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Supreme Court of California
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No. S189373

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LESTER HARLAND WILSON,

Appellant.

CAPITAL CASE

Superior Court
No. RIF079858

AUTOMATIC APPEAL

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE
SUPERIOR COURT OF RIVERSIDE COUNTY

THE HONORABLE ELISABETH SICHEL

SUPPLEMENTAL OPENING BRIEF

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THE HONORABLE ELISABETH SICHEL

SUPPLEMENTAL OPENING BRIEF

Argument

I

This court should vacate the murder conviction because it was based on a theory that has been rejected by the legislature.

Introduction[1]

Appellant Lester Harland Wilson was convicted of first-degree murder in 2000. At his trial, the jury was instructed to convict appellant of first-degree murder if the killing was (1) with malice aforethought, or, (2) whether intentional, unintentional, or accidental, occurred during the commission of kidnapping. (CALJIC 8.21; 8.27.)

In 2019, the legislature modified the definition of felony murder when it passed S.B. 1437. This Court, in *People v. Strong* (2022) 13 Cal.5th 698, explained the law prior to S.B. 1437:

> Under the felony-murder doctrine as it existed at the time of Strong's trial [in 2014], "when a appellant or an accomplice kill[ed] someone during the commission, or attempted commission, of an inherently dangerous felony," the appellant could be found guilty of the crime of murder, without any showing of "an intent to kill, or even implied malice, but merely an intent to commit the underlying felony."

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[1] All statutory references will be to the Penal Code unless otherwise specified. All transcript citations will be to the reporter's transcript of the trial that ended with a death judgment on June 29, 2000. That transcript is part of the record in S089623.

Id. at 704, quoting *People v. Gonzalez* (2012) 54 Cal.4th 643, 654. Under S.B. 1437, death in the course of an enumerated felony would no longer expose a appellant to first-degree murder liability unless they (1) were the actual killer, or, (2) with the intent to kill, aided and abetted the killing, or (3) were a major participant in the felony who acted with reckless indifference to human life.

The jury that convicted appellant was not instructed on the modified elements of felony murder, and was not instructed to specify whether the conviction rested on felony murder or malice aforethought. The conviction of first-degree murder must be reversed and remanded for a new trial at which the jury will have complete instructions on the definition of felony murder in the considered understanding of the Legislature.

S.B. 1437, in addition to modifying Penal Code section 188 and 189 to implement a more just balancing of blameworthiness and punishment, modified Penal Code section 1172.6[2] to provide a

[2] At that time, the statutory authorization for the petition was Penal Code section 1170.95. The statute was modified by S.B. 775 (effective January 1, 2022), and

remedy for appellants whose convictions predated this readjustment. The mechanism of filing a petition for resentencing clearly indicates that the new law was intended to be retroactive. In addition, the Legislature has passed, and the governor has signed, Senate Bill 775, which makes the amendments to section 188 applicable to cases not yet final on appeal. (See Penal Code section 1172.6, subd. (g), effective Jan. 1, 2022.) Appellant has a right to raise this issue as part of his direct appeal – of which this briefing is a part.

Appellants, like Mr. Wilson, are entitled to receive the benefits of ameliorative changes in the law if those changes become effective before their convictions are final. (*In re Estrada* (1965) 63 Cal.2d 740.) The change to section 1172.6 allowing appellants to challenge their murder convictions on direct appeal is an ameliorative change in the law. Appellant's conviction is not final.

This is not a claim that the Superior Court and Court of

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renumbered by A.B. 200 (effective June 1, 2022).

Appeal erred. Those courts correctly found that the 1172.6 petition should be dismissed without prejudice, as neither court had jurisdiction to make any ruling that would undermine this Court's jurisdiction to decide the automatic appeal. Thus, there is no occasion for this Court to consider any legal statement or conclusion of either party or either court. The claim here is simply that a jury instruction was inadequate to ensure that the verdict would comport with justice and proportionality.

Respondent may argue that the claim of instructional error is not properly before the Court on this appeal, because the error occurred in the guilt phase. This would be an inappropriately constricted view. The retrial of this matter concerned the sentence to be imposed for first-degree murder. The verdict of first-degree murder rests on an incorrect and inadequate instruction, and is thus unconstitutional. Appellant's challenge to that verdict is properly raised in this Court at this time.

Statement of the Case[3]

Count one of an indictment charged Wilson and four other persons[4] with first-degree murder with no specified theory. The count included special circumstances of kidnapping and torture, and an allegation of personal use of a firearm.

The trial testimony described kidnapping, torture, and rape. The torture victim was carried out of the appellant's residence rolled in a carpet and placed in appellant's car. Appellant and his wife (co-defendant Barbara Phillips) released the other kidnap victims and drove away. That night, their car broke down on the freeway and was towed. The next morning, in the vicinity of the breakdown, the body of the murder victim was found in a drainage ditch adjacent to the freeway, with numerous

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[3] A detailed retelling of the facts of this case is included in Appellant's Opening Brief. This section of this brief will recount sufficient testimonial and procedural facts to provide a context for the legal argument.

[4] Two appellants pleaded guilty to lesser charges but did not testify. Appellant Norman Culpepper was tried separately, convicted of murder, and sentenced to LWOP. Barbara Phillips (appellant's wife) was tried together with appellant, before separate juries. She was convicted of murder and sentenced to LWOP. Both Culpepper and Phillips filed 1172.6 petitions which were denied, and the denials affirmed by the Court of Appeals. Both petitions are pending in the Court of Appeals following remand by the Supreme Court for reconsideration in light of *Strong* and *Lewis*.

gunshot wounds to the head. There was no testimony about events between leaving the residence and discovery of the body.

The jury was instructed on two theories of first-degree murder: intentional premeditated murder, and felony murder in the course of kidnapping. The jury was also instructed on special circumstances of murder in the course of kidnapping (Penal Code section 190.2(a)(17)(b)) and felony murder in the course of torture (Penal Code section 190.2(a)(18)).

The jury returned a verdict of guilty of first-degree murder with true findings on both specials and the personal use of a firearm. A penalty trial ended in a death sentence.

During penalty deliberations, a Black juror was dismissed. On appeal (S089623), this Court reversed the penalty verdict for improper dismissal of the juror, and affirmed the guilt verdict. *People v. Lester Wilson* (2008) 44 Cal.4th 758, 187 P.3d 1041, 1045 (*Wilson I*). Shortly afterward, a state habeas petition was denied on the guilt claims, and the penalty claims were dismissed as moot.

Defense counsel from the first trial was appointed to represent appellant at the penalty retrial. The appellant objected, on the record, to the appointment, claiming a conflict. The retrial ended in another sentence of death. Counsel on the first appeal was appointed to appeal the second death verdict.

The AOB, filed on March 24, 2014, raised three issues in addition to an omnibus challenge to the death penalty statute. Arguments I and II were that the penalty retrial was barred by double jeopardy and the Eighth Amendment, respectively. Argument III was that the trial judge erred by not inquiring into appellant's claim of a conflict with appointed counsel. Respondent's brief was filed on December 26, 2014, and the Reply was filed on October 22, 2015. A supplemental brief, filed on March 8, 2018, requested a remand for reconsideration of the restitution fine.

Appellant filed a pro se Penal Code section 1172.6 petition in January, 2019. Counsel was appointed, and appeared in Riverside County Superior Court with no apparent knowledge of

the case. The prosecutor said, "The original conviction was affirmed in 2008 and [*sic*] published opinion with a finding that evidence was overwhelming that the appellant beat, tortured, and killed [Uwe Durbin]." Defense counsel said that he had "no reason to doubt what [the prosecutor] said based upon my reading of the case." (RT May 24, 2019, at page 21.) The judge dismissed the petition without prejudice.

New counsel, appointed for the appeal, argued that the Superior Court judge had no jurisdiction to issue the order of dismissal. The Court of Appeal affirmed the dismissal. It agreed that the Superior Court would not have had jurisdiction to *grant* the petition, but the order of *dismissal* had no effect on the judgment on appeal to the Supreme Court.

Penal Code section 1172.6 sets out the requirements for relief under Penal Code section 1437. In relevant part:

(a)(1) A complaint, information of dictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder …

(2) The petitioner was convicted of murder …

(3) The petitioner could not presently be convicted of murder … because of changes to [Penal Code] Section 188 or 189 …

Appellant was charged in Riverside County Indictment RIF079868 with murder, with malice aforethought. The indictment included two special circumstances (kidnapping, P.C. 190.2(a)(17)(b), and torture, P.C. 190.2(a)(18)) and an allegation of personal use of a firearm.

The jury received one instruction covering two theories of first-degree murder: malice aforethought and during the commission of kidnapping (CALJIC 8.10), and another specific instruction solely on felony-murder during the commission of kidnapping.

The jury returned a general verdict of guilty of murder, without a specified theory (CT 3199) and true findings as to the special circumstances of kidnapping and torture.

Penal Code section 189(d), provides that a participant in a specified felony is liable for murder for a death during the commission of the offense only if one of the following is proven: "(1) The person was

the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life …" Appellant can show that none of these three elements are present in his case.

> - He was not the actual killer. There was no percipient or physical (forensic) evidence of the circumstances of the fatal shooting, and thus no direct evidence of the actual killer.
>
> - He did not aid or abet the actual killer with the intent to kill. In the absence of direct evidence of the homicidal act, any intent to kill could only be inferred circumstantially from the testimony of Michael Durbin and L.R. The jury was not instructed on the quantum or quality of evidence required to ascribed liability for homicide from participation in a felony.
>
> - The jury in this case was not instructed, and did not find, that he was a major participant in the underlying felony and acted with reckless indifference to human life.

Because the trial took place before the decisions in *People v. Banks* (2015) 61 Cal 4th 788, and *People v. Clark* (2016) 63 Cal.4th 522, the jury received no instruction to illustrate the meanings of "major

participant" and "reckless indifference" with respect to the elements of the felony murder special circumstances. Granted, the language to implement the principles of those cases is not mandatory even in contemporary trials. This Court's recent decision in *People v. Strong*, however, clearly states that the changes of S.B. 1437 are so wide-reaching over an entire murder case that there can be no confidence that a jury would reach the same guilty verdict if instructed on the operative elements of first-degree felony murder.

There are two places in the 2008 opinion where this Court seems to assert appellant was the "actual killer" of Uwe Durbin. In those circumstances, the relief offered by S.B. 1437 would not be available. Respectfully, however, the matter cannot be reliably decided on that basis. In neither instance was this conclusion necessary to resolution of the issue at hand.

In *Wilson I*,187 P.3d at 1070, the Court found an error in the written instruction on the torture special to be harmless. In the harmless error analysis, the Court said "the evidence was overwhelming that appellant beat, tortured *and killed* Uwe Durbin."

(Emphasis added.) In fact, there is no direct evidence of who was responsible for the victim's ultimate demise. The evidence of torture was enough to support the finding of harmless error in the torture instruction, and it was unnecessary to speculate further as to what the jury might have thought about who shot Durbin in the head.

Elsewhere in its 2008 opinion, addressing a claim of error in the principal/accomplice instruction, this Court said that it was "confident," due to the jury's true finding under PC 12022.5(a) (that the appellant had personally used a firearm in the commission of the offense), that the jury had found that appellant was the direct perpetrator of the murder.

> Because the jury sustained the section 12022.5 allegation, it necessarily found beyond a reasonable doubt that appellant personally used a firearm during the commission of the murder. Accordingly, we are confident the jury unanimously found appellant was the direct perpetrator of the killing. Any possible instructional error regarding unanimity was thus harmless under any standard.

187 P. 3d at 1069.

To be clear, the jury sustained the 12022.5(a) allegation as to count one. The verdict on that count was equally consistent with guilt of felony murder, which would not compel a conclusion that the jury

found appellant to be the actual killer. The elements of felony murder included the kidnapping, for which there was clear evidence that appellant used a firearm. There is no reason to be "confident" that the jury also made a finding for which there was no direct evidence – that appellant personally used a firearm to fatally shoot the victim.

The record demonstrates that appellant was prejudiced by the deficiency in the definition of felony murder. Where the jury has been presented with a legally incorrect theory, reversal is required "absent a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Chun* (2009) 45 Cal.4th 1172, 1203; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) "When the theory is legally erroneous – i.e., of a kind the jury is not equipped to detect – a higher standard must be met for the error to be found harmless. 'These different tests reflect the view that jurors are "well equipped" to sort factually valid from invalid theories, but ill equipped to sort legally valid from invalid theories.'" (*People v. Aledamat* (2019) 8 Cal.5th 1, 7.) Error is prejudicial unless this Court "can conclude 'beyond a reasonable doubt' either that the jury necessarily relied on a valid legal

theory [citations] or that the element omitted or misdescribed 'was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" (*Aledamat*, supra, 8 Cal.5th at p. 17 (conc. & dis. opn. of Cuéllar, J.), italics omitted.)

The evidence that appellant committed intentional murder is scant. There was no forensic evidence anywhere near the body to implicate him – no DNA, no fingerprints or footprints. The difficult decision as to intentional murder contrasted with the alternative theory. In closing argument, the prosecutor described felony murder as the theory of first-degree murder that is "very simple:"

> Now, how do you find the Appellant guilty of first-degree murder? Well, there are two different legal theories under which you can get to that end result of first-degree murder, *one of which is very simple*. It's that felony-murder rule that the judge told you about back in jury selection when she used an example about a burglary:
>
> Somebody goes into a house with a gun, and then the other person is sitting out there in the car, the get-away driver, who knows that the burglar goes in. And nobody is supposed to get shot, nobody is supposed to get into trouble, but because they're doing this residential burglary, which is a felony, and somebody accidently dies, a homeowner surprised them, "boom," he gets killed. That's felony-murder.

The easy way. First-degree. If you find they intended to commit the felony like in the example that the judge gave you, the burglary, they're guilty of first-degree murder.

Now, what is the felony in this case? I'm going to show you the instruction on felony-murder just to kind of reiterate just a bit.

Again, "The unlawful killing of a human being, whether intentional, unintentional, or even accidental, which occurs during the commission or attempted commission of the crime of -- and in this case kidnapping -- is murder of the first-degree when the perpetrator had the specific intent to commit that crime."

"The specific intent to commit kidnapping and the commission or attempted commission of kidnapping must be proved beyond a reasonable doubt."

Now, yesterday the judge read to you the definition of kidnapping, and I'm not going to bore you with the law on kidnapping. This is a textbook case of kidnapping. It's so obvious that the Appellant was kidnapped -- excuse me, that the victim was kidnapped. But what I do want to show you is another instruction that says, "the crime of kidnapping is not completed until the victim is released."

Now, what does that mean? Well, under the law, kidnapping is what we call a continuous crime. The crime doesn't end at that point in time when the victim's freedom is restrained. It goes on and goes on and goes on until the victim's freedom is no longer restrained.

Well, in this case, from the time Uwe Durbin's freedom was restrained by the Appellant, up until he was dead, he was in the course of a kidnapping. So clearly this is a murder in the course of a kidnapping. The kidnapping was intentional. We have a first-degree felony-murder.

(RT 2696-2698; emphasis added)

When the prosecutor made this argument in 2000, felony murder was indeed "very simple." If the defendant was involved in a crime, and someone died, the defendant was guilty of first-degree murder and facing a sentence of death or life without parole. It would have been much less simple for the jury to apply the elements of felony murder that the legislature has determined are necessary for just adjudication of a murder charge.

Jurors were not given instructions requiring them to find, for a verdict of first-degree murder, that appellant had the intent to kill or was a major participant acting with reckless indifference to human life. No evidence shows his murder conviction was based on a valid ground. The prosecution recommended the now-invalid felony murder instruction, calling it "the easy way" to first-degree murder. (RT 2696.)

Conclusion

Because there is no basis on this record for believing appellant's murder conviction was based on a valid theory, it must be reversed.[5]

[5] If this Court finds that this claim is procedurally barred for any reason, appellant requests that it not make any factual findings or legal rulings as alternative grounds for the decision. When this appeal is final, appellant will file a new 1172.6 petition in Superior Court. That court may consider any prior opinions in this matter for

s/Patrick Morgan Ford
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Attorney for Appellant
LESTER HARLAND WILSON

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their procedural history, and not for any factual findings or legal conclusions.

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 3,716 words, as determined by the word count feature of the program used to produce the brief.

Dated: January 17, 2023 Respectfully submitted,

s/Patrick Morgan Ford
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