IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

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

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

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

ARGUMENT

I.

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

A. Introduction

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

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

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

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

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

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

Sedeno standard of reversal in this context.[1]

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

Respondent points out that following *Breverman*, "this Court has continued to find harmless error . . . where the *Sedeno* rule is met (i.e. the jury resolved the factual question posed by the omitted instructions adversely to the defendant under other, properly given instructions), without reference to *Watson* or engaging in an analysis of whether it is reasonably probable the defendant would have achieved a more favorable result had the instructions been given." (ABM 23.) It argues that once the *Sedeno* rule has been satisfied - that it has been "determined that the jury resolved the factual issue posed by the omitted instruction adversely to the defendant, there is simply no need to examine the record further for a reasonable probability as to what the jury would have done if given the omitted instruction. The jury's verdicts and findings *necessarily demonstrate* what it would have done." (ABM 27.) Respondent, however, relies on a diluted version of the *Sedeno* rule which is not supported by *any* authority.

The *Sedeno* rule articulated by this Court provides:

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

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

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

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

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

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

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

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

The court in *People v. Campbell* (2015) 233 Cal.App.4th 148, 167 (*Campbell*), noted that in *People v. Flood* (1998) 18 Cal.4th 470 (*Flood*), "the Supreme Court explained that *Sedeno* should not be read as 'delineat[ing]

circumstances in which such instructional error *categorically* may be deemed harmless'; rather, the prejudicial effect of such instructional error under California law must ultimately be determined under the *Watson* test. (*People v. Flood, supra*, at p. 490, italics added.)" The *Campbell* court further stated:

> In light of *Flood and Breverman*, it is clear that while a jury's determination on a factual issue under other instructions is relevant to determining whether an instructional error is harmless, it does not *categorically* establish that the error was harmless, the court must still determine whether, based on an examination of the entire record, it is reasonably probable that the error affected the outcome.

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

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

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

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

Respondent cites 10 decisions in which this Court "held that the error in failing to instruct on lesser included offenses to malice murder is harmless where the jury's true finding on a felony-murder special circumstance demonstrates that it adversely resolved the factual issue posed by such instructions." (ABM 24, citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328 (*Castaneda*); *People v. Lancaster* (2007) 41 Cal.4th 50, 85-86 (*Lancaster*); *People v. Prince* (2007) 40 Cal.4th 1179 (*Prince*); *People v. Elliot* (2005) 37 Cal.4th 453, 476 (*Elliot*); *People v. Horning* (2004) 34 Cal.4th 871, 906 (*Horning*); *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087 (*Koontz*);

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

included offense.

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