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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JORGE GONZALEZ et al.,

Defendants and Appellants.

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

PETITION FOR REVIEW

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Court of Appeal

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JORGE GONZALEZ et al., Defendants and Appellants.	No. B255375

PETITION FOR REVIEW

Pursuant to Rules 8.500 and 8.504 of the California Rules of Court, appellant Erica Michelle Estrada respectfully requests that this Honorable Court review the published decision of the Court of Appeal, Second Appellate District, Division Four, which affirmed the judgment of the superior court. A copy of the opinion filed on March 30, 2016, is attached hereto as Appendix A, and a copy of the modification of the opinion, filed on April 28, 2016, is attached hereto as Appendix B.

MEMORANDUM IN SUPPORT OF THE PETITION

STATEMENT OF THE ISSUES

1. When a defendant is charged with malice murder and a robbery special circumstance, and the prosecution proceeds solely on a theory of felony murder, does a trial court err by failing to instruct, sua sponte, on the lesser included offenses of malice murder?

2. When a defendant is charged with malice murder and a robbery special circumstance, the prosecution proceeds solely on a theory of felony murder, and the jury is not instructed on premeditated and deliberate murder, is the trial court's error in failing to sua sponte instruct on the lesser included offenses of malice murder necessarily harmless because the defendant was found guilty of felony murder with a true finding on the robbery special circumstance?

3. Did the Court of Appeal in *People v. Campbell* (2015) 233 Cal.App.4th 148, 167-168, correctly conclude that in a case charging malice murder and a robbery special circumstance, when the jury is instructed on felony murder as the sole theory of murder, and the jury finds the defendant guilty of felony murder and the special circumstance true, it cannot "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"?

4. In a special circumstance murder case, are a defendant's federal

constitutional rights to a jury trial and to due process of law violated when the trial court errs by failing to instruct on lesser included offenses of malice murder?

5. In a special circumstance murder case where a jury finds that the shooter and his accomplices were not armed with a firearm, is there sufficient evidence to support a robbery special circumstance and establish that an accomplice acted "with reckless indifference to human life" and was a "major participant" in the commission of a felony within the meaning of section 190.2, subdivision (d), where the only evidence of the accomplice's involvement was that she initiated the idea to rob the victim who was a drug dealer and her friend, she set up a meeting with the victim, and she may have been at the scene and pointed out the victim to another individual who subsequently shot the victim?

6. Does a trial court commit reversible error by permitting a police officer to testify about statements made by an unavailable percipient witness under the spontaneous statement exception to the hearsay rule, where the witness had sufficient time to contrive and misrepresent and the statements went beyond the circumstances of the shooting?

7. Are statements made by an unavailable percipient witness that are erroneously admitted into evidence under the spontaneous statement exception to the hearsay rule testimonial in nature so that they violate the defendant's

federal constitutional rights to due process and to confront adverse witnesses?

8. Is an individual an accomplice as a matter of law if he gives money to a person in exchange for the promise of some of the drugs that the person planned to obtain from a robbery?

9. In a murder case where the victim was shot and the defendant was charged with malice murder and a robbery special circumstance, and the prosecution proceeds solely on a theory of felony murder, does the testimony of an accomplice need to be corroborated specifically with regard to the commission of the robbery (or attempted robbery), or merely in connection with the shooting?

10. Is a defendant's claim on appeal, that the jury was improperly instructed regarding the type of evidence that could be used to corroborate the testimony of an accomplice, forfeited by failing to object to the instructions in the trial court?

11. When an accomplice's testimony and out-of-court statements are admitted into evidence, does a trial court commit reversible error by instructing the jury that only the testimony of the accomplice (as opposed to the testimony and statements of the accomplice) must be corroborated?

12. Does a trial court commit reversible error by failing to instruct the jury that the testimony and out-of-court statements of an accomplice cannot be corroborated by statements or testimony of another accomplice, where the jury

could have used the testimony of a codefendant to corroborate the accomplice's testimony and statements?

13. If the instructional errors and erroneous admission of an unavailable percipient witness's statements as spontaneous declarations standing alone were not prejudicial, did the combination of the errors amount to reversible cumulative error?

STATEMENT OF THE CASE

On October 4, 2013, a jury found appellant Erica M. Estrada and her codefendants Alfonso Garcia and Jorge Gonzalez guilty of first degree felony murder committed in the perpetration of a robbery, with a true finding on a robbery-murder special circumstance. (Pen. Code § 187, subd. (a))/§ 190.2, subd. (a)(17)).[1] The jury found a principal armed allegation to be not true (§ 12022, subd. (a)(1)). It also found Gonzalez not guilty of shooting at an occupied motor vehicle (§ 246), and it found various firearm personal use enhancements alleged as to Gonzalez to be not true. (4CT 644-649; 9RT 7202-7205.) On March 18, 2014, appellant was sentenced to life without the possibility of parole. (4CT 700-703; 9RT 7546-7547.) Appellant filed a timely notice of appeal. (4CT 706-707.)

In a published opinion filed on March 30, 2016, the Court of Appeal modified the judgment by deleting the parole revocation fine, and it affirmed the judgment as amended. (App. A, pp. 3, 33.) Appellant and Garcia filed petitions for rehearing. On April 28, 2016, the Court of Appeal modified the opinion (no change in judgment), and denied the petitions. (App. B.)

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

STATEMENT OF FACTS

For purposes of this Petition for Review appellant adopts the facts set forth in the "Factual Background" portion of the opinion, as modified in the Order Modifying Opinion. (App. A, pp. 4-14; App. B, pp. 1-3.) Additional relevant facts are included in the "Necessity for Review" section that follows.

NECESSITY FOR REVIEW

Review of this case is necessary to secure uniformity of decision and settle important and recurring questions of law. (Cal. Rules of Ct., rule 8.500 (b)(1).) This petition is also necessary to exhaust appellant's state remedies before seeking federal review. (See e.g. *O'Sullivan v. Boerckeli* (1999) 526 U.S. 838.)

1. Failure to Instruct On Lesser Included Offenses of Malice Murder

Although appellant was charged with malice murder, the prosecution proceeded solely on a theory of felony murder, contending Gonzalez was the shooter, and appellant and Garcia were accomplices. A jury convicted appellant and coappellants of felony murder, and found the robbery special circumstance to be true. On appeal appellant argued that her state and federal constitutional rights to due process and to have the jury determine all material issues raised by the evidence were violated by the trial court's failure to instruct, sua sponte, on various lesser included offenses of malice murder. (U.S. Const., 6th, 14th Amends.; Cal. Const., art. I, § 15; *United States v. Gaudin* (1995) 515 U.S. 506, 522-523; *Carella v. California* (1989) 491.U.S. 263, 265; *People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547.)

The Court of Appeal noted that under the accusatory pleading test, appellants were entitled to instructions on the lesser included offenses of

malice murder "if warranted by substantial evidence." (App. A, pp. 26-27.) The court, however, declined to address whether substantial evidence supported such instructions, and instead concluded any error in failing to so instruct was harmless. (App. A, pp. 26-29.) It found the jury's verdicts on the felony murder and robbery special circumstance "necessarily resolved factual issues related to lesser included offenses of malice murder against appellants." (App. A, p. 28.) In doing so it specifically disagreed with *People v. Campbell, supra*, 233 Cal.App.4th 148, wherein the Fourth District Court of Appeal held that jury verdicts finding a defendant guilty of felony murder with a robbery special circumstance do not render harmless under *Watson*, the trial court's failure to instruct on lesser included offenses of malice murder.[2] (App. A, p. 29.)

To support its holding the opinion relies on five cases: *People v. Elliot* (2005) 37 Cal.4th 453, 476; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086-1087; *People v. Earp* (1999) 20 Cal.4th 826, 886; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1328; and *People v. Horning* (2004) 34 Cal.4th 871, 906. (App. A pp. 28-29.) But unlike appellant's case, in each of these cases the jury was instructed on both premeditated murder and first degree felony murder. This is a critical factor because "when, as here, the jurors are not given the choice of convicting the defendant of premeditated

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[2] *People v. Watson* (1956) 46 Cal.2d 818.

murder, and are erroneously given only the choice of felony murder or acquittal, the decision to convict the defendant of murder essentially compels them, even if they harbor doubt as to guilt of the underlying felony, to further find the special circumstance allegation true." (*People v. Campbell, supra,* 233 Cal.App.4th at p. 168.)

This Court should grant review to secure uniformity of decision and determine whether the Court of Appeal properly rejected *Campbell* and correctly found the jury's verdicts precluded a finding of prejudice from failing to instruct on the lesser included offenses of malice murder.

2. Sufficiency of Evidence to Support a Robbery Special Circumstance for an Accomplice

In her appeal appellant also argued the true finding on the robbery special circumstance violates her federal and state constitutional rights to due process (U.S. Const., 5th, 14th Amends.; Cal. Const., art. 1, §§ 7, 15; *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Rowland* (1992) 4 Cal.4th 238, 269), and her state and federal constitutional protection against cruel and unusual punishment. (U.S. Const., 8th, 14th Amends.; Cal. Const. art. I, § 17; *Enmund v. Florida* (1982) 458 U.S. 782, 801; *People v. Dillon* (1983) 34 Cal.3d 441, 477-478), because there was an absence of substantial evidence to establish that she acted with reckless disregard to human life and that she was a major participant in the robbery or attempted robbery, as required by

section 190.2, subdivisions (c) and (d).

Appellant pointed out she had an intimate relationship with the victim Rosales; they were on friendly terms - illustrated by the fact appellant spent time with Rosales the night before the shooting and she was able to obtain drugs from him - often at a discount and sometimes for free; there was no evidence she was armed or knew or believed coappellants were armed at the time of the incident; and, the jury's not true findings on all of the firearm enhancements indicates it found that Rosales, and not appellant or coappellants, was armed with a firearm.

The Court of Appeal found there was sufficient evidence to support the true finding on the robbery special circumstance. (App. B, p. 8.) It noted appellant was identified as the individual who proposed robbing the victim; she informed coappellants the victim was a drug dealer who had previously been physically violent; she set up the robbery by calling the victim and arranging to meet him; she was identified as being present at the scene and pointing out the victim to the shooter; and she failed to call 911 or report the shooting to the police and instead spent the afternoon with the shooter. (*Ibid.*)

The problem with the court's analysis is its failure to recognize that even though it is not disputed appellant arranged a meeting with the victim, the evidence does not establish she did so for the purpose of setting up a robbery, because the evidence was also consistent with appellant arranging the meeting

to purchase drugs or obtain them for free or for a discount. The opinion also ignores the fact appellant called the victim to arrange a meeting *prior* to the time appellants took a "direct but ineffectual act" towards the commission of a robbery (§ 21a), and thus it cannot constitute evidence appellant was a major participant *in* a robbery or attempted robbery. Although Kalac testified appellant stated the target of the robbery was a drug dealer who was her ex-boyfriend who had physically abused her, the opinion does not acknowledge there was no evidence Rosales had ever been physically violent during the course of a drug sales transaction, or that he typically or ever carried a gun while conducting a drug transaction.

The Court of Appeal also ignored the fact there was no evidence appellant helped procure a weapon or knew coappellants or the victim was armed, no evidence she or her coappellants previously committed a violent offense, and no evidence appellant could have prevented the shooting. Although appellant did not call 911 or report the shooting to the police, the evidence does not establish she knew Rosales had been shot, and therefore her failure to seek assistance does not demonstrate that she acted with reckless disregard to human life. Appellant's role in the charged incident was even less than a get-away driver in a planned armed robbery because she did not assist the shooter in fleeing from the scene after the victim was shot and there was no evidence her two confederates were armed. (Cf. *People v. Banks* (2015) 61

Cal.4th 788, 805 ("*Banks*") [defendant getaway driver was not a major participant where there was no evidence he participated in planning the robbery or procuring weapons, that he or his two confederates had previously committed a violent crime, or that he could have prevented the shooting. "[P]articipation in an armed robbery, without more, does not involve 'engaging in criminal activities known to carry a grave risk of death." (*Ibid.*, citing *Tison v. Arizona* (1987) 481 U.S. 137, 157.)

This court should grant review and determine whether the Court of Appeal, in concluding there was sufficient evidence to support the robbery special circumstance, properly analyzed the issue and followed the parameters established in this Court's opinion in *Banks* and correctly concluded that sufficient evidence established appellant was a major participant and acted with reckless indifference to human life.

3. Admission of the Out-of-Court Statements of an Unavailable Percipient Witness as Spontaneous Declarations

Over defense objection, the trial court allowed the prosecution to introduce statements made by percipient witness Ruiz to Officer Vasquez as spontaneous statements pursuant to Evidence Code section 1240.[3] In order for an out-of-court statement of a witness to be admissible pursuant to Evidence

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[3] Ruiz's statement is set forth in section 4 of the Factual Background portion of the opinion. (App. A, p. 9.)

Code section 1240, three foundational requirements must be met: (1) there must have been an occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been made before there has been sufficient time to contrive and misrepresent; and (3) the utterance must relate to the circumstance of the occurrence preceding it. (*People v. Poggi* (1988) 45 Cal.3d 306, 318; *People v. Washington* (1969) 71 Cal.2d 1170, 1176.)

In her appeal appellant argued the trial court's ruling admitting Ruiz's statements was erroneous because the foundational requirements were not met as Ruiz had ample time to contrive and misrepresent what he perceived, and his statement went beyond the circumstances of the shooting and the trial court's in limine ruling. She further argued Ruiz's statement was testimonial in nature and because he did not testify at trial, the admission of his statements through the testimony of Officer Vasquez violated her state and federal constitutional rights to due process and to confront the witnesses against her. (*Crawford v. Washington* (2004) 541 U.S. 36, 59; U.S. Const., 5th, 6th, 14th Amends.; Cal. Const., art. I, §§ 7, 15.)

The Court of Appeal rejected appellant's claim and held the trial court properly determined Ruiz was under the influence of startling events at the time he spoke to Vasquez. (App. A, p. 16.). It found Ruiz was shot between 2:28 p.m. (when his cell phone was last used), and 2:36 p.m. (when 911 was

called), and Vasquez arrived at the home of Rosales "four minutes later, and promptly spoke with Ruiz." (App. B, p. 3.) It also noted, "Ruiz appeared to be in shock" and he "spoke very rapidly in broken sentences and with a high-pitched voice." (App. A, p. 16.)

The record does not support a finding that Vasquez "promptly spoke with Ruiz." Instead, the evidence establishes Vasquez was not the first officer to arrive at Rosales's home, and prior to speaking to Ruiz, Vasquez spent five minutes with the victim, the paramedics then responded, and another officer ascertained Ruiz was a possible witness. The discussion in the opinion essentially ignores the following critical facts: the shooting occurred at another location; Ruiz then made a two minute drive to Rosales's home; 911 was not immediately called upon arriving at the home; and Ruiz spoke to Rosales's sister and mother before speaking to Vasquez. (2RT 1202-1207, 1804-1805.) The opinion also fails to mention Ruiz had necessarily committed a felony by transporting a controlled substance at the time of the incident, and he had sufficient time and a motive to reflect and misrepresent what occurred in an effort to absolve himself of any suspicions related to the incident.

The Court of Appeal found Ruiz's statement explained why Ruiz had gone to the scene of the shooting and therefore that portion of his statement was properly admitted pursuant to Evidence Code section 1240. (App. A, p. 16.) But Ruiz's statements regarding what Rosales told him in the car on the

way to the scene where the shooting occurred did not narrate, describe or explain the shooting incident witnessed by Ruiz, and thus they constituted impermissible hearsay on hearsay and should have been excluded.

The opinion fails to mention the prosecution brought a motion in limine to introduce Ruiz's statement to Vasquez regarding the location of the shooting, but the court allowed the prosecution to introduce Ruiz's entire statement to the officer regarding what happened before, during, and immediately after the shooting incident, and at trial Vasquez's testimony regarding Ruiz's statements incorporated even more than what Ruiz told him during their initial contact.

The Court of Appeal also disagreed with appellant's assertion that Ruiz's statements were testimonial. It noted the high court in *Davis v. Washington* (2006) 547 U.S. 813, 822, found "'[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.'" (App. A, p. 17.) Here Vasquez's questioning of Ruiz *was* designed to investigate the circumstances of the crime, as he did not speak to Ruiz until after another

officer who was speaking to the victim's family members notified him Ruiz was a possible witness to the shooting, and Vasquez *admitted* he was questioning Ruiz to obtain information about the incident to include in his police report. (2RT 1207, 1212.)

Vasquez was a very inexperienced officer, as it was his first week on the job, and during the evidentiary hearing he testified he had obtained additional information from Ruiz after they went to the scene of the shooting, he included that information in his report, and his report did not indicate which portions of Ruiz's statements were made during his initial contact with the witness. (2RT 1213-1214.) When Vasquez spoke to Ruiz the victim was being treated by paramedics, and since the officers had been at the scene for five to ten minutes, they likely were already aware the shooting had occurred at a different location, and there was no ongoing emergency at Rosales's home. This court should grant review and determine if the Court of Appeal properly analyzed the issue and correctly concluded Ruiz's statements were properly admitted pursuant to Evidence Code section 1240, and that were nontestimonial statements.

4. The Court's Determination Kalac Was Not an Accomplice as a Matter of Law and His Testimony Was Sufficiently Corroborated

Kalac's testimony and extrajudicial statements were the only evidence presented during the prosecution's case with regard to its contention appellants

had planned a robbery of Rosales and were in the course of perpetrating a robbery at the time of the homicide. After Kalac asserted his Fifth Amendment privilege against self-incrimination, he was granted use immunity for all of his preliminary hearing testimony, his statements to the police, and subsequently his trial testimony. (2CT 87-90; 5RT 3933-3935, 4003, 4008-4009; 6RT 4413.) Although Kalac testified he did not intend to facilitate or participate in a robbery (6RT 4375), he also testified he expected to receive heroin from someone who was going to get robbed; he gave money to someone he thought was going to call someone to be robbed, and he was expecting to benefit from a crime that was going to be committed. (6RT 4413.)

On appeal appellant argued Kalac was an accomplice as a matter of law because he paid in advance for the proceeds (drugs) of a planned robbery (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90; *People v. McKunes* (1975) 51 Cal.App.3d 487, 493), and he was granted use immunity for his testimony and statements to the police. She further argued Kalac's testimony that appellants intended to commit a robbery was not corroborated, and because corroborating evidence "must relate to some act or fact which is an element of the crime" so that it directly connects the defendant to the charged offense without assistance from the accomplice's testimony (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Zapien* (1993) 4 Cal.4th 929, 982; *People v. Szeto* (1981) 29

Cal.3d 20, 27), and/or to the crime regarding the alleged special circumstance (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1176), the trial court erred by denying appellant's motion to dismiss pursuant to section 1118.1, and double jeopardy principles preclude a retrial (U.S. Const., 5th Amend.; *Burks v. United States* (1978) 437 U.S. 1, 17-18).

In a related issue appellant argued the trial court committed reversible error by failing to instruct the jury that Kalac was an accomplice as a matter of law (*People v. Williams* (2008) 43 Cal.4th 584, 636; *People v. Tobias* (2001) 25 Cal.4th 327, 331; *People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271), and by instead instructing the jury that corroboration of Kalac's testimony was only required if it found Kalac to be an accomplice. She further contended that because there was insufficient evidence to corroborate Kalac's testimony, reversal of her conviction is required.

The Court of Appeal found Kalac was not an accomplice as a matter of law. (App. A, pp. 20-22.) It pointed to Kalac's testimony he did not intend to facilitate or assist in the robbery; he unwillingly gave appellant his money; and he claimed he was present in the hotel room only to attend a birthday party. (App. A, p. 21.) The court also noted, "The fact that Kalac asserted his Fifth Amendment right to remain silent and was granted use immunity is not dispositive." (*Ibid.*, citing *People v. Stankewitz, supra*, 51 Cal.3d at p. 90.) The fatal flaw in the court's analysis is its failure to recognize that by giving

appellant money in exchange for a promise to receive heroin obtained in the robbery, Kalac was an accomplice as a matter of law. (*People v. McKunes, supra*, 51 Cal.App.3d at p. 493; *People v. Lima* (1944) 25 Cal.2d 573, 578-579.)

Appellant's contention that Kalac's testimony was not sufficiently corroborated was also rejected by the court. (App. A, pp. 22-24.) It specifically found Kalac's testimony was corroborated as to appellant by the following:

> Ruiz identified Estrada as the person who pointed at Rosales before he was shot. In a recorded statement, Estrada admitted using Jennifer's cell phone to call Rosales before he died. (See *People v. Gurule* (2002) 28 Cal.4th 557, 628 [accomplice's testimony may be corroborated by defendant's own statements].) She used a cell phone other than her own, but attempted to hide that fact from Rosales. In addition, Estrada moved from the Crystal Inn to the American Inn just before the murder, suggesting she was looking for a place of safety or a hideout following the robbery. . . . Finally, she was arrested with Gonzalez outside her house, hours after Rosales's death.

(App. A, p. 23.)

The problem with the court's analysis is that Kalac's testimony and extrajudicial statements had to be independently corroborated with regard to his assertion appellants had planned and were attempting to *perpetrate a robbery*. (*People v. Rodrigues, supra*, 8 Cal.4th at p. 1129; *People v. Hamilton, supra*, 48 Cal.3d at p. 1177.) There was, however, no other