SUPREME COURT NO. 234377

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Respondent,	Court of Appeal No. B255375
v.	
01) JORGE GONZALEZ, **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

3rd

APPELLANT ALFONSO GARCIA'S PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, SECOND DISTRICT, DIVISION FOUR, AFFIRMING THE JUDGMENT OF CONVICTION WITH DIRECTIONS

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant Alfonso Garcia respectfully petitions for review pursuant to California Rules of Court, rule 8.500. The Court of Appeal, Second

Appellate District, Division Four, filed its opinion on March 30, 2016, affirming with directions the judgment of the Los Angeles County Superior Court. A copy of the opinion is attached. By order dated April 28, 2016, the opinion was modified without change in the judgment and petitions for rehearing filed by appellants Garcia and Estrada were denied. A copy of that order is also attached.

ISSUES PRESENTED FOR REVIEW

1. When the jury finds a defendant guilty of felony murder and a robbery-murder special circumstance allegation to be true, is the trial court's failure to instruct on lesser included offenses to first degree murder ever prejudicial? (On this issue, the Court of Appeal's opinion expressly disagrees with *People v. Campbell* (2015) 233 Cal.App.4th 148.)

2. In a case like this one in which the information charged malice murder but the prosecution elected to proceed exclusively on a felony murder theory of the case, does the trial court have a duty to instruct the jury on lesser included offenses to first degree murder?

3. When a special circumstance allegation is predicated on the commission of a separate offense, does Penal Code section 1111 require corroboration of accomplice testimony specific to that offense?

4. Was the evidence in this case sufficient to sustain the special circumstance true finding, which required the jury to find that appellant Garcia was a major participant in the crime and acted with reckless indifference to human life, in light of this Court's recent decision in *People v. Banks* (2015) 61 Cal.4th 788?

NECESSITY FOR REVIEW

Pursuant to California Rules of Court, rule 8.500(b)(1), these issues merit review in order to secure uniformity of decision and to settle important questions of law.

At the close of evidence in this case, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants. The trial court instructed the jury on first degree felony-murder but not on any lesser included offenses to first degree murder. The Court of Appeal's opinion held that any failure to instruct on lesser included offenses was not prejudicial since the jury's return of guilty verdicts on felony murder

charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In so holding, the Court of Appeal's opinion expressly disagreed with the recent decision issued by Division Two of the Fourth District Court of Appeal in *People v. Campbell* (2015) 233 Cal.App.4th 148, which held that the failure to instruct the jury on lesser included offenses in a case like this one was prejudicial because it confronted the jury with an unwarranted all-or-nothing choice between the charged offense and acquittal. The Court of Appeal's disagreement with *Campbell* was outcome determinative, since the Court would presumably have reversed appellants' convictions had it followed *Campbell*. Review should therefore be granted to resolve this conflict in the published case law and secure uniformity of decision in this important area of the law.

The prosecution's case depended on Anthony Kalac, who testified that appellant Garcia and his co-defendants had set out to rob the victim when he was killed. Kalac established, through his own admissions during his trial testimony, that he was an accomplice as a matter of law whose testimony required corroboration pursuant to Penal Code section 1111. Because the non-accomplice evidence at trial provided no corroboration of

Kalac's testimony regarding the alleged plan to rob the victim, Garcia's robbery-murder special circumstance true finding was barred by Penal Code section 1111 as a matter of law. Moreover, because the elements of the felony-murder charge coincided with the elements of the special circumstance allegation insofar as both required the jury to find that defendants were attempting to rob the victim when he was killed, Garcia's conviction was also barred by Penal Code section 1111 as a matter of law.

The Court of Appeal's opinion held to the contrary that Kalac's testimony was sufficiently corroborated. Appellant Garcia's entire argument was premised on the rule first announced by this Court in *People v. Hamilton* (1989) 48 Cal.3d 1142 and subsequently reaffirmed in *People v. Davis* (2005) 36 Cal.4th 510 that, when a special circumstance allegation requires proof of some other crime, that crime cannot be proved by the uncorroborated testimony of an accomplice. The Court of Appeal's opinion, however, never mentioned or even cited either *Hamilton* or *Davis* and analyzed the evidence without regard to whether it specifically corroborated Kalac's claim that appellants were planning to rob the victim. Review should therefore be granted to clarify whether Penal Code section 1111, as interpreted by this Court in *Hamilton* and *Davis*, requires specific

corroboration of the commission of a separate offense included in a special circumstance allegation.

Review should also be granted to determine whether the evidence in this case was sufficient to sustain the special circumstance true finding, which required the jury to find that appellant Garcia was a major participant in the crime and acted with reckless indifference to human life, in light of this Court's recent decision in *People v. Banks* (2015) 61 Cal.4th 788.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

For the purpose of this Petition for Review, appellant Garcia adopts the factual and procedural history set forth in the opinion of the Court of Appeal (Slip opn. at pp. 3-14), as modified by order dated April 28, 2016, denying the petitions for rehearing. Additional facts relevant to this petition are incorporated herein.

ARGUMENT

I. REVIEW SHOULD BE GRANTED TO RESOLVE A SPLIT IN PUBLISHED AUTHORITY AS TO WHETHER, WHEN THE JURY FINDS A DEFENDANT GUILTY OF FELONY MURDER AND A ROBBERY-MURDER SPECIAL CIRCUMSTANCE ALLEGATION TO BE TRUE, THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES TO FIRST DEGREE MURDER IS EVER PREJUDICIAL

At the close of evidence in this case, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants. The trial court instructed the jury on first degree felony-murder, but it did not instruct on any lesser included offenses to murder. Here, under the accusatory pleading test, the allegation of murder charged in count one, which alleged not merely that Garcia killed in the course of a robbery but that he did so maliciously, on its face gave rise to possible lesser included offenses of second degree murder and manslaughter. While the prosecution was free to try the case on a theory of felony murder, Garcia and his co-defendants were nonetheless legally entitled under the accusatory pleading test to jury instructions on these lesser included offenses, provided there was substantial evidence to support the commission of the lesser offenses but not the greater.

Evidence was presented that Garcia and his co-defendants arranged to meet the victim, Rosales, for the purpose of obtaining drugs. Whether defendants intended to pay for the drugs or to try to steal them was disputed at trial. Substantial evidence supported three possible findings: (1) that defendants intended to purchase the drugs, (2) that they intended to steal the drugs from Rosales without resorting to force or fear (*i.e.*, grand theft from the person), or (3) that they intended to rob Rosales.

Neither of the first two possibilities involved offense conduct inherently dangerous enough to be a predicate for either first or second degree felony-murder. Substantial evidence thus warranted instructions on second degree implied malice murder and involuntary manslaughter, and the superior court's failure to instruct the jury on these lesser included offenses was, therefore, error and violated Garcia's state and federal constitutional rights to have the jury determine every material issue of fact presented by the evidence.

Given the prosecution's decision to proceed exclusively on a first degree felony-murder theory, an accurate determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict. Although the prosecution's key witness, Anthony

Kalac, testified that defendants planned to "rob" the victim, his use of the word "rob" turned out to include conduct that did not involve the use of force or fear and therefore would not satisfy the elements of robbery. In addition, there was no evidence that any of the defendants were armed, and the jury's rejection of the gun-related charge and allegations show that the jury believed that the victim was shot with his own gun, further casting into doubt the prosecution's claim that defendants intended to use force or fear.

The Court of Appeal's opinion held that the trial court's failure to instruct the jury on lesser included offenses to first degree murder was not prejudicial since the jury's return of guilty verdicts on felony murder charges and true findings on the robbery special circumstance allegations necessarily resolved factual issues related to lesser included offenses of malice murder against appellants. In so holding, the Court of Appeal's opinion expressly disagreed with *People v. Campbell, supra,* 233 Cal.App.4th 148, which held that the failure to instruct the jury on lesser included offenses in a case like this one was prejudicial because it confronted the jury with an unwarranted all-or-nothing choice between the charged offense and acquittal.

The Court of Appeal's disagreement with *Campbell* was outcome

determinative, since the Court would presumably have reversed appellants' convictions had it followed *Campbell*. Review should therefore be granted to resolve this conflict in the published case law and secure uniformity of decision in this important area of the law.

A. The Trial Court's Sua Sponte Duty To Instruct the Jury On Lesser Included Offenses Under the Accusatory Pleading Test When Such Instructions Are Warranted By Substantial Evidence

As this Court recently observed: "'California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.' [Citation.] '[T]he rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits."'" (*People v. Smith* (2013) 57 Cal.4th 232, 239-

240.)

Courts "have applied two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

When applying the accusatory pleading test, "[t]he trial court need only examine the accusatory pleading." (*Smith, supra*, 57 Cal.4th at p. 244.) "[S]o long as the prosecution has chosen to allege a way of committing the greater offense that necessarily subsumes a lesser offense, and so long as there is substantial evidence that the defendant committed the lesser offense without also committing the greater, the trial court must instruct on the lesser included offense." (*Ibid.*)

B. Substantial Evidence Warranted Instructions On Second Degree Murder and Involuntary Manslaughter

Although, at the close of evidence, the prosecution elected to proceed exclusively on a felony-murder theory as to all three defendants (8R.T. 5766), count one of the second amended information charged appellant Garcia with murder "with malice aforethought" pursuant to Penal Code section 187, subdivision (a). (3C.T. 457.) "While the prosecutor was free to try the case on a theory of felony murder, defendants were nonetheless legally entitled under the accusatory pleading test to jury instructions on lesser included offenses of first degree malice murder, provided there is substantial evidence to support the commission of the lesser offenses but not the greater." (*People v. Campbell, supra,* 233 Cal.App.4th at p. 160; see *People v. Banks* (2014) 59 Cal.4th 1113, 1160.)

Here, under the accusatory pleading test, the allegation of murder charged in count one, which alleged not merely that Garcia killed in the course of a robbery but that he did so maliciously, on its face gave rise to possible lesser included offenses of second degree murder and manslaughter. (See *People v. Taylor* (2010) 48 Cal.4th 574, 623 [second degree murder is a lesser included offense of first degree murder]; *People v. Thomas* (2012) 53 Cal.4th 771, 813 ["Voluntary and involuntary

manslaughter are lesser included offenses of murder"].) Accordingly, the superior court was required to instruct the jury on second degree murder and manslaughter so long as substantial evidence would have supported either finding. (See *Banks, supra,* 59 Cal.4th at p. 1160.)

Evidence was presented that Garcia and his co-defendants arranged to meet the victim, Rosales, for the purpose of obtaining drugs. Whether defendants intended to pay for the drugs or to try to steal them was disputed at trial. Gonzalez testified that he intended to pay for the drugs and robbery was never even discussed. (8R.T. 5472, 5475-5477, 5486-5487, 5711.) Kalac, on the other hand, testified that defendants planned to "come up" on Rosales. (6R.T. 4261-4262, 4264-4268, 4270-4273.)

The prosecution's felony-murder theory hinged on defendants' alleged use of this expression. Although Kalac testified that "to come up on" meant "to rob" (6R.T. 4262-4263), he also testified that he himself had "robbed" drug dealers in the past by snatching the drugs out of their hand and running (7R.T. 4872-4875), which showed that his own personal definition of "robbery" included theft without the use of force or fear (7R.T. 4872-4873.) Where the element of force or fear is absent, a taking from the person is grand theft rather than robbery. (*People v. Morales* (1975) 49

Cal.App.3d 134, 139.) More specifically, what Kalac described in his testimony regarding his own previous misdeeds amounted to larceny by trick, not robbery. (See *People v. Traster* (2003) 111 Cal.App.4th 1377, 1387; *People v. Ashley* (1952) 42 Cal.2d 246, 258; Pen. Code, § 484.)

In contrast to robbery, which is one of the predicate offenses for first degree felony-murder listed in Penal Code section 189, grand theft from the person has long been held to be a felony not inherently dangerous to life and therefore does not rise to the level of a predicate offense for either first or second degree felony-murder. (*Morales, supra,* 49 Cal.App.3d at p. 143; *People v. Phillips* (1966) 64 Cal.2d 574, 580-583.)

At a minimum, then, substantial evidence warranted instructions on second degree implied malice murder. Based on the evidence, a reasonable jury could have found that, in accompanying Gonzalez to the meeting with Rosales for the purpose of either buying or stealing drugs, Garcia was performing an activity whose natural consequences were dangerous to life, that he was aware of the danger, and that he acted with conscious disregard for life. Substantial evidence also warranted instructions on involuntary manslaughter. There was substantial evidence that the shooting occurred during an attempted drug possession or an attempted grand theft from the

person --offenses that are, at worst, non-inherently-dangerous felonies. A reasonable jury could have found that Garcia, in going along with the plan, was acting with criminal negligence but without implied malice.

The trial court's sua sponte duty to instruct the jury on lesser included offenses is based on the defendant's state and federal constitutional rights to have the jury determine every material issue of fact presented by the evidence. (*People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547; Cal. Const., art. I, § 15.) Although the United States Supreme Court has acknowledged a right to jury instructions on lesser included offenses in state capital proceedings (*Beck v. Alabama* (1980) 447 U.S. 625, 638 [100 S.Ct. 2382, 65 L.Ed 392]), it has not clearly extended that right in other contexts. (*People v. Birks* (1998) 19 Cal.4th 108, 120-121.) Hence, the law is not yet settled regarding constitutional mandates for such an instruction. (See *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 818-819, overruled on another ground in *Tolbert v. Page* (9th Cir. 1999) (*en banc*) 182 F.3d 677, 685.)

Regardless, the Sixth Amendment to the federal constitution guarantees a defendant the right to have a jury determine, beyond a reasonable doubt, his or her guilt of every element of a charged offense.

(*United States v. Gaudin* (1995) 515 U.S. 506, 522-523 [115 S.Ct. 2310, 132 L.Ed.2d 444].) In order to make those findings, the jury must be fully and adequately instructed on the elements of the crime. Instructions that omit or inadequately describe an element of the offense violate the federal constitution. (*Rose v. Clark* (1986) 478 U.S. 570, 579-581 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *Carella v. California* (1989) 491 U.S. 263, 265 [109 S.Ct. 2419, 105 L.Ed.2d 218].)

C. Consistent With the Reasoning and Holding of the Fourth District Court of Appeal's Recent Decision in People v. Campbell, *the Superior Court's Error Was Prejudicial*

The superior court's failure to instruct the jury on the lesser included offenses warranted by substantial evidence was prejudicial. To be sure, the verdicts suggest that the jury believed that defendants were perpetrating a crime when the victim was killed, which explains why all three were found guilty of felony-murder despite the jury's rejection of the gun-related charge and allegations. But given the prosecution's decision to proceed exclusively on a first degree felony-murder theory, an accurate determination of whether defendants specifically intended robbery or some lesser offense was critical to the jury's verdict, and the superior court's failure to instruct the jury on lesser included offenses prevented the jury

from undertaking an informed evaluation of Kalac's claim that defendants set out to "rob" the victim.

At a minimum, Kalac's misleading use of the word "robbery" and the lack of weaponry gave rise to a reasonable doubt as to whether Garcia and his co-defendants harbored the specific intent to use force or fear to obtain the drugs from Rosales. In view of the evidence, the jury should have been given the option of finding that Garcia and his co-defendants specifically intended grand theft from the person, which would have required the jury to acquit Garcia of felony-murder but empowered it to find him guilty of involuntary manslaughter.[1] Had it been properly instructed and given the option, it seems reasonably likely that the jury would have found Garcia guilty --at most-- of the lesser included offense of involuntary manslaughter and acquitted him of first degree felony-murder.

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[1] In addition, had the jury been given the option of considering the lesser included offenses supported by substantial evidence, it could also properly have considered potential defenses of accident and self-defense not available against a charge of felony-murder. (See Pen. Code, § 195; CALCRIM No. 510 [Excusable Homicide: Accident]; CALCRIM No. 3404 [Accident (Pen. Code, § 195)]; *People v. Villanueva* (2008) 169 Cal.App.4th 41, 54 [homicide is excusable when committed by accident while defendant was lawfully acting in self-defense without any unlawful intent]; Pen. Code, § 197; CALCRIM No. 505 [Justifiable Homicide: Self-Defense or Defense of Another]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1081 [homicide is justified when committed in self-defense].)

The superior court's failure to instruct the jury on involuntary manslaughter foreclosed that option, however, and put the jury in an agonizing position. As the United States Supreme Court has observed: "True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction --in this context or any other-- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged 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, 212-13 [93 S.Ct. 1993, 1997-98, 36 L.Ed.2d 844]; accord, *People v. Eid* (2014) 59 Cal.4th 650, 657 ["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"]; *People v. Campbell, supra,* 233 Cal.App.4th at p. 168, fn. 12 ["Although the law ordinarily presumes that jurors follow the court's instructions, the law requiring instructions on lesser included offenses is based, in part, on the

possibility that they will not; that is, when faced with an unwarranted all-or-nothing choice between the charged offense and acquittal, jurors may convict a defendant of the charged offense even though they harbor 'reasonable doubt of guilt of the charged offense . . . solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense.'"].)

Having chosen the only option available other than outright acquittal, the jury was left with little choice when it came to the special circumstance allegation. Since the elements of the special circumstance allegation were substantially similar to the elements of the underlying murder charge insofar as both required the jury to find that defendants were attempting to rob the victim when he was killed, the jury faced the same dilemma it confronted in being forced to choose between conviction of the only available option or outright acquittal. The jury could hardly be expected to find defendants guilty of felony-murder based on the predicate offense of robbery only to find that the special circumstance allegation that the murder was committed while defendants were perpetrating a robbery was *not true*.