURY FACED WITH THE KIND OF ALL-OR-NOTHING CHOICE PRESENTED IN THIS CASE WILL ALWAYS RESOLVE ITS DILEMMA BY CONTRADICTING ITSELF IS UNFOUNDED AND IGNORES THE IMPORTANCE OF THE MISSING JURY INSTRUCTIONS TO JUST AND FULLY-INFORMED VERDICTS AND FINDINGS

A. Respondent's Claim That A Doubtful Jury In a Case Like This One Will Always Resolve Its Dilemma By Rendering Contradictory Verdicts and Findings Is Unfounded

Respondent asserts that the jury's special circumstance true finding in this case necessarily rendered harmless any failure to instruct on lesser included offenses to first degree murder, because any jury that reasonably doubted whether appellants intended to commit a robbery but was unwilling to acquit them altogether would have, first, found appellants guilty of robbery-felony-murder and, second, found *not true* the special circumstance allegation that appellants murdered in the course of a robbery. (ABM at pp. 30-31.) In other words, the jury would have found that the robbery allegation was proved with respect to the felony murder charge, but not proved with respect to the special circumstance allegation. A more direct self-contradiction on the part of a jury is hard to imagine.

Respondent's claim is based on its speculation that, if the jury "convicted appellants of felony murder because it succumbed to the

temptation of convicting them of a greater offense than that established by the evidence," the jury would nevertheless have followed its instructions and found the special circumstance allegation untrue, because there would be no such "temptation when the jury turned to the special circumstance deliberations." (ABM at p. 32.)

Courts including this Court have long acknowledged that a jury faced with an unwarranted all-or-nothing choice in a case like this one may brush aside its reasonable doubts about the robbery component of the felony murder charge rather than acquit defendants it believes to be guilty of some kind of homicide. (See *People v. Eid* (2014) 59 Cal.4th 650, 657; *People v. Barton* (1995) 12 Cal.4th 186, 196; *People v. Campbell* (2015) 233 Cal.App.4th 148, 168, fn. 12; *Keeble v. United States* (1973) 412 U.S. 205, 212-13 [93 S.Ct. 1993, 1997-98, 36 L.Ed.2d 844].) The question here is how such a jury would resolve a special circumstance allegation about which it harbors the same reasonable doubt. Respondent advocates a rigid, more or less automatic application of the *Sedeno* rule[2] to cases like this one based on the presumption that juries faced with this type of unwarranted

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[2] (See *People v. Sedeno* (1974) 10 Cal.3d 703, 721, disapproved on other grounds in *People v. Breverman* (1998) 19 Cal.4th 142, 165.)

all-or-nothing choice will *always* contradict themselves with respect to whether the robbery allegation has been proved. (ABM at p. 34.) Pursuant to this line of reasoning, the trial court's failure to instruct on lesser included offenses in a case like this one would automatically be deemed harmless error unless the jury found the special circumstance allegation to be untrue.

But what if the jury that has brushed aside its reasonable doubts about the predicate robbery (or other felony) for the felony murder charge decides that it is bound by its guilty verdict to also find the special circumstance allegation to be true? Respondent scorns this possibility as "dubious" and unsupported by "reasoning or foundation." (ABM at p. 38.) Yet respondent also acknowledges that the elements of the robbery components of the felony murder charge and the special circumstance allegation "coincide" (ABM at p. 38), and it seems at least as likely that, having resolved the robbery allegation in the context of the felony-murder charge, the jury --or some juries, at least-- will consider that issue already decided when it comes time to deliberate on the special circumstance allegation. After all, any jury that, faced with an unwarranted all-or-nothing choice, resolves its dilemma by convicting has, in effect, conspired

to flout perhaps the most fundamental of the trial court's instructions: that the prosecution must prove every element of the charged offense beyond a reasonable doubt. Such a jury may conclude that a true finding on the special circumstance allegation is necessary to conceal the fact that it followed the trial court's instructions only selectively in arriving at its verdict. Respondent's assumption that no jury would ever proceed in this manner is unrealistic and unfounded.

Contrary to respondent's claim, when the jury in a case like this one harbors a reasonable doubt regarding the robbery components of the felony murder charge and special circumstance allegation, there are three possible outcomes, and none seems any more inherently likely than the others. First, the jury might --as it should-- adhere strictly to the trial court's instructions and acquit the defendant(s) altogether. Such a jury must be willing, however, to let defendants go free even if it believes them to be guilty of some form of homicide. Second, as respondent suggests, the jury might contradict itself, perhaps hoping that the apparent inconsistency between its guilty verdict and its not-true finding will somehow proclaim its umbrage at being forced to choose between two unjust verdicts. Or, third, as the *Campbell* court observed, having felt compelled to go along

with the robbery allegation in order to avoid acquitting the defendant(s) altogether, the jury might feel that it has already resolved the robbery issue and therefore find the special circumstance allegation to be true. (See *Campbell, supra,* 233 Cal.App.4th at p. 172.)

The likelihood of any of these three outcomes seems more a function of the character and personalities of any particular jury than logic or law. After all, any jury that convicts despite its reasonable doubt has already disregarded its instructions, making it that much more difficult to predict in what manner the jury will decide the remaining issues.

Respondent contends that the additional elements of the special circumstance allegation ensured that the jury would revisit the robbery component of that allegation as a fresh issue, and one that it was free to decide without regard to its verdict on the felony murder charge. Respondent points out, for example, that the jury must also find that the robbery was not merely incidental to the murder. (ABM at pp. 30, 32, 38; CALCRIM No. 730.) But no one at trial disputed that the purpose of appellants' meeting with Rosales was to obtain drugs from him or that the plan was formed well before his death. The prosecution never claimed that arranging the meeting was merely a way to lure Rosales to his death.

Hence, there is little reason to think the jury gave much thought to the possibility that the alleged robbery was merely incidental to a plan to kill the victim, and even less reason to conclude that this part of the special circumstance instructions would have prompted the jury to revisit the robbery allegation.

Respondent points out that the special circumstance allegation also required the jury to find that, as alleged accomplices, appellants Garcia and Estrada were major participants and either intended that Rosales be killed or acted with reckless indifference to human life. (ABM at pp. 33, 39.) But there is no reason why consideration of Garcia's and Estrada's level of participation in the plan would necessarily prompt reexamination of the plan itself, which the jury had already considered when arriving at its guilty verdicts. Similarly, the jury might conclude that, in planning to steal drugs from the victim, Garcia and Estrada knowingly engaged in criminal activity that they knew involved a grave risk of death (CALCRIM No. 703), even if the plan involved only trickery. (See *People v. Bland* (1995) 10 Cal.4th 991, 1005 ["Drug dealers are known to keep guns to protect not only themselves, but also their drugs and drug proceeds; ready access to a gun is often crucial to a drug dealer's commercial success"]; *People v. Bradford*

(1995) 38 Cal.App.4th 1733, 1739 ["it is common knowledge that perpetrators of narcotics offenses keep weapons available to guard their contraband"].) In any event, since nothing in the jury instructions foreclosed such a finding, that finding does not show that the jury necessarily believed that appellants intended to use force or fear of force.

Thus, the fact that the special circumstance allegation included these additional elements does not alter the fact that the elements of the robbery component of both the felony murder charge and the special circumstance allegation were the same. If the jury believed, as it apparently did, that the plan to steal from Rosales was formed well before his death and was not merely incidental to killing him, and that Garcia and Estrada were major participants in the plan and knew that it involved a grave risk of death, then none of these additional considerations would provide the jury with any basis for finding the special circumstance allegation to be untrue. Moreover, if the jury was of the view that it had already resolved the robbery allegation by finding appellants guilty of felony murder, there is little reason to think that any of these additional findings would prompt the jury to revisit that issue. Hence, the fact that the jury found these additional elements of the special circumstance allegation to be true provides no

assurance that it would have rejected a lesser included offense had it been properly instructed and given the option.

It is worth noting that, as an indicator of whether the omission of jury instructions on lesser included offenses was prejudicial, a "not true" finding as to the special circumstance allegation in a case like this one would be no less ambiguous. Such a finding might indicate either (1) that the jury succumbed to the temptation to convict the defendant of an offense greater than that established by the evidence, or (2) that the jury harbored a reasonable doubt about one of the additional elements of the special circumstance allegation. If the former, the failure to instruct on lesser included offenses was prejudicial and the judgment of conviction should be reversed. If the latter, however, the jury has simply performed its proper function and the special circumstance finding is not a symptom of prejudicial error. But since there is usually no way to know the precise reason for a not true finding, and since juries are presumed to follow the trial court's instructions (*People v. Sanchez* (2001) 26 Cal.4th 834, 852), the

prejudicial impact of the missing jury instructions will in most cases escape detection if the special circumstance finding is regarded as the litmus test.[3]

The point here is merely that the special circumstance finding in a case like this one does not necessarily reveal whether the jury resolved the factual issues raised by the omitted jury instructions on lesser included

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[3] Had the jury found the special circumstance allegation to be *not* true in this case, for example, it might indicate that the jury succumbed to the temptation to convict appellants of an offense greater than that established by the evidence, as respondent suggests. But even if that were the real reason for the not true finding, that finding would not necessarily *appear* to be inconsistent with the guilty verdicts. There was evidence that Estrada had previously been sexually involved with Rosales, and that Gonzalez became "agitated" when Estrada told him that Rosales had physically abused her in the past, including giving her a black eye. (6R.T. 4265-4266.) There was also evidence that Ruiz excitedly exclaimed that Gonzalez simply walked up to Rosales and shot him. (3R.T. 2793.) As to Gonzalez, therefore, the not true finding might indicate merely that the jury had concluded that he murdered Rosales in a fit of anger and jealousy, and the plan to steal his drugs was merely incidental, a way to lure him to his death. As to Estrada and Garcia, the finding might indicate merely that the jury concluded that they were minor participants or that they did not knowingly engage in criminal activity they knew to involve a grave risk of death. A reviewing court would have no way of knowing whether this interpretation of the verdicts and findings was accurate. But because juries are presumed to have followed the trial court's instructions (*Sanchez, supra,* 26 Cal.4th at p. 852), this interpretation, which reconciles the verdicts and findings, would be presumed to be correct. (Cf. *People v. York* (1992) 11 Cal.App.4th 1506, 1511-1512 [instructions on additional elements of special circumstance allegation, though given in error, "distinguished the special circumstance from the murder in such a way that the jury's findings cannot be viewed as inconsistent"].)

offenses adversely to the defendant(s), regardless of whether that finding is "true" or "not true." Respondent's analysis does not, therefore, provide a sound basis for the kind of rigid, automatic application of the *Sedeno* rule respondent advocates in cases like this one. An accurate assessment of the prejudicial impact of the missing lesser included offense instructions requires a more case-specific review of the evidence and the jury instructions that were actually given. (See *Campbell, supra,* 233 Cal.App.4th at p. 167 ["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"].)

Relying, as the Court of Appeal did below, on several of this Court's prior decisions invoking the *Sedeno* rule, respondent argues that this Court has already decided the issue presented by this appeal. (ABM at pp. 32-33, 34-37; see Slip opn. at pp. 28-29, 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, *People v. Earp* (1999) 20 Cal.4th 826, 886.) As appellant Garcia pointed out in his opening brief (at pp. 39-40), however, in each of the cited cases the jury was instructed on felony murder *and* first degree malice murder.[4] (See *Campbell, supra,* 233 Cal.App.4th at p. 167 ["we note that in each of the cited cases the jury was instructed on felony murder *and* premeditated and deliberate murder"]) Thus, each jury had the option of finding the defendant guilty of first degree malice murder without having to find the special circumstance true. As the *Campbell* court observed, "When, in that situation, the jury does make the special circumstance finding, it can be said with confidence that the jury would have convicted the defendant of felony murder even if it had been instructed as to lesser offenses. Such confidence does not exist when, as here, the jury has been instructed on felony murder only." (*Id.* at pp. 167-

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[4] In *People v. Lewis* (2001) 25 Cal.4th 610, another case relied on by respondent (ABM at p. 35, fn. 7), the jury was instructed on second degree implied malice murder and on theft as a lesser included offense of robbery and burglary. (25 Cal.4th at pp. 644, 646.) In *People v. Seaton* (2001) 26 Cal.4th 598, also relied on by respondent (ABM at p. 33), the jury was instructed on first degree malice murder and second degree express malice murder and was also instructed that there was no robbery if defendant's intent to steal arose only after he killed the victim. (26 Cal.4th at pp. 664, 669, 672.) Thus, neither of these cases presents the kind of instructional deficiencies presented in this case.

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Respondent circles back around to its claim that the jury in this case was free to find the special circumstance allegation untrue if it doubted the robbery component of that allegation to argue that the presence of additional instructions on first degree malice murder "does not meaningfully distinguish those cases from this case." (ABM at p. 36.) What respondent fails to acknowledge, however, is that the option to convict the defendant of first degree malice murder permits a jury that harbors a reasonable doubt about the robbery allegation to reject that allegation altogether instead of having to go along with it in order to convict, as it would have had to do in this case. True, such a jury may still be confronted with an unwarranted all-or-nothing choice as to the degree of the murder conviction if the trial court fails to instruct on any lesser included offenses to first degree murder. But a true finding with respect to the robbery-murder special circumstance allegation in such cases does not come on the heels of a guilty verdict that necessarily required the jury to brush aside any doubts about the robbery allegation in order to convict. The true finding is therefore a far more reliable indicator that the jury had no such doubts and would have rejected any lesser included offense

options, since the jury had another option if it doubted the felony component of the felony murder allegation.[5]

As discussed in appellant Garcia's opening brief (at pp. 40-41), the aforementioned cases are also distinguishable from this case because, in each case, it was patently clear from the evidence that the underlying felony was committed by the perpetrator of the murder. Hence, none of these cases presented circumstances analogous to this case or *Campbell*, in which jury instructions regarding the issue of appellants' intent to commit the

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[5] Respondent's reliance on *People v. Lancaster* (2007) 41 Cal.4th 50 (ABM at pp. 35-36) is misplaced. Respondent acknowledges that it is unclear from this Court's opinion in *Lancaster* whether the jury was instructed on first degree malice murder, but the *Lancaster* court's reliance on its discussion of a similar issue in *Horning, supra*, 34 Cal.4th 871, suggests that, contrary to respondent's claim (ABM at pp. 34-37), the presence of such instructions is crucial to an accurate assessment of what a special circumstance true finding shows. (*Lancaster, supra,* 41 Cal.4th at pp. 85-86.) As this Court explained in *Horning*: "Here, the jury was instructed on *both premeditated first degree murder and first degree felony murder*, as well as on both the burglary-murder and robbery-murder special circumstances. . . . If the jury had had any doubt that this was a felony murder, it did not have to acquit but could have simply convicted defendant of first degree murder without special circumstances." (*Horning, supra*, 34 Cal.4th at p. 906 [emphasis added].) Respondent's claim that the instructions on first degree malice murder were immaterial to the Court's conclusion is inconsistent with this explanation. For the same reasons, respondent's reliance on *People v. Price* (1991) 1 Cal.4th 324, 464 (ABM at p. 35, fn. 7) is also misplaced.

predicate felony for the felony murder charge were inadequate.[6] As the *Campbell* court observed, "It is clear from our examination of the cited cases that the rule relied on by the Attorney General cannot be applied without consideration of the factual context and the other instructions given to the jury." (*Campbell, supra,* 233 Cal.App.4th at p. 172.)

In an effort to nonetheless group this case together with the aforementioned cases, respondent "maintains that the evidence of appellant's intent to commit robbery was compelling." (ABM at p. 44.) Respondent lists the evidence that, in its view, points to robbery. (ABM at pp. 44-46.) All of this evidence is, however, equally consistent with a plan

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[6] Respondent's reliance on *People v. Taylor* (2010) 48 Cal.4th 574 (ABM at p. 36) is also misplaced. In *Taylor*, in which the jury was instructed on felony murder but not first degree malice murder, this Court held that "no reasonable jury could have concluded from the above described evidence that defendant committed second degree implied-malice murder instead of first degree felony murder." (48 Cal.4th at p. 624.) Such is not the case here. In refuting Taylor's claim that the jury was impermissibly forced into an all-or-nothing choice between capital murder and innocence, this Court observed that "the trial court gave the jury the noncapital third option of convicting defendant of first degree felony murder but finding not true the special circumstance allegations that made him death eligible." (*Id.* at p. 625.) This observation had nothing to do, however, with assessing the significance of a special circumstance finding. Indeed, the *Sedeno* rule is never mentioned in *Taylor*. Nor did the *Taylor* Court express any view on how likely the jury would be to actually choose the 'noncapital third option.' *Taylor*, therefore, provides no support for respondent's claims.

to snatch the drugs and run.[7] Simply put, unlike the aforementioned cases relied upon by respondent, this is not a case in which it is "patently clear from the facts" that appellants intended to use force or fear of force, the element critical to the twin robbery allegations. (See *Campbell, supra,* 233 Cal.App.4th at p. 172.) Hence, this Court's prior precedent did not decide the issue on appeal in this case.

With respect to a doubtful jury faced with an unwarranted all-or-nothing choice in a case like this one, the most that respondent can reasonably claim is that the jury *might* adopt mutually contradictory findings on the robbery components of the felony murder charge and the special circumstance allegation, not that it always will. Having already resolved the robbery allegation in the context of the felony-murder charge, the jury might instead consider that issue already decided when it comes time to deliberate on the special circumstance allegation. Moreover, the additional elements of the special circumstance allegation, which may or may not have been the factor that ultimately determined the jury's finding, render the significance of that finding ambiguous in this context, regardless

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[7] Respondent asserts that appellant Garcia's alleged offer to act as a lookout "would have been unnecessary, if not counter-productive, to a 'snatch-and-grab' theft." (ABM at p. 44.) Why this is so is never explained.