S265798

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN RE TYREE FERRELL,	)	No.
	)	
Petitioner,	)	Court of Appeal Case
	)	No. B303028
	)	
	)	Superior Court (Los
On Habeas Corpus.	)	Angeles) BA212763
	)	
_____	)	

PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

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By appointment of the
California Appellate Project

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INTRODUCTION

In 1999, when petitioner Tyree Ferrell was 18 years old, he was charged with the shooting death of his boyhood friend Lawrence Rawlings. Because he was indigent he was given appointed counsel; the defense theory at trial was that the shooting was an accident -- defendant was simply trying to fire a warning shot to break up a fist fight between Rawlings and members of a neighboring gang. The gun accidentally went off a second time, killing Mr. Rawlings.

Jurors were instructed on first degree premeditated murder. They were also instructed they could convict of second degree felony murder if they found an unlawful killing occurred during Mr. Ferrell's discharge of a firearm in a grossly negligent manner -- a violation of Penal Code section 246.3. Relying on this instruction during closing argument, the prosecutor told jurors they could convict of second degree murder even if they agreed

with the defense theory that the shooting was an accident.

Jurors rejected the prosecutor's theory of premeditated murder, unanimously acquitting of first degree murder. But jurors convicted of second degree murder. The court sentenced Mr. Ferrell to 40 years-to-life in state prison -- 15 years to life for the second degree murder conviction and an additional 25 years-to-life for a gun use enhancement found true by the jury.

On appeal, Mr. Ferrell's appointed counsel contended reversal was required because second degree felony murder could not properly be premised on a violation of section 246.3. In its 2004 opinion affirming the conviction the appellate court rejected the claim, noting that this Court had just issued its opinion in *People v. Robertson* (2004) 34 Cal.4th 156, explicitly rejecting the very same claim.

It turns out, however, that Mr. Ferrell was right. Five years after deciding *Robertson*, this Court overruled *Robertson* and held that second degree felony murder could *not* be premised on a violation of section 246.3 after all. (*People v. Chun* (2009) 45 Cal.4th 1172, 1200.)

In December of 2018, Mr. Ferrell's appointed appellate lawyer came across an electronic copy of the opening brief he filed with the appellate court on Mr. Ferrell's behalf on appeal in 2003. He immediately wrote to Mr. Ferrell informing him of the *Chun* decision, offering to prepare and file a habeas petition on his behalf if Mr. Ferrell could send any portions of the appellate record back to counsel. Mr. Ferrell did so the next month, and

within two months Mr. Ferrell filed a Petition for Writ of Habeas Corpus with the appellate court seeking relief. Four days later the appellate court transferred the petition to the Superior Court for resolution, and eight months after that the Superior Court summarily denied relief.

Within a month, petitioner timely filed a new petition with the appellate court which granted an Order to Show Cause. In briefing to the appellate court the state properly conceded that "in light of *Chun* the jury was given a now-legally unauthorized theory of second degree murder as a basis to convict . . . ." (*In re Ferrell*, B303028, Return to Petition for Writ of Habeas Corpus at p. 13, attached as Exhibit I.) The state recognized that "the prosecution partly tried petitioner under a now-erroneous theory of murder . . . ." (*Id*. at p. 14.) The appellate court ultimately agreed that "the jury was improperly given a felony-murder instruction." (*In re Ferrell*, B303028, Opinion at p. 4, attached as Exhibit J.)

But the appellate court went on to find that the jury's true finding on a separate section 12022.53(d) allegation rendered this error harmless. (Exhibit J at pp. 5-7.) The court accurately noted that in addition to the invalid second degree felony murder theory, jurors were given two other theories of second degree murder -- (1) malice murder without premeditation and (2) implied malice murder. (Exhibit J at 4.) The court reasoned that "in finding the section 12022.53, subdivision (d) allegation to be true, there is no reasonable doubt that the jury found Ferrell acted with at least implied malice." (Exhibit J at p. 6.)

As discussed more fully below, the appellate court's interpretation of

section 12022.53, subdivision (d) was unprecedented. Prior to the unpublished decision in this case, as the appellate court itself noted, the case law held precisely to the contrary -- a finding under section 12022.53, subdivision (d) did *not* require or imply a finding of malice. (*See*, *e.g.*, *People v. Offley* (2020) 48 Cal.App.5th 588, 598.) But the appellate court here "disgree[d] with *Offley*" and on that basis denied relief.

This Petition for Writ of Habeas Corpus follows. Petitioner is wrongfully convicted. As the published decision in *Offley* properly concludes, a § 12022.53, subdivision (d) finding does *not* involve the question of malice. This is especially true here where, in a nutshell, the trial record showed that petitioner fired two shots; although he intentionally fired a first shot in the air, the second shot -- which hit Mr. Rawlings and was fatal -- was accidental. In light of the § 12022.53 instructions actually given to the jurors, and this Court's decision in *People v. Bland* (2002) 28 Cal.4th 313, the true finding on the § 12022.53(d) allegation did not establish that the second shot was fired either intentionally or with malice. Instead, the finding represented exactly what the defense conceded at trial: (1) petitioner fired the gun intentionally (the first shot) and (2) petitioner proximately caused the victim's death (the second shot). As the *Offley* court explicitly concluded, the § 12022.53 allegation here did not require jurors to find "that the defendant acted either with the intent to kill or with conscious disregard to life, it does not establish that the defendant acted with malice aforethought." (48 Cal.App.5th at p. 598.)

This Court should grant an Order to Show Cause. The defendant in this case -- a black teenager 18 years of age when the crime occurred -- has

served enough time for a crime that has not existed in California since 2009.

JURISDICTIONAL ALLEGATIONS

I.

Petitioner is unlawfully confined at the Calipatria State Prison by the warden and the director of the California Department of Corrections pursuant to a judgment of the Superior Court for Los Angeles County in *People v. Ferrell*, No. BA212763.

II.

Petitioner was convicted of second degree murder along with a gun use enhancement under section 12022.53. Jurors were instructed they could convict petitioner of second degree felony murder based on a predicate felony of violating Penal Code section 246.3 -- willful discharge of a firearm in a grossly negligent manner. Jurors convicted of second degree murder and found the section 12022.53 allegation true; the trial court sentenced petitioner to 15 years-to-life for the murder charge adding an additional 25 years for the gun use enhancement.

III.

Petitioner appealed his conviction to the state appellate court. On September 27, 2004, the appellate court affirmed the murder conviction rejecting petitioner's argument that "second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner." (*People v. Ferrell* (2004) 2004 WL 2153630 at * 1, attached as Exhibit A.) Petitioner filed a timely Petition for Review in this Court which was denied on December 22, 2004 with Justices Kennard

and Moreno voting for review. (*People v. Ferrell*, S129037, Order of December 22, 2004, attached as Exhibit B.)

IV.

Petitioner has pursued this issue in two prior habeas petitions: (1) a March 4, 2019 petition filed in the appellate court, attached as Exhibit H, which was transferred to the Superior Court and denied n November 18, 2019, and (2) a December 16, 2019 petition filed in the appellate court, attached as Exhibit K, and denied on October 22, 2020. Aside from those two petitions, no other petitions for writ of habeas corpus have been filed in state court. Petitioner has no adequate remedy at law for presentation of these claims because his conviction and sentence were previously affirmed on appeal.

V.

The Court of Appeal granted an Order To Show Cause, but ultimately denied relief by finding that any error was harmless. (*In re Ferrell*, B303028, Opinion of October 22, 2020, attached as Exhibit J.)

VI.

The claim presented in this Petition is properly cognizable on habeas corpus, because it is based on an intervening change in substantive California homicide law -- this Court's opinion in *People v. Chun* (2009) 45 Cal.4th 1172. *Chun* applies retroactively to cases such as this in which the appeal was final before 2009. (*See*, *e.g.*, *In re Hansen* (2014) 227 Cal.App.4th 906; *In re Lucero* (2011) 200 Cal.App.4th 38, 46.)

CLAIM FOR RELIEF

VII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. At trial, jurors were presented with a theory of second-degree murder which does not exist under state law. Jurors were instructed they could rely on petitioner's violation of Penal Code section 246.3 as the predicate for a second degree murder conviction. As more fully set out in his accompanying Memorandum of Points and Authorities, petitioner's conviction of second-degree murder is legally unauthorized and violates state and federal due process because this precise theory of second degree felony murder has been squarely repudiated as the basis for murder liability. Because jurors were given an invalid theory of second degree murder, and the record does not establish beyond a reasonable doubt that the jury convicted him of that offense on any valid alternative basis, petitioner is entitled to a writ of habeas corpus. The following facts now known to petitioner support this claim for relief:

A. The state charged petitioner Tyree Ferrell with the July 12, 1999 murder of his boyhood friend Lawrence Rawlings. (1 CT 48.) The state added an allegation that Mr. Ferrell used a firearm in violation of sections 12022.53, subdivision (d). (1 CT 48.) At the time of the charged shooting Mr. Ferrell was 18 years old. (2 RT 282.)

B. Mr. Ferrell pled not guilty and had a jury trial in May of 2003.

C. Prior to trial, Mr. Ferrell voluntarily waived his *Miranda* rights and spoke with police, telling them what happened on July 12, 1999. (1 CT 110-116; 2 RT 260-261, 264.) At trial, this pre-trial statement to police was introduced into evidence. (RT 258.)

D. Tyree Ferrell and Lawrence Rawlings were boyhood friends and both were members of a local gang known as AFC. (1 CT 114-115.) On July 12, 1999 AFC arranged for a fist fight with another gang – 40 Piru – to resolve a gambling dispute. (1 CT 110; 2 RT 264.) Mr. Rawlings was involved in the fight. (1 CT 114-115.) During the fight, Mr. Ferrell saw that Lawrence was in trouble; to stop the fight he (Mr. Ferrell) then fired a gun into the air. (1 CT111-112; 2 RT 260, 264.) When he brought his arm down, the gun accidentally went off a second time. (1 CT 111-115; 2 RT 264-265.)

E. Realizing that Lawrence had been shot, Tyree dropped the gun, and ran toward Lawrence who was lying on the ground, and held his friend in his arms as he was dying. (1 CT 111-115; 2 RT 264-265.)

F. Eyewitness Henry Keith testified, confirming Mr. Ferrell's account. Mr. Keith was also an AFC member and was fighting along side Mr. Rawlings that day. (2 RT 327-328.) A member of 40 Piru had Mr. Rawlings on his knees. (2 RT 334-335.) Mr. Keith heard a gunshot. (2 RT 340, 356, 359.) He saw Mr. Ferrell holding his arm straight up and firing into the air. (2 RT 341-342.) As Mr. Ferrell's arm came down, the gun went off again. (2 RT 343.) Mr. Keith saw that Mr. Rawlings had been shot. (2 RT 344.) Mr. Ferrell ran to Mr. Rawlings, leaned over him and said "I didn't mean it." (2 RT 345.)

G. The state called two eyewitnesses -- Cussondra Davis (Mr. Rawlings' girlfriend) and Latesha Rawlings (Mr. Rawlings' cousin). (1 RT 90, 140.) They confirmed there was a fist fight between AFC and 40 Piru on July 12, 1999 and that Mr. Ferrell, Mr. Rawlings and Mr. Keith were all involved. (1 RT 94, 96, 103, 136, 147, 151, 153, 157.) They confirmed that Mr. Ferrell dropped his gun immediately after the second shot. (1 RT 102, 153, 168.) Latesha Rawlings confirmed that Mr. Ferrell then ran to Mr. Rawlings' side, exclaiming that "he was sorry [and] he didn't mean to do it." (1 RT 153, 171.) But neither witness recalled Mr. Ferrell pointing his gun in the air for ths first shot; instead, they recalled he held his gun "sideways" and towards

the crowd of people. (1 RT 98-100, 151.)

H. Jurors were instructed on first degree premeditated murder. (3 RT 431.) Jurors were instructed on three different theories of second degree murder: (1) an unlawful killing with express malice but no premeditation, (2) an unlawful killing with implied malice and (3) an unlawful killing "whether intentional, unintentional or accidental" occurring during the willful discharge of a firearm with gross negligence in violation of Penal Code section 246.3. (3 RT 432-435.)

I. In closing argument, the prosecutor first urged jurors to convict of first-degree murder. (3 RT 382.) Alternatively, the prosecutor urged jurors to convict of second-degree murder. The prosecutor told jurors they could rely on the felony murder theory they had been given:

> There is second-degree felony murder, which can get you a conviction for second-degree murder. This is an abbreviation of the much more detailed instruction that her honor will give you. You need to find there was an unlawful killing which could have been intentional, unintentional and even accidental, during the commission of a felony, in this case, discharging a firearm. (3 RT 382.)

> If you find that the defendant discharged a firearm with the specific intent to discharge that firearm, even if the killing was unintentional or accidental, that too is second-degree murder. (3 RT 383.)

J. During deliberations jurors asked the court for "a definition of unlawful killing as it relates to murder." (3 RT 462.)

K. The jury unanimously acquitted of first-degree murder. (3 RT 470.) Jurors rendered a general verdict finding Mr. Ferrell guilty of second-degree murder. (3 RT 471.) The general verdict did not specify which of the three theories of second-degree murder had been relied on. (3 RT 471.)

L. On appeal, Mr. Ferrell contended that reversal was required because "second degree felony murder cannot be predicated on a violation of section 246.3, unlawful discharge of a firearm." (*People v. Ferrell*, *supra*, 2004 WL 2153630 at * 1.) The appellate court correctly recognized that if jurors relied on the felony murder theory, they would have been relieved of the obligation to find either express or implied malice. (*People v. Ferrell*, *supra*, 2004 WL 2153630 at * 4.) Bound by this Court's then-recent decision in *People v. Robertson*, (2004) 34 Cal.4th 156 the appellate court rejected Mr. Ferrell's argument,. Holding that "section

246.3 can be the predicate offense to felony murder." (*Id*. at * 1.)

M. Since the appellate court affirmed the conviction, the law has changed. In *People v. Chun* (2009) 45 Cal.4th 1172 the Supreme Court overruled *Robertson* and held that a felony murder conviction could *not* be premised on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner. Consequently, to be liable for second degree murder, the jury here would have had to find beyond a reasonable doubt that defendant harbored either express or implied malice. This was the precise factual inquiry the appellate court recognized that jurors did not have to make in this case precisely because of the felony murder option. (*People v. Ferrell*, *supra*, 2004 WL 2153630 at * 4.)

N. Because this Court has now held that second-degree felony murder may not be premised on a violation of section 246.3, the submission of that theory to the jury here was unauthorized under California law.

O. The submission of felony murder to this jury also violated petitioner's Fourteenth Amendment right to due process and his Sixth Amendment right to jury trial by allowing a second-degree murder conviction on an unauthorized theory of liability and by relieving the

jurors of finding all the elements of the authorized bases for second-degree murder.

P. As this Court has explained, "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Q. The erroneous submission of a felony-murder theory cannot be found harmless in this case. Nothing in the record indicates jurors convicted petitioner of second-degree murder on a valid ground. None of the verdicts or enhancement findings required jurors to find express or implied malice as required for second-degree murder liability outside the context of felony murder.

S. Because the record does not establish beyond a reasonable doubt that the jury convicted petitioner on a legally authorized ground, the conviction of second-degree murder cannot stand. This Court should

issue an Order to Show Cause.

FACTS RELEVANT TO TIMELINESS

VIII.

The Petition for Writ of Habeas Corpus filed in the appellate court in March of 2019, and transferred to the Superior Court, was timely. The following facts now known to petitioner support this claim:

A. Petitioner incorporates by reference each of the factual allegations in Paragraphs I-VII above, as well as each factual allegation in the accompanying Memorandum of Points and Authorities.

B. Petitioner was indigent at trial and was represented by the Public Defender's Officer. (1 CT 53.) After petitioner was convicted, he appealed his conviction. Petitioner was indigent on appeal and was represented by appointed counsel. (*People v. Ferrell*, B168679, Docket Sheet, attached as Exhibit C.)

C. The appellate court affirmed the conviction in 2004. Petitioner has been incarcerated in state prison since his sentencing and remains indigent. (Declaration of Tyree Ferrell ("Ferrell Declaration"), para. 1, attached as Exhibit D.)

D. *Chun* was decided in June of 2009. On December 28,

2018 the attorney who represented petitioner in his 2004 appeal happened to come across an electronic version of the opening brief he had prepared in petitioner's case. (Declaration of Cliff Gardner ("Gardner Declaration") at para 2, attached as Exhibit E.) Counsel noted that the issue raised in that brief was the same issue which the Supreme Court had decided in *Chun*, years after the appeal in petitioner's case was final. (Gardner Declaration at para. 2.) That same day counsel wrote petitioner a letter, suggesting that he might have an issue under *Chun* and offering to prepare a Petition for Writ of Habeas Corpus pro bono if petitioner could send him a copy of his trial record. (Gardner Declaration at para 2.) Petitioner responded in January 2019, sending a copy of those portions of the record he still had. (Gardner Declaration at para. 3; Ferrell Declaration at para. 2-4.) Relying entirely on volunteer counsel, petitioner filed a petition with the Court of Appeal as soon as practicable. (Ferrell Declaration at para. 4.) The original Petition for Writ of Habeas Corpus was filed in the appellate court in March of 2019 – less than three months after petitioner had been informed of the *Chun* decision.

E. Until receiving counsel's letter of December 28, 2018, petitioner was unaware of the *Chun* decision and unaware of its potential impact on his case. At the

time of petitioner was incarcerated for this offense he had a 10th grade education. He had and has no training in the law, in appellate procedure or in habeas procedure. Until hearing from former appellate counsel in January 2019, petitioner was unaware there was favorable case law undercutting the basis for his conviction. (Ferrell Declaration at para. 4.)

F. Any delay in counsel's filing this petition is counsel's alone and cannot be attributed to Mr. Ferrell. (Gardner Declaration at para. 3.)

G. There is no right to state-appointed habeas counsel in California. Petitioner is indigent and does not currently have appointed counsel. Petitioner filed his petition in the appellate court within weeks of becoming aware of the *Chiu* opinion and its applicability to his case, obtaining the necessary case materials, and obtaining the volunteer assistance of counsel in preparing this petition. (*See In re Lucero*, *supra*, 200 Cal.App.4th at 44-45; *In re Wilson* (2015) 233 Cal.App.4th 544.)

H. In its briefing to the appellate court after the Order to Show Cause issued, the state did not contend the March 2019 habeas petition was untimely. As the appellate court itself noted, "the People do not

challenge the timeliness of the petition." (Exhibit J at p. 4.)

I. After the Superior Court summarily denied Mr. Ferrell's petition on November 18, 2019, he filed a new Petition for Writ of Habeas Corpus with the appellate court within 30 days, on December 16, 2019. After the appellate court denied Mr. Ferrell's petition on October 22, 2020, he filed this new Petition for Writ of Habeas Corpus with this Court on November 25, 2020. These petitions are timely. (*Robinson v Lewis* (2020) 9 Cal.5th 883 [subsequent petition raising the same claim in a higher court is timely if filed within 120 days of lower court ruling].)

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the transcripts and court records in *People v. Ferrell*, B168679;

2. Order respondent to file and serve a certified copy of the record on appeal and issue an Order to Show Cause requiring the state to show cause why petitioner is not entitled to the relief sought;

3. Find this petition states a prima facie case for relief and issue an Order to Show Cause returnable before this Court;

4. Order any additional relief appropriate in the interests of justice.

DATE: November 25, 2020

Respectfully submitted,

/s/Cliff Gardner
Cliff Gardner
Attorney for Petitioner

VERIFICATION

I, Cliff Gardner, declare that I am an attorney for petitioner Tyree Ferrell. I make this verification for petitioner because of his absence from the county where I have my office. I have read the attached petition and believe the matters stated therein to be true. On that basis, I allege they are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25th day of November, 2020, at Berkeley, California.

/s/Cliff Gardner
Cliff Gardner

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MEMORANDUM OF POINTS AND

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STATEMENT OF THE CASE

On January 2, 2002, the Los Angeles County district attorney filed a two-count information against Tyree Ferrell. (1 CT 48.)[1] At the time petitioner was arrested for this offense (and until today) petitioner had a 10th grade education, no training in the law, in appellate procedure or in habeas procedure. (Ferrell Declaration at para. 4.)

Count one charged Mr. Ferrell with a July 12, 1999, murder in violation of Penal Code section 187. (1 CT 48.) This count added an allegation that Mr. Ferrell used a firearm in violation of sections 12022.53, subdivision (d). (CT 48.) Count two charged Mr. Ferrell with a June 25, 1999, assault in violation of section 245, subdivision (a)(2). (1 CT 49.) Mr. Ferrell pled not guilty. (CT 51.)

Opening statements began on May 19, 2003. (1 CT 101.) The state rested its case-in-chief on May 22, 2003. (1 CT 117.) The court instructed jurors they could convict Mr. Ferrell of second degree felony murder if they found the killing occurred during a violation of section 246.3, the willful discharge of a firearm in a grossly negligent manner. (3 RT 434-435.)

The jury began its deliberations on May 27, 2003. (1 CT 121.) On May 29, 2003, jurors convicted Mr. Ferrell of second degree murder and found the firearm use allegations true. (3 RT 471.) They also found him

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1. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript. For the Court's convenience, Mr. Ferrell has attached a copy of the record as Exhibit F.

guilty in connection with the count two assault. (3 RT 472.)

The trial court imposed a 15 year-to-life term on the count one charge, then added a 25 year-to-life term for the firearm allegation. (3 RT 479.) The court then added a concurrent upper term of four years on the count two offense. (3 RT 479.)

On appeal, defendant contended that reversal of the murder charge was required because second degree felony murder could not properly rest on a violation of section 246.3. In an unpublished opinion dated September 27, 2004, the appellate court recognized that "Ferrell contends second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner." (*People v. Ferrell* (2004) 2004 WL 2153630, at *1, attached as Exhibit A.) The Court rejected that claim, noting that "after the parties briefed this appeal" this Court decided *People v. Robertson* (2004) 34 Cal.4th 156 and "recently decided section 246.3 can be the predicate offense to felony murder." (*Ibid*.)

In *People v. Chun* (2009) 45 Cal.4th 1172 this Court specifically overruled *Robertson* and held that a violation of section 246.3 could *not* serve as the predicate for a second degree felony murder prosecution. (*Id*. at p. 1200.) Until hearing about *Chun* from his former appellate counsel in January 2019, petitioner was unaware that *Robertson* had been overruled and there was now directly favorable case law undercutting the basis for his conviction. (Ferrell Declaration at para. 4.)

With the assistance of volunteer counsel, petitioner filed a Petition for Writ of Habeas Corpus with the appellate court less then three months later – in March of 2019. The appellate court transferred the case to the Superior Court. In November 2019, and without appointing counsel, the Superior Court summarily denied the petition, ruling that (1) it was untimely and (2) there was no prima facie case for relief. (Exhibit G).

Mr. Ferrell filed a new petition with the appellate court. (Exhibit K.) The appellate court granted an Order to Show Cause. On October 22, 2020 the appellate court denied relief, finding error under *Chun* but ruling that the error was harmless. (Exhibit J.) This Petition for Writ of Habeas Corpus follows.

STATEMENT OF FACTS

Tyree Ferrell was charged with a July 1999 homicide. At the prosecutor's request, jurors were given a second-degree felony-murder theory of culpability premised on a felony violation of Penal Code section 246.3 -- willful discharge of a firearm. Because a felony violation of section 246.3 cannot serve as the predicate for a second degree felony murder conviction, habeas relief is proper.

A. The July 12, 1999 Homicide.

In July of 1999, Tyree Ferrell was 18 years old. (2 RT 282.) He lived with his mother in Los Angeles on 41st Place. (1 RT 41, 49.) Across the street lived Ms. Ferrell's childhood friend, Valerie Golden along with her son Lawrence Rawlings. (1 RT 48, 76-77.)

Ms. Ferrell and Ms. Golden grew up together in the neighborhood. (1 RT 67.) They went to school together. (1 RT 67.) After they had children they lived across the street from one another. (1 RT 41, 49.) They lived across the street from one another until Ms. Ferrell died. (1 RT 67-68.) At that point, and because Tyree's father had also died, Tyree moved in with his grandmother. (1 CT 227; 1 RT 67-68.)

Tyree and Lawrence grew up together as well. (1 RT 31.) Because Lawrence was four years old than Tyree, he acted as an older brother and always "looked out for" Tyree. (1 RT 31.) According to Ms. Golden, Lawrence and Tyree were the "best of friends." (1 RT 52.) Tyree was

"very respectful" and always treated Ms. Golden well. (1 RT 23.)

Yet on July 12, 1999, Tyree was charged with murder in the shooting death of Lawrence Rawlings, his childhood friend and big brother figure. Because Tyree did not deny the shooting, the only real issue for the jury to decide was his mental state at the time of the shooting. On this issue, the parties presented vastly different theories.

The state's theory was that the shooting constituted a premeditated and malicious killing -- first degree murder. The defense theory was entirely different: Tyree never intended to shoot his childhood friend. On July 12, 1999, when Tyree saw Lawrence getting beat up during a gang brawl he took out a gun and fired a shot into the air to stop the fighting. (2 RT 264, 341-342.) A second shot accidentally went off; instead of breaking up the fight, Lawrence was killed and the state charged Tyree with murder. (1 CT 48.)

Prior to trial, Tyree voluntarily waived his *Miranda* rights and spoke with police, telling them what happened on July 12, 1999. (1 CT 110-116; 2 RT 260-261, 264.) On that day, two local gangs -- "All For Crime" ("AFC") and 40 Piru -- arranged a fist-fight to settle a gambling dispute. (1 CT 110; 2 RT 264.) Both Tyree and Lawrence belonged to AFC. (1 CT 114-115.) During the fight, Tyree realized that Lawrence was in trouble; the 40 Piru gang member fighting Lawrence was "getting the best of him." (1 CT 111-112.) To stop the fight and make sure Lawrence was alright, Tyree fired a gun into the air. (1 CT 111-112; 2 RT 260, 264.) When he brought his arm down, the gun accidentally went off a second time. (1 CT

111-115; 2 RT 264-265.) Mr. Ferrell immediately dropped the gun, and ran toward Lawrence who had been shot and was lying on the ground. (1 CT 111-115; 2 RT 264-265.) Tyree held Lawrence in his arms as he was dying. (1 CT 111-115; 2 RT 264.)

At trial, this pre-trial statement to police was introduced into evidence. (2 RT 258.) To corroborate this statement, the defense called eyewitness Henry Keith to testify. (2 RT 326.) Mr. Keith was also a member of AFC and was there at the fight between AFC and 40 Piru on July 12, 1999. (2 RT 327-328.) Mr. Keith testified that at the time of the shooting he was fighting along side Mr. Ferrell and Mr. Rawlings. (2 RT 327-328.) Mr. Keith confirmed that a member of 40 Piru had Mr. Rawlings on his knees. (2 RT 334-335.) Shortly after and as the fighting continued, Mr. Keith and Mr. Rawlings were side by side when Mr. Keith heard a gunshot. (2 RT 340, 356, 359.) According to Mr. Keith, when he looked over he saw Mr. Ferrell holding his arm straight up and firing into the air. (2 RT 341-342.) As Mr. Ferrell's arm came down, the gun went off again. (2 RT 343.) Mr. Keith looked over at Mr. Rawlings and realized he had been shot. (2RT 344.) Mr. Ferrell ran to Mr. Rawlings, leaned over him and said "I didn't mean it." (2 RT 345.)

The state's theory of the case was that this was not an accident, but that Mr. Ferrell had intentionally fired his gun toward the crowd and killed his friend Lawrence. (3 RT 379-385.) In support of its theory, the state called Mr. Rawlings's girlfriend -- Cussondra Davis -- and his cousin -- Latesha Rawlings. (1 RT 90, 140.) In large part these witnesses corroborated Mr. Ferrell's own statements to police, confirming that (1) on

July 12, 1999, there was a fight between AFC and 40 Piru, (2) Mr. Ferrell, Mr. Rawlings and Mr. Keith were all involved, (3) Mr. Ferrell dropped the gun immediately after the second shot and (4) after the second shot, Mr. Ferrell ran to Mr. Rawlings' side, exclaiming that "he was sorry [and] he didn't mean to do it." (1 RT 94, 96, 102-103, 136, 147, 151, 153, 157, 168, 171.)

But the version of events given by the state's witnesses differed in one important respect from the version given by the defense witnesses. Neither Cussondra nor Latesha saw Mr. Ferrell point his gun in the air; they recalled him holding his gun "sideways" and pointing it towards the crowd of people. (1 RT 98-100, 151.) In other words, the parties disputed whether the shot that actually killed Mr Rawlings -- the second shot -- was intentionally fired into the crowd (as the state argued) or fired accidentally (as the defense contended).

B. The Theories Of Culpability Given To The Jury And The Prosecutor's Argument.

In accord with the prosecutor's theory, the jury was instructed on first degree premeditated murder. (3 RT 431-432.) As discussed above, however, the jury ultimately rejected the prosecutor's theory, unanimously acquitting of first degree murder. (3 RT 470.)

In connection with second degree murder, and as the prosecutor explained to the jury during closing arguments, there were three different theories on which jurors had been instructed. (3 RT 380.) The first theory

was murder with express malice -- that is, murder with an intent to kill but no premeditation. (3 RT 381.) The second theory was implied malice murder -- that is, murder without an intent to kill but with a disregard for human life, such as by intentionally firing into a crowd. (3 RT 382.) The third theory was felony murder, that is, "an unintentional, and even accidental [killing] during the commission of a felony, in this case, discharging a firearm." (3 RT 382.)

Jurors were instructed on each of these theories. (3 RT 432 [malice murder with no premeditation]; 434 [implied malice murder]; 429, 434-435 [felony murder].) Under the felony murder theory, jurors were told they could find Mr. Ferrell guilty of felony murder by finding (1) he willfully discharged a firearm and (2) a killing resulted that was neither justifiable nor excusable. (3 RT 429, 434-435.) In accord with current law, the prosecutor told jurors they were not required to agree under which theory Mr. Ferrell was guilty, so long as each juror agreed he was guilty under one of the three theories. (3 RT 380, 384, 393, 409, 412.) The prosecutor told jurors they could convict of second degree murder under a felony-murder theory even if they accepted defendant's testimony that the shooting was accidental. (3 RT 382, 383.) The jury convicted Mr. Ferrell of second degree murder without specifying the theory on which it relied. (3 RT 471.)

ARGUMENT

I. BECAUSE JURORS WERE GIVEN A THEORY OF CULPABILITY THAT NO LONGER EXISTS UNDER STATE LAW, AN ORDER TO SHOW CAUSE SHOULD ISSUE.

As noted above, jurors were instructed they could convict of second degree murder by relying on a violation of section 246.3 as the predicate felony. (3 RT 429, 434-435.) The prosecutor relied on this theory in her closing argument. (See, *e.g.*, 3 RT 382, 383.) The prosecutor told jurors they could convict of second degree felony murder even if they believed that the shooting was accidental. (RT 382, 383.)

There is no longer any dispute as to whether the trial court erred. In its Return to Petition for Writ of Habeas Corpus the state admitted that instructional error had occurred under *People v. Chun*, *supra*, 45 Cal.4th 1172. The state conceded that jurors in petitioner's trial were given "a now-legally unauthorized theory of second degree murder as a basis to convict him" and that "the prosecution partly tried petitioner under a now-erroneous theory of murder." (Exhibit I at pp. 13, 14.) And the appellate court agreed "the jury was improperly given a felony-murder instruction." (Exhibit J at p. 4.) The appellate court nevertheless denied relief by finding that (1) jurors were also instructed on second degree express or implied malice murder and (2) "in finding the section 12022.53, subdivision (d) allegation to be true, there is no reasonable doubt that the jury found Ferrell acted with at least implied malice." (Exhibit J at 6.)

This conclusion cannot be squared with the case law. In *People v. Offley* (2020) 48 Cal.App.5th 588 the Court of Appeal explicitly rejected this view and held that "an enhancement under section 12022.53, subdivision (d) does not require that the defendant acted either with the intent to kill or with conscious disregard to life, it does not establish that the defendant acted with malice aforethought." (*Id*. at p. 598.) *Offley* recognized that express malice requires an intent to kill, while implied malice requires examination of the defendant's subjective mental state to see if he acted in "conscious disregard for the danger to life that the [defendant's] act poses." (*Ibid*.) In contrast, a finding under section 12022.53, subdivision (d) is "a general intent enhancement, and does not require the prosecution to prove that the defendant harbored a particular mental state as to the victim's injury or death." (*Id*. at p. 598. *Accord People v. Lucero* (2016) 246 CalApp.4th 750, 759-760.)

Nor can the appellate court's conclusion be squared with the instructions which were actually given in this case on the §12022.53, subdivision (d) allegation. Jurors were instructed that two elements were necessary to find the allegation true; they had to find "defendant [1] intentionally and personally discharged a firearm and [2] proximately caused death to a person during the commission of the crime charged." (1 CT 190, emphasis added.) The court did not give any definition of what constituted "proximate cause." (*See People v. Bland* (2002) 28 Cal.4th 313, 334 [absent instruction defining proximate cause "[i]t is reasonably likely that when jurors hear the term 'proximate cause' they may misunderstand its meaning."].) *Nothing in these instructions advised jurors that a finding of malice – either express or implied – was required to find*

true the § 12022.53, subdivision (d) allegation.

Given the facts and instructions in this case, there are three different factual theories on which jurors could have relied to find the § 12022.53, subdivision (d) enhancement true. First, jurors could have found that the first shot (in the air) was intentional (which the defense at all points conceded) and that in firing the second shot (even accidentally as he claimed), petitioner proximately caused Mr. Rawlings' death (which was also conceded). Second, jurors could have found the first shot intentional and --- without being given any definition of proximate cause -- they could reasonably have believed that this first shot set in motion a series of events which proximately caused Mr. Rawlings' death. Third, jurors could have found that the second shot was intentional and it was this intentional shot that caused Mr. Rawlings' death.

The first two of these scenarios permitted by the trial court's instructions does not reflect a finding of malice (either express or implied) on the jury's part. The third might. The first problem with the appellate court's rationale here is that it assumes that the focus of the jury's § 12022.53, subdivision (d) finding was the second shot. It assumes the third of these scenarios is what happened. The second problem with the appellate court's rationale is that it assumes the jury had been told that malice was a part of the § 12022.53 calculus.

But it was not. To be sure, had jurors been instructed they could not find the § 12022.53 allegation true absent a finding that defendant's second shot -- the shot which actually killed Mr. Rawlings -- was intentional and

done with express or implied malice, then the state's argument would have merit. But as noted above, this is *not* what jurors were instructed they had to find; the instructions do not focus on the second shot at all and (as *Offley* recognized) they say nothing about malice. The instructions simply asked jurors to find whether the defendant intentionally discharged a firearm and whether he proximately caused the victim's death. None of which was disputed. Under the instructions as given, there was no linkage between the two findings -- the instructions never asked jurors to determine whether the shot that actually caused Mr. Rawlings' death was intentionally fired or was fired with malice. Put another way, and just as in *Offley*, because the instructions actually given to the jurors here did "not require that [jurors find] the defendant acted either with the intent to kill or with conscious disregard to life, [the section 12022.53 finding] does not establish that the defendant acted with malice aforethought." (48 Cal.App.5th at p. 598.)

Indeed, this was the precise teaching of this Court's decision in *People v. Bland*, *supra*, 28 Cal.4th 313 and its progeny. In *Bland*, the Court held that pursuant to section 12022.53, subdivision (d), a jury may properly find that a defendant "proximately caused" death under section 12022.53(d) even where the defendant did not personally cause the death:

> The jury, properly instructed, reasonably found that defendant did personally discharge a firearm. The statute states nothing else that defendant must personally do. Proximately causing and personally inflicting harm are two different things. The Legislature is aware of the difference. When it wants to require personal infliction, it says so. (E.g., Pen. Code, § 12022.7, subd. (a) [imposing a sentence enhancement on a person who "personally inflicts great bodily injury"].) When it

> wants to require something else, such as proximate causation, it says so, as in section 12022.53(d).

(28 Cal.4th at p. 336.) As one appellate court has recognized, pursuant to *Bland* a jury may find a § 12022.53, subdivision (d) allegation true even where the intentional discharge of a firearm does not actually cause injury. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1150. *See also Accord People v. Rodriguez* (1999) 69 Cal.App.4th 341, 351 ["Proximately causing an injury is clearly different from personally inflicting an injury."].)

In sum, the appellate court denied relief here by reading far too much into the jury's true finding on the § 12022.53 enhancement. As the published case law makes clear, the § 12022.53 finding does not mean jurors unanimously found that the second (fatal) shot was intentional or that Mr. Ferrell harbored malice. To the contrary, all that jurors here were asked to find was whether defendant intentionally fired a gun and whether he proximately caused Mr. Rawlings' death. *None of which was even disputed in this case.* As *Bland* properly recognized, § 12022.53(d) does not by its terms require linkage between the two. And as both *Lucero* and *Offley* recognized in turn, a § 12022.53, subdivision (d) finding simply does not establish the presence of malice. An Order to Show Cause should issue.

CONCLUSION

Petitioner was 18 years old when he accidentally shot his best friend. Using what the state has conceded is an erroneous legal theory, the prosecutor told jurors they could convict him of second degree felony murder even if they believed the shooting was an accident.

The appellate court avoided a grant of relief solely by relying on the jury's § 12022.53, subdivision (d) finding. As the appellate court itself recognized, that reliance cannot be squared with *People v. Offley*, *supra*, 48 Cal.Ap.5th 588. It cannot be squared with *People v. Lucero*, *supra*, 246 Cal.App.4th 750. It cannot be squared with *People v. Bland*, *supra*, 28 Cal.4th 313. And it cannot be squared with the instructions actually given in this case.

Most of all, it cannot be squared with fundamental fairness. If indeed this was an accidental shooting, as the prosecutor herself recognized jurors could find, then petitioner is serving time for a crime that has not existed in California since the *Chun* decision in 2009. An Order to Show

Cause should issue.

DATED: November 25, 2020 Respectfully submitted,

CLIFF GARDNER

By: /s/Cliff Gardner
Cliff Gardner
Attorney for Petitioner[2]

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2. When an appellate court denies a Petition for Writ of Habeas corpus there are two procedural vehicles available to seek relief in this Court: a Petition for Review and a new Petition for Writ of Habeas Corpus. (*In re Reed* (1983) 33 Cal.3d 913, 918, n.2.) If the appellate court has published its decision denying the writ, the preferred method is by a Petition for Review. (*See In re Michael E.* (1975) 15 Cal.3d 183, 193, n.15.)

Here, although the appellate court denied relief by departing from the published decisions in *Offley* and *Lucero*, it did not publish the decision. (*But see* California Rule of Court 8.1105, subdivision (c)(5) [providing that an opinion should be published if it "addresses or creates an apparent conflict in the law."].) Because the appellate court's decision is unpublished, it may technically not meet the criteria for seeking relief via a Petition for Review. (*See*, *e.g.*, *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 6 [granting review to resolve a split among published decisions]; *ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 184 [same]; *Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 507 [same]; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1319; [same]; *People v. Camarella* (1991) 54 Cal.3d 592, 595 [same]; *People v. Bouzas* (1991) 53 Cal.3d 467, 469 [same].)

But this should not mean the case is beyond this Court's reach. While error correction may not the purview of a Petition for Review, it certainly is the purview of a Petition for Writ of Habeas Corpus. Accordingly, that is the route petitioner has pursued here.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.384(a) and 8.204(c), I certify that the accompanying Petition for Writ of Habeas Corpus is 1.5 spaced, that a 13 point proportional font was used, and that there are 3,655 words in the petition and the supporting memorandum of points and authorities is 1.5 spaced, that a 13 point proportional font was used, and that there are 3,415 words in the memorandum.

Dated: November 25, 2020.

/s/Cliff Gardner
Cliff Gardner

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE TYREE FERRELL,	)	No.
	)	
Petitioner,	)	Court of Appeal Case
	)	No. B303028
	)	
	)	Superior Court (Los
On Habeas Corpus.	)	Angeles) BA212763
	)	
_____	)	

EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

TABLE OF CONTENTS

EXHIBIT A

2004 WL 2153630
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second
District, Division 6, California.

The PEOPLE, Plaintiff and Respondent,
v.
Tyree Irvin **FERRELL**, Defendant and Appellant.

2d Crim. No. B168679.
|
(Los Angeles County Super. Ct. No. BA212763).
|
Sept. 27, 2004.

Superior Court County of Los Angeles, Marsha N. Revel, Judge.

Attorneys and Law Firms

Cliff Gardner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J. Nolan, Supervising Deputy Attorney General, and William H. Davis Jr., Deputy Attorney General, for Plaintiff and Respondent.

Opinion

GILBERT, P.J.

*1 A jury found **Tyree** Irvin **Ferrell** not guilty of first degree premeditated murder, but guilty of second degree murder. (Pen.Code, § 187, subd. (a), 189.)[1] On appeal, Ferrell contends the trial court erred in giving a second degree felony murder-instruction where a violation of section 246.3 is the predicate offense. Section 246.3 prohibits the willful discharge of a firearm in a grossly negligent manner. Our Supreme Court recently decided section 246.3 can be the predicate offense to felony murder. (*People v. Robertson* (2004) 34 Cal.4th 156.) Ferrell also contends the prosecutor committed misconduct. We affirm.

FACTS

Ferrell and Lawrence Rawlings were friends and members of the "All For Crime" (AFC) gang. On July 12, 1999, AFC and another local gang, 40 Piru, got into a fist fight over a gambling debt. Ferrell, Rawlings and another AFC member, Henry Keith, participated in the fight. Rawlings' girlfriend, Cussondra Davis, and his cousin, Latesha Rawlings, saw the fight.

After the fight was over, Davis saw Ferrell shoot in the direction of the 40 Piru gang members. Davis dropped to the ground and saw Ferrell fire a second shot. When she looked down the street, she saw Rawlings lying on the ground with blood coming from his head. Ferrell dropped the gun and fled.

Latesha Rawlings gave testimony similar to Davis', except she testified, "As he was shooting, his hand was going all kind of ways, like he couldn't handle the gun.... [H]is hand wasn't like he had control of the gun...."

Ferrell fled to Missouri. Eventually, the police arrested him there. He waived his *Miranda* rights and talked to the police. (*Miranda v. Arizona* (1966) 384 U.S. 436.) He said that on July 12, 1999, he was with members of his gang and members of the 40 Piru gang. They got into a fight. He said he shot once into the air to stop the fight. As he brought the gun down it discharged accidentally, hitting Rawlings.

Defense

Henry Keith testified that he is a member of the AFC gang. He participated in the fight on June 12, 1999. He heard a shot and saw Ferrell holding a gun with his arm straight up in the air. As Ferrell brought his gun down, Keith heard another shot. Keith turned and saw Rawlings

on the ground. Ferrell went to Rawlings and said, " 'I didn't mean it.' " Then Ferrell left the area.

Ferrell did not testify.

DISCUSSION

I

Ferrell contends second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner.[2] Thus he believes the trial court erred in so instructing the jury.

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) A killing during the commission or attempted commission of specified crimes is first degree felony murder. (§ 189.) A killing during the commission or attempted commission of any felony inherently dangerous to human life is second degree murder. (See *People v. Phillips* (1966) 64 Cal.2d 574, 582.) Although it is sometimes said the felony-murder rule presumes malice, the reality is that malice is not an element of felony murder. (*People v. Dillon* (1983) 34 Cal.3d 441, 473, 475.)

*2 The elimination of the element of malice caused the court in *People v. Ireland* (1969) 70 Cal.2d 522, 538-540, to limit the application of the second degree felony-murder rule. The court decided that a felonious assault, such as assault with a deadly weapon, cannot form the basis for the application of the felony-murder rule. The court reasoned that because the great majority of all homicides are committed as a result of a felonious assault, application of the felony-murder rule would effectively prevent the jury from considering malice aforethought in the great majority of cases. (*Id.* at p. 539.) The court stated, "We therefore hold that a second degree felony murder-instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged. [Fn. omitted.]" (*Ibid.*) The court described this as the " 'merger' doctrine." (*Id.* at p. 540.)

In *People v. Mattison* (1971) 4 Cal.3d 177, the defendant furnished methyl alcohol to a fellow prisoner who died as a result of drinking it. The question was whether felony murder could be based on a violation of section 347, mingling poison with any food, drink or medicine. The court held the merger doctrine did not apply because the underlying felony was committed with a " 'collateral and independent felonious design,' " that is, it was not intended to result in injury or death. (*Id.* at p. 185.)

Our Supreme Court revisited the merger doctrine in *People v. Hansen* (1994) 9 Cal.4th 300. There the question was whether a violation of section 246, discharging a firearm at an inhabited dwelling house, could support a murder conviction under the felony-murder rule. The court concluded that a violation of section 246 is an inherently dangerous felony and that the merger doctrine did not prevent the application of the felony-murder rule.

The court stated that the purpose of the merger doctrine was to prevent frustration of the Legislature's intent to punish felonious assaults resulting in death committed with malice aforethought more harshly than such assaults committed without malice aforethought. (*People v. Hansen, supra,* 9 Cal.4th at pp. 311-312.)

Hansen rejected *Ireland's* " 'integral part of the homicide' " as the crucial test in determining the existence of merger. (*People v. Hansen, supra,* 9 Cal.4th at p. 314.) Instead, the test is whether the use of the inherently dangerous felony as the predicate offense in felony murder will "elevate all felonious assaults to murder or otherwise subvert the legislative intent." (*Id.* at p. 315.)

After the parties briefed this appeal, our Supreme Court decided *People v. Robertson, supra,* 34 Cal.4th 156. There the defendant claimed he did not intend to injure or kill anyone, but was only firing warning shots.

The trial court gave a felony-murder instruction with section 246.3 as the predicate offense. The court held the merger doctrine did not apply to section 246.3. The court stated the purpose of the felony-murder rule is to "deter both carelessness in the commission of a crime and the commission of the inherently dangerous crime itself. [Citations.]" (*People v. Robertson, supra,* at p. 171.) Section 246.3 serves that purpose by punishing reckless imprudence in the discharge of firearms. (*Id.* at p. 172.) The court also determined that *Mattison's* collateral purpose doctrine provided the best framework for analysis. (*Id.* at p. 171.) The court stated that the firing of warning shots was a collateral purpose to the resulting homicide in that the defendant claimed he did not intend to cause injury or death. (*Ibid.*)

*3 Here, although Ferrell claimed the shot that killed Rawlings was fired accidentally, the jury could reasonably conclude it was fired intentionally as a warning. Thus the felony murder-instruction was proper.

II

Ferrell contends that a decision upholding the application of the felony-murder rule cannot be retroactively applied.

Due process prohibits the retroactive application of a judicial decision that unforeseeably enlarges criminal liability. (*People v. Morante* (1999) 20 Cal.4th 403, 431.) But *Ireland* only applied the merger rule to felony assaults. In *Hansen,* our Supreme Court pointed out that it has never applied *Ireland* beyond the context of assault. (*People v. Hansen, supra,* 9 Cal.4th at p. 312.) A violation of section 246.3 is not an assault. Among the differences, a violation of section 246.3 requires conduct that "could" result in injury or death. An assault requires conduct that "*will probably and directly* result in injury." (*People v. Williams* (2001) 26 Cal.4th 779, 787.) Thus it was foreseeable that our Supreme Court would refuse to extend the merger doctrine to section 246.3. This is particularly true after *Hansen* refused to extend the doctrine to section 246.

III

Ferrell contends his felony-murder conviction is based on a conclusive presumption of malice in violation of due process.

But our Supreme Court rejected the same argument as to first degree felony murder in *People v. Dillon, supra,* 34 Cal.3d, pages 472 through 476. The felony-murder rule does not presume the element of malice, it eliminates the element of malice. (*Ibid.*) The same reasoning applies to second degree felony murder.

IV

Ferrell contends the second degree felony-murder rule violates the separation of powers doctrine and due process.

Ferrell's contention is based on the statement that the second degree felony-murder rule is a creature of judicial intervention. (See *People v. Burroughs* (1984) 35 Cal.3d 824, 829, fn. 3.) Ferrell points out that section 6 provides in part, "No act or omission ... is criminal or punishable, except as prescribed or authorized by this code...." Thus there is no common law crime in this state. (*People v. Armitage* (1987) 194 Cal.App.3d 405, 415.)

But an argument can be made that second degree felony murder is based on statute. Section 187, subdivision (a), incorporates the common law definition of murder as the killing of a human being with malice aforethought. When common law crimes have been incorporated into our penal statutes, courts may look to the common law to determine the nature and character of the offense. (*People v. Armitage, supra,* 194 Cal.App.3d at p. 415.)

At common law, a homicide that occurred during the commission of any felony constituted murder. (*People v. Carlson* (1974) 37 Cal .App.3d 349, 352.) Thus section 187, subdivision (a), by incorporating the common law definition of murder, embraces both first and second

degree felony murder. Section 189 does not limit the application of the felony-murder rule. It simply specifies which felonies are predicate offenses to first degree felony-murder and provides "[a]ll other kinds of murders are of the second degree." (*Ibid.*)

*4 In any event, even if we were inclined to decide the issue in Ferrell's favor, we have no power to do so. Our Supreme Court has summarily rejected the contention that it should not apply the second degree felony-murder rule because it is not expressly set forth in the Penal Code. (*People v. Phillips, supra,* 64 Cal.2d at p. 582.) The court stated simply that "the concept lies imbedded in our law." (*Ibid.*) Suffice it to say that we are bound by the court's decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

V

Ferrell contends the felony-murder instructions erroneously prevented the jury from considering his involuntary manslaughter defense.

This argument assumes that if the jury finds the killing occurred during the commission of an inherently dangerous felony, it will be prevented from considering whether he acted without malice. True, but that is the nature of felony murder. (See *People v. Burton* (1971) 6 Cal.3d 375, 385.)

VI

Finally, Ferrell contends the prosecutor committed misconduct.

Keith testified for the defense, corroborating some of Ferrell's exculpatory statements to the police. On cross-examination, the prosecutor elicited testimony from Keith that he and Ferrell were both incarcerated in the same jail, and had opportunities to talk in jail and in the courthouse prior to Keith's testimony.

Ferrell points out that Keith had no choice about where he was incarcerated. Ferrell argues the prosecutor commits misconduct when he attacks a defense witness based on circumstances the state itself has created.

But Ferrell's argument is based on the wrong standard for prosecutorial misconduct. Ferrell bases his argument on examples of prosecutorial misconduct. It is misconduct, for example, for the prosecutor to argue to the jury that the defense failed to produce evidence that had been excluded on the prosecutor's motion. (See *People v. Varona* (1983) 143 Cal.App.3d 566, 570.) It is misconduct, however, not because the state created the circumstances, but because the prosecutor's argument is deliberately misleading. (*Ibid.*)

Here nothing about the prosecutor's misconduct was misleading. The prosecutor never suggested Keith could choose his place of incarceration and it would be obvious to any reasonable adult that he could not. There was no misconduct.

The judgment is affirmed.

We concur: YEGAN and PERREN, JJ.

All Citations

Not Reported in Cal.Rptr.3d, 2004 WL 2153630

Footnotes

1 All statutory references are to the Penal Code.

2 Section 246.3 provides: "Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison."

End of Document

EXHIBIT B

Appellate Courts Case Information

Supreme Court

Change court ▼

Court data last updated: 01/31/2019 11:01 AM

Docket (Register of Actions)

PEOPLE v. FERRELL
Division SF
Case Number S129037

Date	Description	Notes
11/05/2004	Petition for review filed	by counsel for aplt
11/09/2004	Record requested	
11/12/2004	Received Court of Appeal record	one doghouse
12/22/2004	Petition for review denied	Kennard, J., and Moreno, J., are of the opinion the petition should be granted. Werdegar, J., was absent and did not participate.

Click here to request automatic e-mail notifications about this case.

EXHIBIT C

Appellate Courts Case Information

2nd Appellate District

Change court ▼

Court data last updated: 01/31/2019 11:01 AM

Docket (Register of Actions)

The People v. Ferrell
Division 6
Case Number B168679

Date	Description	Notes
07/21/2003	Notice of appeal lodged/received (criminal).	n/a 7/17/03 Tyree Irvin Ferrell
07/31/2003	N/A sent to CAP for appointment recommendation.	
08/15/2003	Counsel appointment order filed.	Clifford Gardner
09/05/2003	Reporter's transcript to auditing.	
09/11/2003	Record on appeal filed.	C-1 (219) & R-3 (486) + Prob. Report
10/20/2003	Requested - extension of time	Appellant's opening brief. Requested for 11/20/2003 By 30 Day(s) Aplnt's 1st ext. to 11/20/03 (30 days) Party: Ferrell, Tyree
10/20/2003	Granted - extension of time.	Appellant's opening brief. Due on 11/20/2003 By 30 Day(s) Attorney: Gardner, Clifford Party: Ferrell, Tyree
11/20/2003	Requested - extension of time	Appellant's opening brief. Requested for 12/22/2003 By 32 Day(s) Aplnt's 2nd ext. to 12/20/03 (30 days) Party: Ferrell, Tyree

11/21/2003 Granted - extension of time.	Appellant's opening brief. Due on 12/22/2003 By 30 Day(s)
	No Further Attorney: Gardner, Clifford Party: Ferrell, Tyree
12/22/2003 Appellant's opening brief.	Defendant and Appellant: Tyree Irvin Ferrell Attorney: Clifford Gardner Attorney: Gardner, Clifford Party: Ferrell, Tyree
12/22/2003 Modified criminal address.	CSATF / C-5 205L; PO Box 5246, Corcoran 93212-5246
01/23/2004 Requested - extension of time	Respondent's brief. Requested for 03/22/2004 By 61 Day(s)
	Respondent's 1st ext. to 3/22/04 (61 days) Party: The People
01/23/2004 Granted - extension of time.	Respondent's brief. Due on 03/22/2004 By 61 Day(s)
	Attorney: Office of the Attorney General Party: The People
03/24/2004 Requested - extension of time	Respondent's brief. Requested for 04/21/2004 By 30 Day(s)
	Respondent's 2nd ext. to 4/21/04 (30 days) Party: The People
03/24/2004 Granted - extension of time.	Respondent's brief. Due on 04/21/2004 By 30 Day(s)
	Attorney: Office of the Attorney General Party: The People
04/26/2004 Requested - extension of time	Respondent's brief. Requested for 05/20/2004 By 29 Day(s)
	Respondent's 3rd ext. to 5/20/04 (29 days) Party: The People
04/27/2004 Granted - extension of time.	Respondent's brief. Due on 05/20/2004 By 29 Day(s)
	No Further!!! Office of the Attorney General Party: The People

05/26/2004	Requested - extension of time	Respondent's brief. Requested for 06/21/2004 By 32 Day(s) Attorney: Office of the Attorney General Party: The People resp's 4th ext to 6-19-04 (32 dys)
05/26/2004	Granted - extension of time.	Respondent's brief. Due on 06/21/2004 By 32 Day(s) Attorney: Office of the Attorney General Party: The People **No Further** 17(a)(2) notice to issue @ conclusion of this request/PJ-Gilbert
06/25/2004	Respondent notified pursuant to rule 17(a)(2).	
07/27/2004	Respondent's brief.	Plaintiff and Respondent: The People Attorney: Office of the Attorney General 40(k) Office of the Attorney General Party: The People
08/10/2004	Calendar notice sent. Calendar date:	9-9-04 @ 1:30 pm
08/17/2004	Requested - extension of time	Attorney: Gardner, Clifford Party: Ferrell, Tyree aplt's 1st ext to 9-15-04 (30 dys)
08/18/2004	Denied - extension of time.	Attorney: Gardner, Clifford Party: Ferrell, Tyree
08/18/2004	Case fully briefed.	No ARB
08/30/2004	Requested - extension of time	Aplnt's Renewed Motion for Extension of Time to file ARB to 9/13/04 (28 days)
08/31/2004	Filed document entitled:	Application for Order Permitting Filing of Late Reply Brief
09/02/2004	Granted - extension of time.	ARB to 9-6-04 only!
09/02/2004	Order filed.	Granting Application for Order Permitting Filing of Late Reply Brief.
09/02/2004	Appellant's reply brief.	Defendant and Appellant: Tyree Irvin Ferrell Attorney: Clifford Gardner Attorney: Gardner, Clifford Party: Ferrell, Tyree
09/02/2004	Case fully briefed.	
09/09/2004	Argument waived, cause submitted.	
09/27/2004	Opinion filed.	AFF/NFP/ 9P / G-Y-P
10/06/2004	Mail returned and re-sent.	Aplnt's CDC number was incorrect. We had it as V-0002 but it is really V-00002. CDC sent it back.
11/09/2004	Petition for review in Supreme Court received.	Aplnt
11/10/2004	Record transmitted to Supreme Court.	
11/16/2004	Filed document entitled:	Receipt for appellate record from CA Supreme Court
01/03/2005	Record returned from Supreme Court.	
01/14/2005	Note:	Sent Record to L.A. at Oscar Gonzalez' request along w/ copy of opinion.
12/22/2004	Petition for review denied in Supreme Court.	Kennard, J., and Moreno, J., are of the opinion the petition should be granted. Werdegar, J., was absent and did not participate. *** A copy of this ruling was not received in this court until 1-24-05 ***
01/25/2005	Remittitur issued.	
01/25/2005	Case complete.	
02/02/2005	Note:	1x6"record sent to Div 6

02/03/2005 Note:	Record returned to Div. 6 from L.A.
12/10/2008 Record in Box #	Iron Mnt. # 360393149

Click here to request automatic e-mail notifications about this case.

EXHIBIT D

DECLARATION OF TYREE FERRELL

I, Tyree Ferrell, declare:

1. I am the petitioner in this case. In 1999, I was charged with the shooting death of my friend Lawrence Rawlings. I pled not guilty and was tried by a jury. I was convicted of second degree murder. I was indigent at trial and on appeal. I had appointed counsel at both trial and on appeal. I have been in state prison since my conviction was affirmed on appeal in 2004. I am still indigent.

2. In January 2019 I received a letter from Cliff Gardner who was my appointed appellate lawyer on appeal. In that letter Mr. Gardner advised me that he had looked at the brief he wrote in my case on appeal and he thought I might have a claim under a Supreme Court case called *People v. Chun*. He asked me to send him a copy of my record on appeal and told me he would help me for free.

3. Because I am indigent, it took me a few week to be able to send Mr. Gardner the trial record materials I still had in the case. I did so on January 25, 2019.

4. Until Mr. Gardner contacted me in January 2019, I had never heard of the

Chun decision. At the time I was arrested for this crime in 1999, I had finished 10th grade in high school. I have had no training or education in the law and I have no training or education in appellate or habeas corpus procedure. I had no idea there was a factual or legal basis for a challenge to my conviction until I received Mr. Gardner's letter in January 2019. Had I known I had a claim earlier, I would certainly have filed sooner. Why on Earth would I delay seeking relief? With Mr. Gardner's assistance, I am filing this Petition for Writ of Habeas Corpus as quickly as I can now that I know there is a potential challenge to my conviction.

I declare under penalty of perjury that the foregoing is true.

Executed on 15th day of February, 2019, in Calipatria, California.

By: Tyree Ferrell
Tyree Ferrell

EXHIBIT E

DECLARATION OF CLIFF GARDNER

I, Cliff Gardner, declare as follows:

1. I am an appellate and a post-conviction lawyer licenced to practice in California. In 2003 I was appointed to represent Tyree Ferrell on appeal. Mr. Ferrell had been convicted of second degree murder. The Court of Appeal affirmed this conviction in 2004.

2. In December 2018 I happened to see an electronic copy of the opening brief I filed on Mr. Ferrell's part in the Court of Appeal. In that brief I contended that the second degree murder conviction should be reversed because jurors had been permitted to convicted of second degree felony murder based on a predicate felony of willful discharge of a firearm, a violation of Penal Code section 246.3. When I saw that brief, I realized that Mr. Ferrell night have a strong challenge to his conviction based on *People v. Chun* (2009) 45 Cal.4th 1279, since *Chun* held that second-degree felony murder could no longer be premised on a violation of section 246.3, overruling *People v. Robertson* (2004) 34 Cal.4th 156. I immediately sent Mr. Ferrell a letter, dated December 28, 2018, advising him that I would be happy to look into whether such a challenge could be made if he could send me his record on appeal.

3. On January 30, 2019 I received a copy of the record on appeal from Mr. Ferrell and I began to review the record. Because petitioner was entirely untrained in the law, I offered my assistance in preparing a habeas petition raising the *Chun* issue. I prepared the Petition for Writ of Habeas Corpus and the Supporting Memorandum to which this declaration is attached. I did so as quickly as my otherwise full appellate and habeas schedule would permit. To the extent the Court believes there is some delay involved, none of that delay is attributable to conduct on Mr. Ferrell's part. I certainly had no tactical reason for any delay on my part. I prepared the petition as quickly as I could under all the circumstances.

I declare under penalty of perjury under the laws of the State of California and of the United States that the foregoing is true and correct. Executed this 22nd day of ~~January~~ February, 2019, in Berkeley, CA.

Cliff Gardner

EXHIBIT F

(See Separate Attachments)

EXHIBIT G

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 11/18/19

CASE NO. BA212763

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: TYREE IRVIN FERRELL

INFORMATION FILED ON 01/10/02.

COUNT 01: 187(A) PC FEL
COUNT 02: 245(A)(2) PC FEL

ON 11/18/19 AT 830 AM IN CENTRAL DISTRICT DEPT 128

CASE CALLED FOR HABEAS CORPUS HEARING

PARTIES: TERRY A. BORK (JUDGE) JOSEMARI PEREZ (CLERK)
NONE (REP) NONE (DDA)

DEFENDANT IS NOT PRESENT IN COURT, AND NOT REPRESENTED BY COUNSEL

IN CHAMBERS

PETITION FOR WRIT OF HABEAS CORPUS BY TYREE IRVIN FERRELL, PRO SE ("PETITIONER"). APPEARANCE BY RESPONDENT, THE LOS ANGELES COUNTY DISTRICT ATTORNEY BY INFORMAL LETTER RESPONSE DATED SEPTEMBER 24, 2019. DENIED.

THE COURT HAS READ AND CONSIDERED THE PETITION FOR WRIT OF HABEAS CORPUS FILED BY PETITIONER ON MARCH 14, 2019. THE PETITIONER CHALLENGES THE JUDGMENT OF CONVICTION IN HIS CASE BASED UPON A CHANGE IN THE LAW SINCE HIS DIRECT APPEAL WAS DECIDED. (SEE PEOPLE V. CHUN (2009) 45 CAL.4TH 1172, 1200 ¿OVERRULING PEOPLE V. ROBERTSON (2004) 34 CAL.4TH 156¿; IN RE HANSEN (2014) 227 CAL.APP.4TH 906, 918-920 ¿APPLYING CHUN RETROACTIVELY¿; PEOPLE V. CHIU (2014) 59 CAL.4TH 155, 167 ¿"¿W¿HEN A TRIAL COURT INSTRUCTS A JURY ON TWO THEORIES OF GUILT, ONE OF WHICH WAS LEGALLY CORRECT AND ONE LEGALLY INCORRECT, REVERSAL IS REQUIRED UNLESS THERE IS A BASIS IN THE RECORD TO FIND THAT THE VERDICT WAS BASED ON A VALID GROUND."¿.). THE PETITION IS SUMMARILY DENIED FOR THE FOLLOWING REASONS:

ASSUMING THE FACTS ALLEGED IN THE PETITION ARE TRUE, PETITIONER FAILS TO ALLEGE FACTS ESTABLISHING A PRIMA FACIE CASE FOR HABEAS RELIEF. (PEOPLE V. DUVALL (1995) 9 CAL.4TH 464, 474-475.) PREJUDICE, ALTHOUGH REQUIRED, WAS NOT SHOWN BY THE PETITIONER. IN RE CLARK (1993) 5 CAL.4TH 750, 775.

THE PETITION IS UNTIMELY, AND PETITIONER FAILS TO ADEQUATELY JUSTIFY THE SIGNIFICANT DELAY IN SEEKING HABEAS CORPUS RELIEF, COMING 10 YEARS AFTER THE RELEVANT CHANGE IN THE LAW, 15 YEARS AFTER THE JUDGMENT BECAME FINAL, AND 20 YEARS AFTER THE 1999 KILLING. THE REASONS PROVIDED DO NOT AMOUNT TO GOOD CAUSE. (IN RE BURDAN (2008) 169 CAL.APP.4TH 18, 30-31; IN RE CLARK (1993) 5 CAL.4TH 750, 765; IN RE SWAIN (1949) 34 CAL.2D 300, 302.) CLAIMS WHICH ARE BASED ON A CHANGE IN THE LAW WHICH IS RETROACTIVELY APPLICABLE TO FINAL JUDGMENTS WILL BE CONSIDERED IF PROMPTLY ASSERTED. (IN RE CLARK (1993) 5 CAL.4TH 750, 775.)

FOR ALL OF THE FOREGOING REASONS, THE PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

DATED: 11/15/19
TERRY A. BORK, JUDGE OF THE SUPERIOR COURT

A COPY OF THIS MINUTE ORDER IS MAILED TO:

COURTNEY ZIFKIN, DEPUTY DISTRICT ATTORNEY
HABEAS CORPUS LITIGATION TEAM
320 WEST TEMPLE ST. SUITE 540
LOS ANGELES, CA 90012

TYREE IRVIN FERRELL
CDCR# V00002

CALIPATRIA STATE PRISON
P.O. BOX 5005
CALIPATRIA, CA 92233

COURT ORDERS AND FINDINGS:

-PETITION FOR WRIT OF HABEAS CORPUS IS DENIED.

NEXT SCHEDULED EVENT:
PROCEEDINGS TERMINATED

EXHIBIT H

TYREE FERRELL
In Propria Persona
V-00002
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

COURT OF APPEAL OF THE STATE OF CALIFORNIA,

SECOND APPELLATE DISTRICT, DIVISION SIX

IN RE TYREE FERRELL,	)
	)
Petitioner,	)
	)
	)
	)
On Habeas Corpus.	)
	)
	)

PETITION FOR WRIT OF HABEAS CORPUS

AND MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT THEREOF

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

IN RE TYREE FERRELL,	)	No.
	)	
	)	PETITION FOR WRIT
Petitioner,	)	OF HABEAS CORPUS
	)	
	)	
	)	
On Habeas Corpus.	)	
	)	
	)	

INTRODUCTION

In 1999, when petitioner Tyree Ferrell was 18 years old, he was charged with the shooting death of his boyhood friend Lawrence Rawlings. The defense theory was that the shooting was an accident -- defendant was simply trying to fire a warning shot to break up a fist fight between Rawlings and members of a neighboring gang.

Jurors were instructed on first degree premeditated murder. They were also instructed they could convict of second degree felony murder if they found an unlawful killing occurred during Mr. Ferrell's discharge of a firearm in a grossly negligent manner

-- a violation of Penal Code section 246.3. Relying on this instruction during closing argument, the prosecutor told jurors they could convict of second degree murder even if they agreed with the defense theory that the shooting was an accident.

Jurors rejected the prosecutor's theory of first degree murder, unanimously acquitting of first degree murder. But jurors convicted of second degree murder. The court sentenced Mr. Ferrell to 40 years-to-life in state prison -- 15 years to life for the second degree murder conviction and an additional 25 years-to-life for a gun use enhancement found true by the jury.

On appeal, Mr. Ferrell contended that reversal was required because second degree felony murder could not properly be premised on a violation of section 246.3. In its 2004 opinion affirming the conviction this Court rejected the claim, noting that the state supreme court had just issued its opinion in *People v. Robertson* (2004) 34 Cal.4th 156, explicitly rejecting the very same claim.

It turns out, however, that Mr. Ferrell was right. Years after the *Robertson* opinion, the Supreme Court overruled *Robertson* and held that second degree felony murder could *not* be premised on a violation of section 246.3 after all. (*People v. Chun* (2009) 45 Cal.4th 1172, 1200.) For the reasons discussed below, this Court should

appoint counsel for the pro per defendant in this case, issue an Order to Show Cause and grant relief.

JURISDICTIONAL ALLEGATIONS

I.

Petitioner is unlawfully confined at the Calipatria State Prison by the warden and the director of the California Department of Corrections pursuant to a judgment of the Superior Court for Los Angeles County in *People v. Ferrell,* No. BA212763.

II.

Petitioner was convicted of second degree murder along with a gun use enhancement under section 12022.53. Jurors were permitted to convict petitioner of second degree felony murder based on a predicate felony of violating Penal Code section 246.3 -- willful discharge of a firearm in a grossly negligent manner. Jurors convicted of second degree murder and found the section 12022.53 allegation true; the trial court sentenced petitioner to 15 years-to-life for the murder charge adding an additional 25 years for the gun use enhancement.

III.

Petitioner appealed his conviction to this Court. On September 27, 2004, the Court

affirmed the murder conviction rejecting petitioner's argument that "second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner." (*People v. Ferrell* (2004) 2004 WL 2153630 at * 1, attached as Exhibit A.) Petitioner filed a timely Petition for Review in the California Supreme Court which was denied on December 22, 2004 with Justices Kennard and Moreno voting for review. (*People v. Ferrell*, S129037, Order of December 22, 2004, attached as Exhibit B.)

IV.

No other petitions for writ of habeas corpus have been filed in state court. Petitioner has no adequate remedy at law for presentation of these claims because his conviction and sentence were previously affirmed on appeal.

V.

The claim presented in this Petition is properly cognizable on habeas corpus, because it is based on an intervening change in substantive California homicide law -- the California Supreme Court's opinion in *People v. Chun* (2009) 45 Cal.4th 1172. *Chun* applies retroactively to cases such as this in which the appeal was final before 2009. (*See, e.g., In re Hansen* (2014) 227 Cal.App.4th 906; *In re Lucero* (2011) 200 Cal.App.4th 38, 46.)

VI.

Review in this Court is appropriate for three separate reasons. First, this Court is better suited than a trial court to assess whether the *Chun* error requires reversal. Determination of the prejudicial effect of the error requires application of the *Chapman* prejudice standard to an unauthorized theory of liability. That is an inquiry better suited to an appellate court, because this Court commonly conducts that same analysis in assessing instructional errors on appeal. Second, this Court has ready access to the substantial record on appeal. Finally, as discussed in the attached Memorandum of Points and Authorities, the Court's prior appellate opinion in this case reached a factual conclusion directly relevant to the issue presented in this Petition.

CLAIM FOR RELIEF

VII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. At trial, jurors were presented with a theory of second-degree murder which does not exist under state law. Jurors were instructed they could rely on petitioner's violation of Penal Code section 246.3 as the predicate for a second degree murder conviction. As more fully set out in his accompanying Memorandum of Points and

Authorities, petitioner's conviction of second-degree murder is legally unauthorized and violates state and federal due process because this precise theory of second degree felony murder has been squarely repudiated as the basis for murder liability. Because jurors were given an invalid theory of second degree murder, and the record does not establish beyond a reasonable doubt that the jury convicted him of that offense on any valid alternative basis, petitioner is entitled to a writ of habeas corpus. The following facts now known to petitioner support this claim for relief:

A. The state charged petitioner Tyree Ferrell with the July 12, 1999 murder of his boyhood friend Lawrence Rawlings. (1 CT 48.) The state added an allegation that Mr. Ferrell used a firearm in violation of sections 12022.53, subdivision (d). (1 CT 48.) At the time of the charged shooting Mr. Ferrell was 18 years old. (2 RT 282.)

B. Mr. Ferrell pled not guilty and had a jury trial in May of 2003.

C. Prior to trial, Mr. Ferrell voluntarily waived his *Miranda* rights and spoke with police, telling them what happened on July 12, 1999. (1 CT 110-116; 2 RT 260-261, 264.) At trial, this pre-trial statement to police was introduced into evidence. (RT 258.)

D. Tyree Ferrell and Lawrence Rawlings were boyhood friends and both were members of a local gang known as AFC. (1 CT 114-115.) On July 12, 1999 AFC arranged for a fist fight with another gang – 40 Piru – to resolve a gambling dispute. (1 CT 110; 2 RT 264.) Mr. Rawlings was involved in the fight. (1 CT 114-115.) During the fight, Mr. Ferrell saw that Lawrence was in trouble; to stop the fight he (Mr. Ferrell) then fired a gun into the air. (1 CT111-112; 2 RT 260, 264.) When he brought his arm down, the gun accidentally went off a second time. (1 CT 111-115; 2 RT 264-265.)

E. Realizing that Lawrence had been shot, Tyree dropped the gun, and ran toward Lawrence who was lying on the ground, and held his friend in his arms as he was dying. (1 CT 111-115; 2 RT 264-265.)

F. Eyewitness Henry Keith testified, confirming Mr. Ferrell's account. Mr. Keith was also an AFC member and was fighting along side Mr. Rawlings that day. (2 RT 327-328.) A member of 40 Piru had Mr. Rawlings on his knees. (2 RT 334-335.) Mr. Keith heard a gunshot. (2 RT 340, 356, 359.) He saw Mr. Ferrell holding his arm straight up and firing into the air. (2 RT 341-342.) As Mr. Ferrell's arm

came down, the gun went off again. (2 RT 343.) Mr. Keith saw that Mr. Rawlings had been shot. (2 RT 344.) Mr. Ferrell ran to Mr. Rawlings, leaned over him and said "I didn't mean it." (2 RT 345.)

G. The state called two eyewitnesses -- Cussondra Davis (Mr. Rawlings' girlfriend) and Latesha Rawlings (Mr. Rawlings' cousin). (1 RT 90, 140.) They confirmed there was a fist fight between AFC and 40 Piru on July 12, 1999 and that Mr. Ferrell, Mr. Rawlings and Mr. Keith were all involved. (1 RT 94, 96, 103, 136, 147, 151, 153, 157.) They confirmed that Mr. Ferrell dropped his gun immediately after the second shot. (1 RT 102, 153, 168.) Latesha Rawlings confirmed that Mr. Ferrell then ran to Mr. Rawlings' side, exclaiming that "he was sorry [and] he didn't mean to do it." (1 RT 153, 171.) But neither witness recalled Mr. Ferrell pointing his gun in the air for ths first shot; instead, they recalled he held his gun "sideways" and towards the crowd of people. (1 RT 98-100, 151.)

H. Jurors were instructed on first degree premeditated murder. (3 RT 431.) Jurors were instructed on three different theories of second degree murder: (1) an unlawful killing with express malice but no

premeditation, (2) an unlawful killing with implied malice and (3) an unlawful killing "whether intentional, unintentional or accidental" occurring during the willful discharge of a firearm with gross negligence in violation of Penal Code section 246.3. (3 RT 432-435.)

I. In closing argument, the prosecutor first urged jurors to convict of first-degree murder. (3 RT 382.) Alternatively, the prosecutor urged jurors to convict of second-degree murder. The prosecutor told jurors they could rely on the felony murder theory they had been given:

> There is second-degree felony murder, which can get you a conviction for second-degree murder. This is an abbreviation of the much more detailed instruction that her honor will give you. You need to find there was an unlawful killing which could have been intentional, unintentional and even accidental, during the commission of a felony, in this case, discharging a firearm. (3 RT 382.)
>
> If you find that the defendant discharged a firearm with the specific intent to discharge that firearm, even if the killing was unintentional or accidental, that too is second-degree murder. (3 RT 383.)

J. During deliberations jurors asked the court for "a definition of

unlawful killing as it relates to murder." (3 RT 462.)

K. The jury unanimously acquitted of first-degree murder. (3 RT 470.) Jurors rendered a general verdict finding Mr. Ferrell guilty of second-degree murder. (3 RT 471.) The general verdict did not specify which of the three theories of second-degree murder had been relied on. (3 RT 471.)

L. On appeal, Mr. Ferrell contended that reversal was required because "second degree felony murder cannot be predicated on a violation of section 246.3, unlawful discharge of a firearm." (*People v. Ferrell*, *supra*, 2004 WL 2153630 at * 1.) This Court correctly recognized that if jurors relied on the felony murder theory, they would have been relieved of the obligation to find either express or implied malice. (*People v. Ferrell*, *supra*, 2004 WL 2153630 at * 4.) Bound by the then-recent Supreme Court decision in *People v. Robertson*, (2004) 34 Cal.4th 156 this Court rejected Mr. Ferrell's argument,. Holding that "section 246.3 can be the predicate offense to felony murder." (*Id.* at * 1.)

M. Since this Court affirmed the conviction, the law has changed. In *People v. Chun* (2009) 45 Cal.4th 1172 the Supreme Court overruled *Rovbertson* and held that a felony murder conviction could *not* be premised on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner. Consequently, to be liable for second degree murder, the jury here would have had to find beyond a reasonable doubt that defendant harbored either express or implied malice. This was the precise factual inquiry this Court recognized that jurors did not have to make in this case precisely because of the felony murder option. (*People v. Ferrell*, *supra*, 2004 WL 2153630 at * 4.)

N. Because the California Supreme Court has now held that second-degree felony murder may not be premised on a violation of section 246.3, the submission of that theory tot he jury here was unauthorized under California law.

O. The submission of felony murder to this jury also violated petitioner's Fourteenth Amendment right to due process and his Sixth Amendment right to jury trial by allowing a second-degree

murder conviction on an unauthorized theory of liability and by relieving the jurors of finding all the elements of the authorized bases for second-degree murder.

P. As the Supreme Court has explained, "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Q. The erroneous submission of a felony-murder theory cannot be found harmless in this case. Nothing in the record indicates jurors convicted petitioner of second-degree murder on a valid ground. None of the verdicts or enhancement findings required jurors to find express or implied malice as required for second-degree murder liability outside the context of felony murder.

S. Because the record does not establish beyond a reasonable doubt that the jury convicted petitioner on a legally authorized ground, the conviction of second-degree murder cannot stand. This Court should issue an Order to Show Cause.

FACTS RELEVANT TO TIMELINESS

IX.

The Petition for Writ of Habeas Corpus is timely. The following facts now known to petitioner support this claim:

A. Petitioner incorporates by reference each of the factual allegations in Paragraphs I-VIII above, as well as each factual allegation in the accompanying Memorandum of Points and Authorities.

B. Petitioner was indigent at trial and was represented by the Public Defender's Officer. (1 CT 53.) After petitioner was convicted, he appealed his conviction. Petitioner was indigent on appeal and was represented by appointed counsel. (*People v. Ferrell*, B168679, Docket Sheet, attached as Exhibit C.)

C. This Court affirmed the conviction in 2004. Petitioner has been incarcerated in state prison since his sentencing and remains indigent. (Declaration of Tyree Ferrell ("Ferrell Declaration"), para. 1, attached as Exhibit D.)

D. *Chun* was decided in June of 2009. On December 28, 2018 the attorney who represented petitioner in his 2004 appeal happened to come across an electronic version of the opening brief he had prepared in petitioner's case. (Declaration of Cliff Gardner ("Gardner Declaration") at para 2.) Counsel noted that the issue raised in that brief was the same issue which the Supreme Court had decided in *Chun*, years after the appeal in petitioner's case was final. (Gardner Declaration at para. 2.) That same day counsel wrote petitioner a letter, suggesting that he might have an issue under *Chun* and offering to prepare a Petition for Writ of Habeas Corpus pro bono if petitioner could send him a copy of his trial record. (Gardner Declaration at para 2.) Petitioner responded in January 2019, sending a copy of those portions of the record he still had. (Gardner Declaration at para. 3; Ferrell Declaration at para. 2-4.) Relying entirely on volunteer counsel, petitioner has filed this petition as

soon as practicable. (Ferrell Declaration at para. 4.)

E. Until receiving counsel's letter of December 28, 2018, petitioner was unaware of the *Chun* decision and unaware of its potential impact on his case. At the time of petitioner was incarcerated for this offense he had a 10th grade education. He had and has no training in the law, in appellate procedure or in habeas procedure. Until hearing from former appellate counsel in January 2019, petitioner was unaware there was favorable case law undercutting the basis for his conviction. (Ferrell Declaration at para. 4.)

F. Any delay in counsel's filing this petition is counsel's alone and cannot be attributed to Mr. Ferrell. (Gardner Declaration at para. 3.)

G. There is no right to state-appointed habeas counsel in California. Petitioner is indigent and does not currently have appointed counsel. Petitioner has filed this petition within weeks of becoming aware of the *Chiu* opinion and its applicability to his case, obtaining the necessary case materials, and obtaining the volunteer assistance of counsel in preparing this petition. (*See In re Lucero*, *supra*, 200

Cal.App.4th at 44-45; *In re Wilson* (2015) 233 Cal.App.4th 544.)

REQUEST FOR APPOINTMENT OF COUNSEL AND ISSUANCE OF ORDER TO SHOW CAUSE

X.

A. Petitioner has prepared and submitted this habeas corpus petition with the assistance of volunteer counsel.

B. Petitioner recognizes the that further development of these arguments with reference to the specific circumstances of petitioner's case may be necessary. Petitioner therefore seeks appointment of counsel. A reviewing court must appoint counsel on a habeas petition upon issuance of an order to show cause (OSC). (*In re Clark* (1993) 5 Cal.4th 750, 780; Rules 4.451(c)(2) (superior court), 8.385(f) (appellate court).)

C. The Court also has discretion to appoint counsel at an earlier stage in the interest of justice. Petitioner respectfully ask this Court to appoint counsel at the earliest opportunity to ensure full legal and factual development of these claims with the assistance of counsel.

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the transcripts and court records in *People v. Ferrell*, B168679, and this Court's 2004 opinion in the case;

2. Order respondent to file and serve a certified copy of the record on appeal and issue an Order to Show Cause requiring the state to show cause why petitioner is not entitled to the relief sought;

3. Appoint counsel at the earliest opportunity for all further proceedings in this habeas proceeding;

4. Find this petition states a prima facie case for relief and issue an Order to Show Cause returnable before this Court;

5. Order any additional relief appropriate in the interests of justice.

DATE: 2-15-19

Respectfully submitted,

Tyree Ferrell

Tyree Ferrell

VERIFICATION

I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct.

DATED: 2-15-19

Tyree Ferrell

Tyree Ferrell

EXHIBIT I

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

In re **TYREE FERRELL,** On Habeas Corpus.	Case No. B303028

Los Angeles County Superior Court Case No. BA212763
The Honorable Marsha N. Revel, Judge

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
JAIME L. FUSTER
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Joseph.Lee@doj.ca.gov
Attorneys for Respondent

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TO THE HONORABLE ARTHUR GILBERT, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX:

Respondent hereby presents this return to the order to show cause ("OSC") issued in the above-entitled case on June 9, 2020:

> Why a writ of habeas corpus should not issue granting the relief requested in the petition.

INTRODUCTION

A Los Angeles County jury convicted petitioner of second degree murder, in violation of Penal Code section 187, subdivision (a), and assault with a firearm, in violation of section 245, subdivision (a)(2).[1] The jury further found true that petitioner personally and intentionally discharged a firearm and proximately caused great bodily injury, within the meaning of section 12022.53, subdivision (d). The trial court sentenced petitioner to 15 years to life for second degree murder plus an additional and consecutive 25 years to life pursuant to section 12022.53, for an aggregate term of 40 years to life. The trial court imposed a concurrent four-year upper term for assault with a firearm. (CT 48-49, 206, 208, 213-217.)

On appeal, in 2004, this Court rejected petitioner's claim, inter alia, that the trial court improperly instructed the jury that his second degree felony murder conviction could be based on

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

willfully discharging a firearm with gross negligence, in violation of section 246.3. (Pet. Exh. A.) However, in 2009, the California Supreme Court held that second degree felony murder could not be premised on a violation of section 246.3. (*People v. Chun* (2009) 45 Cal.4th 1172, 1200.)

In December 2018, petitioner's appellate counsel found a copy of his opening brief filed on appeal, wrote petitioner regarding the *Chun* decision, and then prepared and filed a habeas petition in this Court seeking relief. This Court transferred the matter to the Los Angeles County Superior Court, which denied the petition because it was untimely and because no prima facie case was shown. (See Pet. 28-29, 44-45; Pet. Exhs. D, E, G, H.) Petitioner then filed the instant habeas petition in this Court. Respondent filed an informal response.

On June 9, 2020, this Court issued an order to show cause ("OSC") as to why the relief petitioner requested in his habeas petition should not be granted.

STANDARD OF REVIEW

Concerning the merits of claims raised in a habeas petition, the California Supreme Court has aptly stated,

> "For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended."

(*In re Avena* (1996) 12 Cal.4th 694, 710, quoting *People v. Duvall* (1995) 9 Cal.4th 464, 474, emphasis in original.)

Since a judgment is presumed to be valid, a "petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." (*Duvall, supra*, 9 Cal.4th at p. 474, emphasis in original.) To satisfy the initial burden of pleading adequate grounds for relief, the petition should both "state fully and with particularity the facts on which relief is sought" and "include copies of reasonably available documentary evidence supporting the claim." (*Ibid.*) In other words, "[c]onclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing," especially when the petition is prepared by counsel, since the reviewing court must "presume the regularity of proceedings that resulted in a final judgment." (*Ibid.*, quoting *People v. Karis* (1988) 46 Cal.3d 612, 656.) The petition should be evaluated based on its contents. (*In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.)

The return to the OSC is required to allege facts tending to show the petitioner's confinement is legal and also respond to the petition's factual allegations. (*Duvall, supra*, 9 Cal.4th at p. 476.) Where appropriate, the return should also provide such documentary evidence as will allow the court to determine which issues are truly in dispute. (*Ibid.*; see *In re Gay* (1998) 19 Cal.4th 771, 783-784, fn. 9.) The reviewing court should not order an evidentiary hearing unless it determines there are material facts in dispute. (*Duvall, supra*, at p. 480.)

The return need not prove the petitioner's factual allegations are wrong:

> [I]f an evidentiary hearing is held, it is the petitioner who bears the burden of proof. At this *pleading* stage, however, the general rule has been that respondent must either admit the factual allegations set forth in the habeas corpus petition, or *allege additional facts* that *contradict* those allegations. If a dispute arises regarding material facts, the appellate court will then appoint a referee to determine the true facts at a hearing in which the petitioner will have the burden of proof. At this early stage, however, the People's burden is one of pleading, not proof.

(*Duvall, supra*, 9 Cal.4th at p. 483, emphasis in original, footnote omitted.)

THE RETURN

Respondent makes this return to the OSC and admits, denies, and alleges as follows:

Respondent denies that petitioner is unlawfully confined at Calipatria State Prison by the warden and the director of the California Department of Corrections and Rehabilitation pursuant to a judgment of the Los Angeles County Superior Court in case number BA212763.

Respondent agrees that petitioner was convicted of second degree murder along with a gun use enhancement under section 12022.53, and that the jury was instructed that it could convict petitioner of second degree felony murder based on a predicate felony of violating section 246.3, i.e., willful discharge of a firearm in a grossly negligent manner.

Respondent agrees that the trial court sentenced petitioner to 15 years to life for the murder plus an additional 25 years to life for the gun use enhancement.

Respondent agrees that petitioner's appeal was rejected and his conviction was affirmed by this Court on September 27, 2004, and that among the arguments rejected was that "second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner."

Respondent agrees that petitioner's petition for review in the California Supreme Court was denied on December 22, 2004, with Justices Kennard and Moreno voting for review.

Respondent agrees that apart from the habeas corpus petition filed by petitioner on March 4, 2019, which was transferred to the superior court, no other petitions for writ of habeas corpus have been filed in state court, and that petitioner has no adequate remedy at law for presentation of these claims on appeal because his conviction and sentence were previously affirmed on appeal.

Respondent agrees that the superior court denied the habeas petition, finding that (1) the petition was untimely, and (2) that no prima facie case for relief had been established.

Respondent agrees that the claim presented in the instant petition is cognizable on habeas corpus and based on an intervening change in substantive California homicide law – the California Supreme Court's decision in *People v. Chun* (2009) 45

Cal.4th 1172, and that *Chun* applies retroactively to the instant case.

Respondent agrees that there was instructional error in the instant case under *Chun*.

Respondent denies that the instructional error was prejudicial.

Respondent alleges that the instructional error was harmless beyond a reasonable doubt because "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*People v. Prettyman* (1996) 14 Cal.4th 248, 276, internal quotation marks omitted.)

Respondent alleges that in finding the section 12022.53, subdivision (d), gun use enhancement to be true, the jury necessarily rejected petitioner's theory that he accidentally shot Lawrence. Therefore, the jury made the requisite finding necessary to sustain a valid murder conviction under state law.

CONCLUSION

For the reasons set forth above, as well as in the attached Memorandum of Points and Authorities which follows, respondent requests this Court discharge the OSC issued June 9, 2020, and deny the petition for writ of habeas corpus.

Dated: July 6, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
SUSAN SULLIVAN PITHEY
Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General

JOSEPH P. LEE
Deputy Attorney General
Attorneys for Respondent

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN TO ORDER TO SHOW CAUSE

ARGUMENT

PETITIONER IS NOT ENTITLED TO ANY RELIEF DUE TO INSTRUCTIONAL ERROR

Petitioner alleges he was tried for second degree murder partly based on a now-invalidated legal theory, and that the record does not establish beyond a reasonable doubt that the jury based its verdict on a legally valid ground. (Pet. 36-42.) As set forth below, petitioner is not entitled to relief because the instructional error was harmless beyond a reasonable doubt under the circumstances.

As noted by petitioner, the California Supreme Court in *Chun* held that based on merger principles, a violation of 246.3 cannot serve as the predicate for a second degree felony murder conviction: "[w]hen the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction." (*People v. Chun, supra*, 45 Cal.4th at p. 1200.) This decision has been held to apply retroactively to cases that were final on appeal before *Chun* was decided. (See, e.g., *In re Hansen* (2014) 227 Cal.App.4th 906, 918-920; *In re Lucero* (2011) 200 Cal.App.4th 38, 46.)

In the present case, the prosecutor pursued a second degree murder conviction based, inter alia, on three theories – that petitioner intentionally shot the victim with malice but without premeditation (second degree malice murder), that petitioner intentionally shot the victim with implied malice or a conscious

disregard for human life (implied malice murder), and that petitioner committed felony murder based on willfully discharging a firearm with gross negligence. As to the third theory, the jury was instructed that it could convict petitioner of felony murder based on a violation of section 246.3. (3RT 429, 434-435.) In closing argument, the prosecutor noted more than once that the jury need not agree on any particular theory in order to convict petitioner of second degree murder. (See, e.g., 3RT 380, 382-384, 393, 409, 412.) The jury subsequently convicted petitioner of second degree murder.

As petitioner notes, in light of *Chun*, the jury was given a now-legally unauthorized theory of second degree murder as a basis to convict him. Petitioner contends this was prejudicial error because the record does not establish beyond a reasonable doubt that the jury based its verdict on a legally valid ground. (Pet. 39-42, citing *Chapman v. California* (1967) 386 U.S. 18, 24.) He claims that the erroneous theory and corresponding instructions

> relieved the jury of the necessity of finding the elements necessary for a conviction of second degree murder under a proper, non-felony-murder theory – that is, jurors did not necessarily find either that [petitioner] (1) intentionally shot with malice but without premeditation (which would support second degree malice murder) or (2) intentionally shot with implied malice, that is, a conscious disregard for human life (which would support implied malice murder).

(Pet. 40.)

Petitioner is mistaken. Among other reasons, instructional errors are harmless when "the factual question posed by the

omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions." (*Prettyman, supra,* 14 Cal.4th at p. 276, internal quotation marks omitted.) Here, although the prosecution partly tried petitioner under a now-erroneous theory of murder, the jury was instructed on two valid theories of second degree murder – unpremeditated but intentional murder and implied malice murder. And in finding petitioner guilty of second degree murder, the jury found true a section 12022.53, subdivision (d), enhancement. Therefore, the jury found that petitioner personally *and intentionally* discharged a firearm and proximately caused great bodily injury or death. In arguing that the instructional error was not harmless, petitioner conveniently ignores the jury's true finding on this section 12022.53, subdivision (d), enhancement. (See Pet. 41-42).

At trial, petitioner claimed that he fired a first shot upwards, and then, as he was bringing his arm down, the gun accidentally discharged, striking and killing Lawrence. (See 2RT 264, 341-345.) In contrast, eyewitnesses testified petitioner shot with his hand and gun parallel to the ground. (See 1RT 98-100, 151.) Thus, the sole issue for the jury to determine was whether that second shot fired by petitioner which killed Lawrence was intentional or accidental.

In finding the section 12022.53, subdivision (d), enhancement to be true, the jury necessarily rejected petitioner's theory that he accidentally shot Lawrence: the jury's finding that petitioner *intentionally* (as opposed to accidentally, as he claimed) discharged the firearm which proximately caused

Lawrence's death is only reconcilable with a second degree murder verdict based on either one of the two valid theories -- second degree malice (i.e., petitioner intentionally shot with malice but without premeditation), or implied malice (i.e., petitioner intentionally shot with a conscious disregard for human life). Petitioner concedes both are "proper, non-felony-murder" theories. (Pet. 40.)

Therefore, this is not a case, as petitioner contends, where "it is impossible to determine if 1 or all 12 jurors relied on felony murder to convict based on a violation of section 246.3." (Pet. 38.) The jury's true finding on the section 12022.53, subdivision (d), enhancement, establishes that all 12 jurors rejected petitioner's theory that the shooting was accidental (which would have supported a conviction under the invalid felony-murder theory), agreed petitioner intentionally shot the victim, and found him guilty under either of the two valid theories of second degree murder. Accordingly, the alleged instructional error was harmless beyond a reasonable doubt because the jury made the requisite finding necessary to sustain a valid murder conviction. (Cf. *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419 [in a Senate Bill 1437 case, the jury's true felony-murder special-circumstance finding rendered any post Senate Bill 1437 instructional error related to the felony murder harmless beyond a reasonable doubt "because the jury made the requisite findings necessary to sustain a felony-murder conviction under the amended law"].) Accordingly, petitioner is not entitled to any habeas relief.

CONCLUSION

For the reasons set forth above, respondent requests this Court discharge the OSC issued May 29, 2012, and deny the petition for writ of habeas corpus.

Dated: July 6, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
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Senior Assistant Attorney General
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Deputy Attorney General

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Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached RETURN TO PETITION FOR WRIT OF HABEAS CORPUS uses a 13 point Century Schoolbook font and contains 2,379 words.

,

Dated: July 6, 2020

XAVIER BECERRA
Attorney General of California

JOSEPH P. LEE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **In re Tyree Ferrell, on Habeas Corpus** No.: **B303028**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence that is submitted electronically is transmitted using the Court's TrueFiling system. Participants who are registered with TrueFiling will be served electronically. Participants who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On July 6, 2020, I caused the attached **RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** to be electronically served by transmitting a true copy via this Court's TrueFiling system to:

Cliff Gardner, Casetris@aol.com (Attorney for Appellant)

Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on July 6, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Sherri R. Carter, Court Executive Officer / Clerk
Los Angeles County Superior Court
for delivery to: Hon. Marsha N. Revel, Judge
111 North Hill Street
Los Angeles, CA 90012

I also served the attached **RETURN TO PETITION FOR WRIT OF HABEAS CORPUS** by transmitting a true copy via electronic mail using my e-mail address as irene.rangel@doj.ca.gov to:

Gretchen Ford	California Appellate Project
Deputy District Attorney	CapDocs@lacap.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 6, 2020, at Los Angeles, California.

s/ Irene Rangel
Declarant

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EXHIBIT J

Filed 10/22/20 In re Ferrell CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re TYREE IRVIN FERRELL, on Habeas Corpus.	2d Crim. No. B303028 (Super. Ct. No. BA212763) (Los Angeles County)

Tyree Irvin Ferrell petitions for a writ of habeas corpus claiming the jury was given an erroneous felony murder instruction along with valid instructions on two other theories of second degree murder. We conclude the error was harmless beyond a reasonable doubt and deny the petition.

FACTS

Underlying Trial

Farrell was charged with first degree murder of Lawrence Rawlings (Pen. Code,[1] § 187, subd. (a)), plus a firearm enhancement pursuant to section 12022.53, subdivision (d).

[1] All statutory references are to the Penal Code.

Ferrell and Rawlings were friends and members of the "All For Crime" (AFC) gang. On July 12, 1999, AFC and another local gang "40 Piru" got into a fist fight over a gambling debt. Ferrell, Rawlings, and another AFC member, Henry Keith, participated in the fight. Rawlings's girlfriend, Cussondra Davis, and his cousin, Latesha Rawlings, saw the fight.

After the fight was over, Davis saw Ferrell shoot in the direction of the 40 Piru gang members. Davis dropped to the ground and saw Ferrell fire a second shot. When she looked down the street, she saw Rawlings lying on the ground with blood coming from his head. Ferrell dropped the gun and fled.

Latesha Rawlings gave testimony similar to Davis's, except she testified, "As [Ferrell] was shooting, his hand was going all kind of ways, like he couldn't handle the gun. . . . [H]is hand wasn't like he had control of the gun. . . ."

Ferrell fled to Missouri. Eventually the police arrested him there. He waived his *Miranda* rights and talked to the police. (*Miranda v. Arizona* (1966) 384 U.S. 436.) He said that on July 12, 1999, he was with members of his gang and members of the 40 Piru gang. They got into a fight. He said he shot once into the air to stop the fight. As he brought the gun down, it discharged accidentally, hitting Rawlings.

Defense

Keith testified that he is a member of the AFC gang. He participated in the fight on July 12, 1999. He heard a shot and saw Ferrell holding a gun with his arm straight up in the air. As Ferrell brought his gun down, Keith heard another shot. Keith turned and saw Rawlings on the ground. Ferrell went to Rawlings and said, "I didn't mean it." Then Ferrell left the area.

Ferrell did not testify.

Instructions and Verdict

The prosecution argued to the jury, and the jury was instructed that it could convict Ferrell of second degree murder on any one of three theories: 1) an unlawful killing with express malice but no premeditation, 2) an unlawful killing with implied malice, and 3) felony murder that occurred during the willful discharge of a firearm with gross negligence in violation of section 246.3.

The jury returned a general verdict of second degree murder without specifying the ground. The jury also found that in committing the murder, Ferrell personally and intentionally discharged a firearm proximately causing death. (§ 12022.53, subd. (d).) The trial court sentenced Ferrell to 15 years to life for the murder, plus a consecutive 25 years to life for the firearm enhancement.

APPEAL

On appeal, Ferrell argued that a violation of section 246.3 is not a proper predicate offense for felony murder. We rejected the argument on the ground that in *People v. Robertson* (2004) 34 Cal.4th 156, our Supreme Court held that a violation of section 246.3 is a proper predicate offense for felony murder. We affirmed Ferrell's conviction. (*People v. Ferrell* (Sept. 27, 2004, B168679) [nonpub. opn.].)

POST-APPEAL

In *People v. Chun* (2009) 45 Cal.4th 1172, our Supreme Court reconsidered *Robertson* and held that a violation of section 246.3 is not a proper predicate offense for felony murder. *Chun* has been held to be retroactive even to cases that are final on appeal. (*In re Hansen* (2014) 227 Cal.App.4th 906, 920.)

Ferrell filed a petition for a writ of habeas corpus in superior court on the ground that the trial court erred in instructing on felony murder. The superior court denied the petition as untimely and for failure to state a prima facie case. Ferrell subsequently filed the instant petition in this court. We issued an order to show cause.

Ferrell filed this petition 10 years after *Chun* was decided. He claims he was unaware of *Chun* until December 2018 when his former appellate counsel happened to come across the opening brief he prepared in Ferrell's appeal. The People do not challenge the timeliness of the petition.

DISCUSSION

Ferrell contends that reversal of his second degree murder conviction is required because the jury was improperly given a felony-murder instruction.

Here the jury was properly instructed on two theories of second degree murder, express malice and implied malice, but improperly given a felony-murder instruction based on a violation of section 246.3. Where a jury is instructed on both correct and incorrect theories of guilt, reversal is required unless we conclude beyond a reasonable doubt that the jury based it verdict on a legally valid theory. (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

The People argue that the jury's true finding that Ferrell violated section 12022.53, subdivision (d) shows beyond a reasonable doubt that the jury based its verdict on a correct legal theory.

Section 12022.53, subdivision (d) provides for a consecutive 25-years-to-life enhancement for any person who in the commission of a murder "personally and intentionally discharges

a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice . . . ."

The People argue that by finding Ferrell intentionally discharged a firearm, the jury rejected his defense that he accidentally fired the shot that killed Rawlings. The People conclude that the jury necessarily based its verdict on one of the two valid theories.

Ferrell does not contest that he personally and intentionally discharged his firearm. But he claims he only intentionally discharged it into the air. Ferrell argues the jury could find both that he intentionally discharged his firearm into the air and that the bullet that hit Rawlings was discharged accidentally as a proximate cause of the intentional discharge when he lowered the gun.

Included with the instruction on the elements of section 12022.53, subdivision (d), the jury was instructed on proximate cause as follows: "A proximate cause of death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death and without which the death would not have occurred." (CALJIC No. 17.19.5.)

The proximate cause instruction requires the death be the "*direct*, natural and probable consequence" of the act that caused the death. Rawlings's death was not the direct consequence of Ferrell's discharging his firearm into the air. His death was the direct consequence of Ferrell's shot parallel to the ground. In finding the firearm allegation pursuant to section 12022.53, subdivision (d) true, the jury necessarily found that Ferrell intentionally fired the shot that killed Rawlings. There is no reasonable doubt that the jury based its verdict on a valid theory.

Ferrell points out that in our opinion on appeal we stated the felony-murder instruction meant that the jury did not have to consider whether he acted without malice. (*People v Ferrell*, *supra*, B168679.) But in finding the section 12022.53, subdivision (d) allegation to be true, there is no reasonable doubt that the jury found Ferrell acted with at least implied malice.

Ferrell is not helped by *People v. Bland* (2002) 28 Cal.4th 313. In *Bland*, the defendant and a cohort shot into a car killing the driver and wounding two passengers. It could not be determined which shooter inflicted the harm. A jury convicted the defendant of murder and two counts of attempted murder. The jury also found true a firearm enhancement pursuant to section 12022.53, subdivision (d). The trial court instructed the jury on section 12022.53, subdivision (d), but failed to define proximate cause. Our Supreme Court concluded the failure to define proximate cause was harmless. It reasoned that although it could not be determined which shooter inflicted the actual injuries, proximate cause does not require the defendant to inflict an actual injury. Second, an uninstructed jury would interpret "proximate cause" to have a narrower meaning than it does. (*Bland*, at p. 338.)

Here, unlike *Bland*, the trial court instructed on the definition of proximate cause. In addition, here there is no doubt Ferrell inflicted the injury that killed Rawlings. He admitted so to the police, and his defense witness so testified at trial.

Ferrell relies on *People v. Offley* (2020) 48 Cal.App.5th 588. In *Offley*, gang members entered into a conspiracy to ambush a vehicle believing its occupants were members of a rival gang. At least three people fired shots into the vehicle, including defendant. The defendant was convicted of murder and

attempted murder, and the jury found a firearm enhancement pursuant to section 12022.53, subdivision (d) to be true. Subsequently, the Legislature changed the law to require proof of personal malice aforethought for a murder conviction. (§ 188, subd. (a)(3).) The defendant petitioned for relief under section 1170.95, establishing a procedure for vacating murder convictions for defendants who could not have been convicted of murder under the new law. Based on the jury's section 12022.53, subdivision (d) finding, the trial court summarily denied the petition for failure to state a prima facie case. The Court of Appeal reversed. The court held, "Because an enhancement under section 12022.53, subdivision (d) does not require that the defendant acted either with the intent to kill or with conscious disregard to life, it does not establish that the defendant acted with malice aforethought." (*Offley*, at p. 598.)

We respectfully disagree with *Offley*. Under these facts, section 12022.53, subdivision (d) leads the *Offley* court to the wrong conclusion. It strains our credulity to believe that gang members shooting into a car containing rival gang members were not acting with at least implied malice. Similarly, here, Ferrell brought a gun to a gang fight and used it. It strains credulity beyond all reason to believe he did not act with at least implied malice.

DISPOSITION

The order to show cause is dissolved and the petition for a writ of habeas corpus is denied.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Terry A. Bork, Marsha N. Revel, Judges

Superior Court County of Los Angeles

Tyree Ferrell, in pro. per.; Cliff Gardner, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Jaime L. Fuster and Joseph P. Lee, Deputy Attorneys General, for Respondent.

EXHIBIT K

DEC 16 2019

TYREE FERRELL
In Propria Persona
V-00002
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

COURT OF APPEAL OF THE STATE OF CALIFORNIA,

SECOND APPELLATE DISTRICT, DIVISION SIX

IN RE TYREE FERRELL,	)
	)
Petitioner,	)
	)
	)
	)
On Habeas Corpus.	)
	)
	)

PETITION FOR WRIT OF HABEAS CORPUS

AND MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT THEREOF

TYREE FERRELL
In Propria Persona
V-00002
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

COURT OF APPEAL OF THE STATE OF CALIFORNIA,

SECOND APPELLATE DISTRICT, DIVISION SIX

IN RE TYREE FERRELL,	)
	)
Petitioner,	)
	)
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On Habeas Corpus.	)
	)
	)

PETITION FOR WRIT OF HABEAS CORPUS

AND MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT THEREOF

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

IN RE TYREE FERRELL,	)	No.
	)	
	)	PETITION FOR WRIT
Petitioner,	)	OF HABEAS CORPUS
	)	
	)	
	)	
On Habeas Corpus.	)	
	)	
	)	

INTRODUCTION

In 1999, when petitioner Tyree Ferrell was 18 years old, he was charged with the shooting death of his boyhood friend Lawrence Rawlings. Because he was indigent he was given appointed counsel; the defense theory at trial was that the shooting was an accident -- defendant was simply trying to fire a warning shot to break up a fist fight between Rawlings and members of a neighboring gang.

Jurors were instructed on first degree premeditated murder. They were also instructed they could convict of second degree felony murder if they found an unlawful

killing occurred during Mr. Ferrell's discharge of a firearm in a grossly negligent manner -- a violation of Penal Code section 246.3. Relying on this instruction during closing argument, the prosecutor told jurors they could convict of second degree murder even if they agreed with the defense theory that the shooting was an accident.

Jurors rejected the prosecutor's theory of first degree murder, unanimously acquitting of first degree murder. But jurors convicted of second degree murder. The court sentenced Mr. Ferrell to 40 years-to-life in state prison -- 15 years to life for the second degree murder conviction and an additional 25 years-to-life for a gun use enhancement found true by the jury.

On appeal, Mr. Ferrell's appointed counsel contended reversal was required because second degree felony murder could not properly be premised on a violation of section 246.3. In its 2004 opinion affirming the conviction this Court rejected the claim, noting that the state supreme court had just issued its opinion in *People v. Robertson* (2004) 34 Cal.4th 156, explicitly rejecting the very same claim.

It turns out, however, that Mr. Ferrell was right. Five years after the *Robertson* opinion, the Supreme Court overruled *Robertson* and held that second degree felony murder could *not* be premised on a violation of section 246.3 after all. (*People v. Chun*

(2009) 45 Cal.4th 1172, 1200.)

In December of 2018, Mr. Ferrell's appointed appellate lawyer came across an electronic copy of the opening brief he filed with this Court on Mr. Ferrell's behalf on appeal in 2003. He immediately wrote to Mr. Ferrell informing him of the *Chun* decision, offering to prepare and file a habeas petition on his behalf if Mr. Ferrell could send any portions of the appellate record back to counsel. Mr. Ferrell did so the next month, and within two months – on March 4, 2019 – Mr. Ferrell filed a Petition for Writ of Habeas Corpus in this Court seeking relief. Four days later this Court issued the following order:

> Petitioner has not sought habeas relief in the superior court in the first instance. Accordingly, this matter is ordered transferred to the Los Angeles County Superior Court for resolution in the first instance.

More than eight months later – on November 18, 2019 – the Superior Court summarily denied the petition. Although second degree felony murder based on a violation of section 246.3 no longer exists in California, the Superior Court held that continued incarceration in this case was proper for that offense because (1) the unrepresented and indigent petitioner in this case filed his *Chun* petition too late and, in any event, (2) there was no prima facie case shown.

For the reasons discussed below, this Court should appoint counsel for the pro per defendant in this case and issue an Order to Show Cause. Contrary to the Superior Court's utterly unexplained ruling, the Petition was not untimely; *to the contrary, it was filed within three months of the indigent and uncounseled petitioner first learning of the Chun decision.* If there is improper delay in this case, it is attributable to appointed appellate counsel, not to petitioner himself. And contrary to the Superior Court's alternate ruling, petitioner's continued incarceration for a crime that no longer exists plainly established a prima facie case for relief.

JURISDICTIONAL ALLEGATIONS

I.

Petitioner is unlawfully confined at the Calipatria State Prison by the warden and the director of the California Department of Corrections pursuant to a judgment of the Superior Court for Los Angeles County in *People v. Ferrell*, No. BA212763.

II.

Petitioner was convicted of second degree murder along with a gun use enhancement under section 12022.53. Jurors were instructed they could convict petitioner of second degree felony murder based on a predicate felony of violating Penal Code section 246.3 -- willful discharge of a firearm in a grossly negligent manner. Jurors

convicted of second degree murder and found the section 12022.53 allegation true; the trial court sentenced petitioner to 15 years-to-life for the murder charge adding an additional 25 years for the gun use enhancement.

III.

Petitioner appealed his conviction to this Court. On September 27, 2004, the Court affirmed the murder conviction rejecting petitioner's argument that "second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner." (*People v. Ferrell* (2004) 2004 WL 2153630 at * 1, attached as Exhibit A.) Petitioner filed a timely Petition for Review in the California Supreme Court which was denied on December 22, 2004 with Justices Kennard and Moreno voting for review. (*People v. Ferrell*, S129037, Order of December 22, 2004, attached as Exhibit B.)

IV.

Aside from the Petition for Writ of Habeas Corpus filed in this Court on March 4, 2019, attached as Exhibit H and which was transferred to the Superior Court, no other petitions for writ of habeas corpus have been filed in state court. Petitioner has no adequate remedy at law for presentation of these claims because his conviction and sentence were previously affirmed on appeal.

V.

The Superior Court denied the Petition that was transferred to that court for two reasons, finding (1) the petition was untimely and (2) no prima facie case for relief had been established. (*In re Ferrell*, BA212763, Order of November 18, 2019, attached as Exhibit G.)

VI.

The claim presented in this Petition is properly cognizable on habeas corpus, because it is based on an intervening change in substantive California homicide law -- the California Supreme Court's opinion in *People v. Chun* (2009) 45 Cal.4th 1172. *Chun* applies retroactively to cases such as this in which the appeal was final before 2009. (*See, e.g., In re Hansen* (2014) 227 Cal.App.4th 906; *In re Lucero* (2011) 200 Cal.App.4th 38, 46.)

CLAIM FOR RELIEF

VII.

Petitioner's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution as well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. At trial, jurors were presented with a theory of second-degree murder which

does not exist under state law. Jurors were instructed they could rely on petitioner's violation of Penal Code section 246.3 as the predicate for a second degree murder conviction. As more fully set out in his accompanying Memorandum of Points and Authorities, petitioner's conviction of second-degree murder is legally unauthorized and violates state and federal due process because this precise theory of second degree felony murder has been squarely repudiated as the basis for murder liability. Because jurors were given an invalid theory of second degree murder, and the record does not establish beyond a reasonable doubt that the jury convicted him of that offense on any valid alternative basis, petitioner is entitled to a writ of habeas corpus. The following facts now known to petitioner support this claim for relief:

A. The state charged petitioner Tyree Ferrell with the July 12, 1999 murder of his boyhood friend Lawrence Rawlings. (1 CT 48.) The state added an allegation that Mr. Ferrell used a firearm in violation of sections 12022.53, subdivision (d). (1 CT 48.) At the time of the charged shooting Mr. Ferrell was 18 years old. (2 RT 282.)

B. Mr. Ferrell pled not guilty and had a jury trial in May of 2003.

C. Prior to trial, Mr. Ferrell voluntarily waived his *Miranda* rights and

spoke with police, telling them what happened on July 12, 1999. (1 CT 110-116; 2 RT 260-261, 264.) At trial, this pre-trial statement to police was introduced into evidence. (RT 258.)

D. Tyree Ferrell and Lawrence Rawlings were boyhood friends and both were members of a local gang known as AFC. (1 CT 114-115.) On July 12, 1999 AFC arranged for a fist fight with another gang – 40 Piru – to resolve a gambling dispute. (1 CT 110; 2 RT 264.) Mr. Rawlings was involved in the fight. (1 CT 114-115.) During the fight, Mr. Ferrell saw that Lawrence was in trouble; to stop the fight he (Mr. Ferrell) then fired a gun into the air. (1 CT111-112; 2 RT 260, 264.) When he brought his arm down, the gun accidentally went off a second time. (1 CT 111-115; 2 RT 264-265.)

E. Realizing that Lawrence had been shot, Tyree dropped the gun, and ran toward Lawrence who was lying on the ground, and held his friend in his arms as he was dying. (1 CT 111-115; 2 RT 264-265.)

F. Eyewitness Henry Keith testified, confirming Mr. Ferrell's account. Mr. Keith was also an AFC member and was fighting along side Mr.

Rawlings that day. (2 RT 327-328.) A member of 40 Piru had Mr. Rawlings on his knees. (2 RT 334-335.) Mr. Keith heard a gunshot. (2 RT 340, 356, 359.) He saw Mr. Ferrell holding his arm straight up and firing into the air. (2 RT 341-342.) As Mr. Ferrell's arm came down, the gun went off again. (2 RT 343.) Mr. Keith saw that Mr. Rawlings had been shot. (2 RT 344.) Mr. Ferrell ran to Mr. Rawlings, leaned over him and said "I didn't mean it." (2 RT 345.)

G. The state called two eyewitnesses -- Cussondra Davis (Mr. Rawlings' girlfriend) and Latesha Rawlings (Mr. Rawlings' cousin). (1 RT 90, 140.) They confirmed there was a fist fight between AFC and 40 Piru on July 12, 1999 and that Mr. Ferrell, Mr. Rawlings and Mr. Keith were all involved. (1 RT 94, 96, 103, 136, 147, 151, 153, 157.) They confirmed that Mr. Ferrell dropped his gun immediately after the second shot. (1 RT 102, 153, 168.) Latesha Rawlings confirmed that Mr. Ferrell then ran to Mr. Rawlings' side, exclaiming that "he was sorry [and] he didn't mean to do it." (1 RT 153, 171.) But neither witness recalled Mr. Ferrell pointing his gun in the air for ths first shot; instead, they recalled he held his gun "sideways" and towards the crowd of people. (1 RT 98-100, 151.)

H. Jurors were instructed on first degree premeditated murder. (3 RT 431.) Jurors were instructed on three different theories of second degree murder: (1) an unlawful killing with express malice but no premeditation, (2) an unlawful killing with implied malice and (3) an unlawful killing "whether intentional, unintentional or accidental" occurring during the willful discharge of a firearm with gross negligence in violation of Penal Code section 246.3. (3 RT 432-435.)

I. In closing argument, the prosecutor first urged jurors to convict of first-degree murder. (3 RT 382.) Alternatively, the prosecutor urged jurors to convict of second-degree murder. The prosecutor told jurors they could rely on the felony murder theory they had been given:

> There is second-degree felony murder, which can get you a conviction for second-degree murder. This is an abbreviation of the much more detailed instruction that her honor will give you. You need to find there was an unlawful killing which could have been intentional, unintentional and even accidental, during the commission of a felony, in this case, discharging a firearm. (3 RT 382.)
>
> If you find that the defendant discharged a firearm with the specific intent to discharge that firearm, even if the killing

was unintentional or accidental, that too is second-degree murder. (3 RT 383.)

J. During deliberations jurors asked the court for "a definition of unlawful killing as it relates to murder." (3 RT 462.)

K. The jury unanimously acquitted of first-degree murder. (3 RT 470.) Jurors rendered a general verdict finding Mr. Ferrell guilty of second-degree murder. (3 RT 471.) The general verdict did not specify which of the three theories of second-degree murder had been relied on. (3 RT 471.)

L. On appeal, Mr. Ferrell contended that reversal was required because "second degree felony murder cannot be predicated on a violation of section 246.3, unlawful discharge of a firearm." (*People v. Ferrell, supra*, 2004 WL 2153630 at * 1.) This Court correctly recognized that if jurors relied on the felony murder theory, they would have been relieved of the obligation to find either express or implied malice. (*People v. Ferrell, supra*, 2004 WL 2153630 at * 4.) Bound by the then-recent Supreme Court decision in *People v. Robertson*, (2004) 34 Cal.4th 156 this Court rejected Mr. Ferrell's argument,.

Holding that "section 246.3 can be the predicate offense to felony murder." (*Id.* at * 1.)

M. Since this Court affirmed the conviction, the law has changed. In *People v. Chun* (2009) 45 Cal.4th 1172 the Supreme Court overruled *Rovbertson* and held that a felony murder conviction could *not* be premised on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner. Consequently, to be liable for second degree murder, the jury here would have had to find beyond a reasonable doubt that defendant harbored either express or implied malice. This was the precise factual inquiry this Court recognized that jurors did not have to make in this case precisely because of the felony murder option. (*People v. Ferrell, supra*, 2004 WL 2153630 at * 4.)

N. Because the California Supreme Court has now held that second-degree felony murder may not be premised on a violation of section 246.3, the submission of that theory tot he jury here was unauthorized under California law.

O. The submission of felony murder to this jury also violated petitioner's Fourteenth Amendment right to due process and his Sixth Amendment right to jury trial by allowing a second-degree murder conviction on an unauthorized theory of liability and by relieving the jurors of finding all the elements of the authorized bases for second-degree murder.

P. As the Supreme Court has explained, "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*People v. Chiu* (2014) 59 Cal.4th 155, 167.)

Q. The erroneous submission of a felony-murder theory cannot be found harmless in this case. Nothing in the record indicates jurors convicted petitioner of second-degree murder on a valid ground.

None of the verdicts or enhancement findings required jurors to find express or implied malice as required for second-degree murder liability outside the context of felony murder.

S. Because the record does not establish beyond a reasonable doubt that the jury convicted petitioner on a legally authorized ground, the conviction of second-degree murder cannot stand. This Court should issue an Order to Show Cause.

FACTS RELEVANT TO TIMELINESS

VIII.

The Petition for Writ of Habeas Corpus filed in this Court in March of 2019, and transferred to the Superior Court, was timely. The following facts now known to petitioner support this claim:

A. Petitioner incorporates by reference each of the factual allegations in Paragraphs I-VII above, as well as each factual allegation in the accompanying Memorandum of Points and Authorities.

B. Petitioner was indigent at trial and was represented by the Public

Defender's Officer. (1 CT 53.) After petitioner was convicted, he appealed his conviction. Petitioner was indigent on appeal and was represented by appointed counsel. (*People v. Ferrell*, B168679, Docket Sheet, attached as Exhibit C.)

C. This Court affirmed the conviction in 2004. Petitioner has been incarcerated in state prison since his sentencing and remains indigent. (Declaration of Tyree Ferrell ("Ferrell Declaration"), para. 1, attached as Exhibit D.)

D. *Chun* was decided in June of 2009. On December 28, 2018 the attorney who represented petitioner in his 2004 appeal happened to come across an electronic version of the opening brief he had prepared in petitioner's case. (Declaration of Cliff Gardner ("Gardner Declaration") at para 2, attached as Exhibit E.) Counsel noted that the issue raised in that brief was the same issue which the Supreme Court had decided in *Chun*, years after the appeal in petitioner's case was final. (Gardner Declaration at para. 2.) That same day counsel wrote petitioner a letter, suggesting that he might have an issue under *Chun* and offering to prepare a Petition for Writ

of Habeas Corpus pro bono if petitioner could send him a copy of his trial record. (Gardner Declaration at para 2.) Petitioner responded in January 2019, sending a copy of those portions of the record he still had. (Gardner Declaration at para. 3; Ferrell Declaration at para. 2-4.) Relying entirely on volunteer counsel, petitioner has filed this petition as soon as practicable. (Ferrell Declaration at para. 4.) The original Petition for Writ of Habeas Corpus was filed in this Court in March of 2019 – less than three months after petitioner had been informed of the *Chun* decision.

E. Until receiving counsel's letter of December 28, 2018, petitioner was unaware of the *Chun* decision and unaware of its potential impact on his case. At the time of petitioner was incarcerated for this offense he had a 10th grade education. He had and has no training in the law, in appellate procedure or in habeas procedure. Until hearing from former appellate counsel in January 2019, petitioner was unaware there was favorable case law undercutting the basis for his conviction. (Ferrell Declaration at para. 4.)

F. Any delay in counsel's filing this petition is counsel's alone and

cannot be attributed to Mr. Ferrell. (Gardner Declaration at para. 3.)

G. There is no right to state-appointed habeas counsel in California. Petitioner is indigent and does not currently have appointed counsel. Petitioner has filed this petition within weeks of becoming aware of the *Chiu* opinion and its applicability to his case, obtaining the necessary case materials, and obtaining the volunteer assistance of counsel in preparing this petition. (*See In re Lucero*, *supra*, 200 Cal.App.4th at 44-45; *In re Wilson* (2015) 233 Cal.App.4th 544.)

REQUEST FOR APPOINTMENT OF COUNSEL AND ISSUANCE OF AN ORDER TO SHOW CAUSE

IX.

A. Petitioner has prepared and submitted this habeas corpus petition with the assistance of volunteer counsel.

B. Petitioner recognizes that further development of these arguments with reference to the specific circumstances of petitioner's case may be necessary. Petitioner therefore seeks appointment of counsel. A reviewing court must appoint counsel on a habeas petition upon

issuance of an order to show cause (OSC). (*In re Clark* (1993) 5 Cal.4th 750, 780; Rules 4.451(c)(2) (superior court), 8.385(f) (appellate court).)

C. The Court also has discretion to appoint counsel at an earlier stage in the interest of justice. Petitioner respectfully ask this Court to appoint counsel at the earliest opportunity to ensure full legal and factual development of these claims with the assistance of counsel.

WHEREFORE, petitioner prays that this Court:

1. Take judicial notice of the transcripts and court records in *People v. Ferrell*, B168679, and this Court's 2004 opinion in the case;

2. Order respondent to file and serve a certified copy of the record on appeal and issue an Order to Show Cause requiring the state to show cause why petitioner is not entitled to the relief sought;

3. Appoint counsel at the earliest opportunity for all further

proceedings in this habeas proceeding;

4. Find this petition states a prima facie case for relief and issue an Order to Show Cause returnable before this Court;

5. Order any additional relief appropriate in the interests of justice.

DATE: 12·6·19

Respectfully submitted,

Tyree Ferrell

Tyree Ferrell

VERIFICATION

I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct.

DATED: 12-6-19

Tyree Ferrell

Tyree Ferrell

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

IN RE TYREE FERRELL,	)	No.
	)	
	)	
Petitioner,	)	
	)	
	)	
On Habeas Corpus.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

TYREE FERRELL
In Propria Persona
V-00002
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233

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STATEMENT OF THE CASE

On January 2, 2002, the Los Angeles County district attorney filed a two-count information against Tyree Ferrell. (1 CT 48.)[1] At the time petitioner was arrested for this offense (and until today) petitioner had a 10th grade education, no training in the law, in appellate procedure or in habeas procedure. (Ferrell Declaration at para. 4.)

Count one charged Mr. Ferrell with a July 12, 1999, murder in violation of Penal Code section 187. (1 CT 48.) This count added an allegation that Mr. Ferrell used a firearm in violation of sections 12022.53, subdivision (d). (CT 48.) Count two charged Mr. Ferrell with a June 25, 1999, assault in violation of section 245, subdivision (a)(2). (1 CT 49.) Mr. Ferrell pled not guilty. (CT 51.)

Opening statements began on May 19, 2003. (1 CT 101.) The state rested its case-in-chief on May 22, 2003. (1 CT 117.) The court instructed jurors they could convict Mr. Ferrell of second degree felony murder if they found the killing occurred during a violation of section 246.3, the willful discharge of a firearm in a grossly negligent manner. (3 RT 434-435.)

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[1] "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript. For the Court's convenience, Mr. Ferrell has attached a copy of the record on a CD as Exhibit F.

The jury began its deliberations on May 27, 2003. (1 CT 121.) On May 29, 2003, jurors convicted Mr. Ferrell of second degree murder and found the firearm use allegations true. (3 RT 471.) They also found him guilty in connection with the count two assault. (3 RT 472.)

The trial court imposed a 15 year-to-life term on the count one charge, then added a 25 year-to-life term for the firearm allegation. (3 RT 479.) The court then added a concurrent upper term of four years on the count two offense. (3 RT 479.)

On appeal, defendant contended that reversal of the murder charge was required because second degree felony murder could not properly rest on a violation of section 246.3. In an unpublished opinion dated September 27, 2004, this Court recognized that "Ferrell contends second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner." (*People v. Ferrell* (2004) 2004 WL 2153630, at *1, attached as Exhibit A.) The Court rejected that claim, noting that "after the parties briefed this appeal" the Supreme Court decided *People v. Robertson* (2004) 34 Cal.4th 156 and "recently decided section 246.3 can be the predicate offense to felony murder." (*Ibid.*)

In *People v. Chun* (2009) 45 Cal.4th 1172 the Supreme Court specifically

overruled *Robertson* and held that a violation of section 246.3 could *not* serve as the predicate for a second degree felony murder prosecution. (*Id.* at p. 1200.) Until hearing about *Chun* from his former appellate counsel in January 2019, petitioner was unaware that *Robertson* had been overruled and there was now directly favorable case law undercutting the basis for his conviction. (Ferrell Declaration at para. 4.)

With the assistance of volunteer counsel, petitioner filed a Petition for Writ of Habeas Corpus with this Court less then three months later – in March of 2019. The Court issued an order transferring the case to the Superior Court. In November 2019, and without appointing counsel, the Superior Court summarily denied the petition, ruling that (1) it was untimely and (2) there was no prima facie case for relief. (Exhibit G). This Petition for Writ of Habeas Corpus follows.[2]

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[2] As noted, petitioner has no training or education in the law. (Exhibit D at para. 4.) He relied on volunteer counsel to prepare both the original petition and this Petition and supporting memorandum. (*Ibid.*) He has requested appointment of counsel in his habeas petition. (Petition at 18.)

STATEMENT OF FACTS

Tyree Ferrell was charged with a July 1999 homicide. At the prosecutor's request, jurors were given a second-degree felony-murder theory of culpability premised on a felony violation of Penal Code section 246.3 -- willful discharge of a firearm. Because a felony violation of section 246.3 cannot serve as the predicate for a second degree felony murder conviction, habeas relief is proper.

A. The July 12, 1999 Homicide.

In July of 1999, Tyree Ferrell was 18 years old. (2 RT 282.) He lived with his mother in Los Angeles on 41st Place. (1 RT 41, 49.) Across the street lived Ms. Ferrell's childhood friend, Valerie Golden along with her son Lawrence Rawlings. (1 RT 48, 76-77.)

Ms. Ferrell and Ms. Golden grew up together in the neighborhood. (1 RT 67.) They went to school together. (1 RT 67.) After they had children they lived across the street from one another. (1 RT 41, 49.) They lived across the street from one another until Ms. Ferrell died. (1 RT 67-68.) At that point, and because Tyree's father had also died, Tyree moved in with his grandmother. (1 CT 227; 1 RT 67-68.)

Tyree and Lawrence grew up together as well. (1 RT 31.) Because Lawrence was four years old than Tyree, he acted as an older brother and always "looked out for" Tyree. (1 RT 31.) According to Ms. Golden, Lawrence and Tyree were the "best of friends." (1 RT 52.) Tyree was "very respectful" and always treated Ms. Golden well. (1 RT 23.)

Yet on July 12, 1999, Tyree was charged with murder in the shooting death of Lawrence Rawlings, his childhood friend and big brother figure. Because Tyree did not deny the shooting, the only real issue for the jury to decide was his mental state at the time of the shooting. On this issue, the parties presented vastly different theories.

The state's theory was that the shooting constituted a premeditated and malicious killing -- first degree murder. The defense theory was entirely different: Tyree never intended to shoot his childhood friend. On July 12, 1999, when Tyree saw Lawrence getting beat up during a gang brawl he took out a gun and fired a shot into the air to stop the fighting. (2 RT 264, 341-342.) A second shot accidentally went off; instead of breaking up the fight, Lawrence was killed and the state charged Tyree with murder. (1 CT 48.)

Prior to trial, Tyree voluntarily waived his *Miranda* rights and spoke with police, telling them what happened on July 12, 1999. (1 CT 110-116; 2 RT 260-261, 264.) On

that day, two local gangs -- "All For Crime" ("AFC") and 40 Piru -- arranged a fist-fight to settle a gambling dispute. (1 CT 110; 2 RT 264.) Both Tyree and Lawrence belonged to AFC. (1 CT 114-115.) During the fight, Tyree realized that Lawrence was in trouble; the 40 Piru gang member fighting Lawrence was "getting the best of him." (1 CT 111-112.) To stop the fight and make sure Lawrence was alright, Tyree fired a gun into the air. (1 CT 111-112; 2 RT 260, 264.) When he brought his arm down, the gun accidentally went off a second time. (1 CT 111-115; 2 RT 264-265.) Mr. Ferrell immediately dropped the gun, and ran toward Lawrence who had been shot and was lying on the ground. (1 CT 111-115; 2 RT 264-265.) Tyree held Lawrence in his arms as he was dying. (1 CT 111-115; 2 RT 264.)

At trial, this pre-trial statement to police was introduced into evidence. (2 RT 258.) To corroborate this statement, the defense called eyewitness Henry Keith to testify. (2 RT 326.) Mr. Keith was also a member of AFC and was there at the fight between AFC and 40 Piru on July 12, 1999. (2 RT 327-328.) Mr. Keith testified that at the time of the shooting he was fighting along side Mr. Ferrell and Mr. Rawlings. (2 RT 327-328.) Mr. Keith confirmed that a member of 40 Piru had Mr. Rawlings on his knees. (2 RT 334-335.) Shortly after and as the fighting continued, Mr. Keith and Mr. Rawlings were side by side when Mr. Keith heard a gunshot. (2 RT 340, 356, 359.) According to Mr. Keith, when he looked over he saw Mr. Ferrell holding his arm straight up and firing

into the air. (2 RT 341-342.) As Mr. Ferrell's arm came down, the gun went off again. (2 RT 343.) Mr. Keith looked over at Mr. Rawlings and realized he had been shot. (2RT 344.) Mr. Ferrell ran to Mr. Rawlings, leaned over him and said "I didn't mean it." (2 RT 345.)

The state's theory of the case was that this was not an accident, but that Mr. Ferrell had intentionally fired his gun toward the crowd and killed his friend Lawrence. (3 RT 379-385.) In support of its theory, the state called Mr. Rawlings's girlfriend -- Cussondra Davis -- and his cousin -- Latesha Rawlings. (1 RT 90, 140.) In large part these witnesses corroborated Mr. Ferrell's own statements to police, confirming that (1) on July 12, 1999, there was a fight between AFC and 40 Piru, (2) Mr. Ferrell, Mr. Rawlings and Mr. Keith were all involved, (3) Mr. Ferrell dropped the gun immediately after the second shot and (4) after the second shot, Mr. Ferrell ran to Mr. Rawlings' side, exclaiming that "he was sorry [and] he didn't mean to do it." (1 RT 94, 96, 102-103, 136, 147, 151, 153, 157, 168, 171.) Neither Cussondra nor Latesha saw Mr. Ferrell point his gun in the air; they recalled him holding his gun "sideways" and pointed it towards the crowd of people. (1 RT 98-100, 151.)

B. The Theories Of Culpability Given To The Jury And The Prosecutor's Argument.

In accord with the prosecutor's theory, the jury was instructed on first degree premeditated murder. (3 RT 431-432.) As discussed above, however, the jury ultimately rejected the prosecutor's theory, unanimously acquitting of first degree murder. (3 RT 470.)

In connection with second degree murder, and as the prosecutor explained to the jury during closing arguments, there were three different theories on which jurors had been instructed. (3 RT 380.) The first theory was murder with express malice -- that is, murder with an intent to kill but no premeditation. (3 RT 381.) The second theory was implied malice murder -- that is, murder without an intent to kill but with a disregard for human life, such as by intentionally firing into a crowd. (3 RT 382.) The third theory was felony murder, that is, "an unintentional, and even accidental [killing] during the commission of a felony, in this case, discharging a firearm." (3 RT 382.)

Jurors were instructed on each of these theories. (3 RT 432 [malice murder with no premeditation]; 434 [implied malice murder]; 429, 434-435 [felony murder].) Under the felony murder theory, jurors were told they could find Mr. Ferrell guilty of felony murder by finding (1) he willfully discharged a firearm and (2) a killing resulted that was

neither justifiable nor excusable. (3 RT 429, 434-435.) In accord with current law, the prosecutor told jurors they were not required to agree under which theory Mr. Ferrell was guilty, so long as each juror agreed he was guilty under one of the three theories. (3 RT 380, 384, 393, 409, 412.) The prosecutor told jurors they could convict of second degree murder under a felony-murder theory even if they accepted defendant's testimony that the shooting was accidental. (3 RT 382, 383.) The jury convicted Mr. Ferrell of second degree murder without specifying the theory on which it relied. (3 RT 471.)

ARGUMENT

I. BECAUSE JURORS WERE GIVEN A THEORY OF CULPABILITY THAT NO LONGER EXISTS UNDER STATE LAW, AN ORDER TO SHOW CAUSE SHOULD ISSUE.

As noted above, jurors were instructed they could convict of second degree murder by relying on a violation of section 246.3 as the predicate felony. (3 RT 429, 434-435.) The prosecutor relied on this theory in her closing argument. (See, *e.g.*, 3 RT 382, 383.) The prosecutor told jurors they could convict of second degree felony murder even if they believed that the shooting was accidental. (RT 382, 383.)

As discussed in Argument I-A below, this theory of felony murder culpability no longer exists under state law. As discussed in Argument I-B below, because the verdicts do not show that jurors resolved this case on a proper theory of second degree murder, an Order to Show Cause should issue as to the second degree murder verdict in this case. Finally, as discussed in Argument I-C the Superior Court's ruling that the Petition is untimely, and its alternate ruling that no prima facie case has been pled, are no bar to issuance of an Order to Show Cause. In fact, the Petition was filed within three months of the indigent and uncounseled petitioner becoming aware of the legal basis for the claim. And petitioner's continued incarceration based on a theory of culpability that does

not exist under state law plainly states a prima facie case for relief.

A. The California Supreme Court in *People v. Chun* Unequivocally Held That Section 246.3 May Not Serve As The Predicate For A Felony Murder Conviction.

As noted above, in his original appeal in this case Mr. Ferrell contended reversal was required because "second degree felony murder cannot be predicated on a violation of section 246.3, willful discharge of a firearm in a grossly negligent manner." (*People v. Ferrell, supra*, 2004 WL 2153630 at *1, attached as Exhibit A.) This Court rejected the claim in its 2004 opinion because in the then-recent Supreme Court decision of *People v. Robertson, supra*, 34 Cal.4th 156 the Supreme Court had resolved the issue and "decided section 246.3 can be the predicate offense to felony murder." (*Ibid.*)

In *People v. Chun, supra*, 45 Cal.4th 1172, the Supreme Court overruled *Robertson* and explicitly held that a violation of section 246.3 could *not* serve as the predicate for a second degree felony murder prosecution. (*Id.* at p. 1200.) The Court could not have been more clear in overruling *Robertson*: "[w]hen the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction." (*Ibid.*) In the years since *Chun* was decided, numerous courts have held it to be fully

retroactive to cases like Mr. Ferrell's, which were final on appeal before *Chun* was decided. (*See, e.g., In re Hansen* (2014) 227 Cal.App.4th 906, 918-920; *In re Lucero* (2011) 200 Cal.App.4th 38, 46.)

Here, the instructions given to jurors explicitly permitted them to convict of felony murder based on a violation of section 246.3. (3 RT 429, 434-435.) Moreover not only did the prosecutor explicitly rely on this theory in closing argument, but he told jurors that as to the other theories presented, they did not have to unanimously agree on a theory of second degree murder in order to convict. (3 RT 380, 382, 383, 384, 393, 409, 412.)

The jury returned a general verdict of guilt on the second degree murder charge. (3 RT 471.) Thus, from the record itself, it is impossible to determine if 1 or all 12 jurors relied on felony murder to convict based on a violation of section 246.3. What is clear, however, is that pursuant to *Chun*, that theory of culpability simply no longer exists under state law. It has not existed since 2009. Provision of this theory of culpability, and a conviction based on such a theory, violated state law.

It also violated federal law. Conviction on a theory of liability which is invalid violated Due Process. (*See Fiore v. White* (2001) 531 U.S. 225, 228 [a conviction on an invalid legal theory violates due process even when the decision of the highest state court

recognizing the invalidity of the theory occurs after the conviction has become final]; *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d. 664 [defendant charged with murder, in addition to proper theory of culpability, jury was presented with a felony-murder theory which did not exist under California law, jury returned a general verdict of guilt; held, Due Process violated and habeas relief required in the absence of a showing that the jury relied on the untainted theory]. *See also Schirro v. Summerlin* (2004) 542 U.S. 348, 351-352 [as a matter of federal law, judicial decisions that narrow the scope of criminal liability apply to convictions that are already final on appeal].) The only remaining question in assessing whether an Order to Show Cause should issue is whether the *Chun* error can be considered harmless as a matter of law.

B. An Order To Show Cause Should Issue Because The Record Does Not Establish Beyond A Reasonable Doubt That Jurors Based Their Verdict On A Legally Valid Ground.

As discussed above, the submission of a second degree felony murder theory of culpability based on a violation of section 246.3 violated both federal and state law. Because this theory of second-degree murder liability is now legally unauthorized, instructions on that theory deprived petitioner of his right to jury determination beyond a reasonable doubt of all the elements of a murder charge. (*See generally United States v. Gaudin* (1995) 515 U.S. 506; *Neder v. United States* (1999) 527 U.S. 1; *Hedgepeth v.*

Pulido (2008) 555 U.S. 57, 58-61; *People v. Chun*, *supra*, 45 Cal.4th at p. 1201.) Specifically, the erroneous instructions relieved the jury of the necessity of finding the elements necessary for a conviction of second degree murder under a proper, non-felony-murder theory -- that is, jurors did not necessarily find either that Mr. Ferrell (1) intentionally shot with malice but without premeditation (which would support second degree malice murder) or (2) intentionally shot with implied malice, that is, a conscious disregard for human life (which would support implied malice murder).

As this Court properly noted in resolving the appeal, "the nature of felony murder" is such that any juror relying on that theory "will be prevented from considering whether [defendant] acted without malice." (*People v. Ferrell*, *supra*, 2004 WL 2153630, at *4.) The Court was entirely correct; the instructional error relieved jurors of the necessity of finding either express or implied malice required for a proper conviction of second degree murder outside the context of felony murder.

As with other federal constitutional errors, reversal is required under the *Chapman* test unless the state can prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Chapman v. California* (1967) 386 U.S. 18; *see People v. Chiu* (2014) 59 Cal.4th 155, 167; *People v. Chun*, *supra*, 45 Cal.4th at p. 1201.) Error under *Chun* can be harmless only where the state establishes that the verdicts show the jury convicted on a

valid theory of culpability. (*People v. Chun*, *supra*, 45 Cal.4th at p. 1201. *Accord People v. Chiu, supra*, 59 Cal.4th at p. 167 ; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.)

The record of this case leaves little doubt that the state cannot prove the *Chun* error harmless. As an initial matter, and as discussed above, the prosecutor relied on the second degree felony murder theory in closing argument. (3 RT 382.) And although jurors were given other, legitimate theories of second degree murder, jurors were told they did not have to agree on a theory of second degree murder in order to convict of the crime. (3 RT 380, 384, 393, 409, 412.) Moreover, the prosecutor made clear jurors could convict of second degree murder under the felony murder theory even if they accepted the defense theory that this was an entirely accidental shooting. (RT 382, 383.) Of course, the prosecutor's reliance on this improper theory in closing argument is vital to any prejudice determination. (*See People v. Powell* (1967) 67 Cal.2d 32, 55-57; *People v. Cruz* (1964) 61 Cal.2d 861, 868.)

In short, on this record the state will be unable to carry its burden of proving that jurors relied on either of the two valid theories of second degree murder in reaching their decision. (*See e.g.*, *People v. Smith* (1984) 35 Cal.3d 798, 808 [trial court instructs jury on both proper and improper theories of murder; held, reversal is required because "the People cannot show that no juror relied on the erroneous instruction as the sole basis for

finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial."]; *accord People v. Bejarano* (2007) 149 Cal.App.4th 975, 992; *People v. Guiton* (1993) 4 Cal.4th 1116, 1120; *see also People v. Morris* (1988) 46 Cal.3d 1, 24; *People v. Boyd* (1985) 38 Cal.3d 762, 770; *People v. Cantrell* (1973) 8 Cal.3d 672, 686; *People v. Robinson* (1964) 61 Cal.2d 373, 406.) To the contrary, just as this Court noted in its 2004 opinion, provision of the second degree felony murder instructions made it unnecessary for jurors to decide whether Mr. Ferrell harbored either express or implied malice. An Order to Show Cause should issue.[3]

C. Because The Indigent And Uncounseled Petitioner Filed His Petition Within Three Months Of Becoming Aware Of *Chun*, The March 4, 2019 Petition Was Timely.

California law does not contain a defined time limit within which a habeas petition must be filed. Instead, the rule is flexible and provides that a habeas petition should be

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[3] This habeas corpus petition is the proper vehicle for presentation and consideration of petitioner's claim under *People v. Chun*, *supra*, 45 Cal.4th 1172. Habeas corpus is the appropriate procedural vehicle where an intervening opinion of the California Supreme Court has disavowed one of the theories on which a defendant was tried and convicted. (*In re Lucero*, *supra*, 200 Cal.App.4th at pp. 43-44; *In re Hansen*, *supra*, 227 Cal.App.4th at pp. 919-920.) An intervening "change in the law" represents a well-established exception to the general rule barring habeas review of claims that were either raised and rejected on a prior appeal or could have been raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 841; see e.g., *In re Coley* (2012) 55 Cal.4th 524, 537; *In re Wilson* (2015) 233 Cal.App.4th 544.)

filed without "substantial delay." (*In re Robbins* (1998) 18 Cal.4th 770, 780.) "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." (*Ibid.*) The facts supporting the claim, and the legal basis for the claim are referred to as "triggering facts." (*Ibid.*)

A petitioner may avoid a finding of substantial delay by alleging "facts showing when information offered in support of the claim was obtained, and that the information neither was known, nor reasonably should have been known, at any earlier time." (*Ibid.*) Although there are no hard and fast rules, a delay of five months between discovery of triggering facts and filing a petition is not considered substantial. (*Compare In re Stankewitz* (1985) 40 Cal.3d 391 [finding no delay where petition filed a year and a half after obtaining the operative declarations]; *In re Robbins*, *supra*, 18 Cal.4th at pp. 795-796 [finding no delay where petition filed five months after discovery of triggering facts.].) Indeed, in explaining the "substantial delay" rule to the United States Supreme Court, the state conceded that "a 5-month window from the discovery of triggering facts to the presentation . . . of the claim was a reasonable amount of time." (*Walker v. Martin*, No. 09-996, Oral Argument Transcript, 2010 WL 4818791 (U.S.) 10.) Where a petitioner's delay in learning the basis of a claim is due to prior counsel's inadequate representation, there is no substantial delay. (*In re Clark* (1993) 5 Cal.4th 750, 780.)

Here, under the circumstances, petitioner presented his Petition in a timely fashion. Petitioner is indigent. He was convicted in 2003 and given appointed counsel on appeal. His appeal was affirmed in 2003. *Chun* was decided on March 30, 2009. At that point, petitioner was an incarcerated, indigent prisoner without counsel.

Petitioner has received volunteer assistance from counsel in presenting and filing this Petition. In December 2018 petitioner's appointed appellate counsel came across a copy of petitioner's opening brief on appeal and realized -- from that brief -- that petitioner might have a claim under *Chun*. (Declaration of Cliff Gardner ("Gardner Declaration") at para 2, attached as Exhibit E.) Counsel immediately wrote petitioner a latter advising him of the *Chun* decision and offering to represent him pro bono in raising the claim. (Gardner Declaration at para. 2.)

Until receiving that letter, Mr. Ferrell was unaware of the *Chun* decision. (Declaration of Tyree Ferrell ("Ferrell Declaration") at para. 4, attached as Exhibit D.) At the time of the 1999 shooting, Mr. Ferrell was a teenager. (RT 282.) He had completed 10th grade. (Ferrell Declaration at para. 4.) Mr. Ferrell has had no experience or training in the law, in criminal procedure or in habeas practice or procedure. (Ferrell Declaration at para. 4.) Mr. Ferrell accepted counsel's offer to prepare a Petition for Writ of Habeas Corpus on his behalf for free and, in January 2019, he was able to send counsel a copy of

the record. (Ferrell Declaration at para 3; Gardner Declaration at para 3.) Volunteer counsel then reviewed the nearly 750 page record on appeal. (Gardner Declaration at para. 3.) Relying on volunteer counsel, petitioner filed this petition within three months of learning about the *Chun* decision. (Ferrell Declaration at para. 4.) The Petition was not untimely. If there is delay in this case, it is delay on the part of prior appellate counsel in failing to notify Mr. Ferrell more promptly of the *Chun* decision.[4]

Additionally, the interests of justice require the Court review petitioner's claim. (See *In re Huffman* (1986) 42 Cal.3d 552, 555; *In re Estrada* (1965) 63 Cal.2d 740, 750.) Here, petitioner was prosecuted and convicted of murder under an invalid legal theory. *Chun* was decided in 2009. If petitioner is correct, he has already served 16 years he should not have had to serve -- ten years of which (the ten years since *Chun* was decided) -- simply because of his lack of knowledge and his indigency. This is a fundamental miscarriage of justice which, as the Supreme Court has noted, permits merits review even of habeas petitions that are deemed untimely. (*In re Clark* (1993) 5 Cal.4th

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[4] The Superior Court denied relief on November 18, 2019. Because this Petition has been filed within 60 days of that decision, it too is timely. (*See Chaffer v. Prosper* (9th Cir. 2008) 542 F.3d 662, 666; *Warbuton v. Walker* (C. D. Cal. 2008) 548 F.Supp. 835, 839.)

750, 797.) Principles of fundamental fairness support the Court in deciding to review his habeas claim.[5]

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[5] As noted above, the Superior Court alternatively ruled that no Order to Show Cause should issue because petitioner had not established a prima face case as to prejudice. (Exhibit G.) But as discussed in Argument I-B above, this conclusion ignores the record. The prosecutor relied on the invalid theory in closing argument and although other theories of second degree murder were given to the jury, the prosecutor (and court) both told jurors they did not have to unanimously agree on a theory of second degree murder. (3 RT 380, 384, 393, 409, 412.) On this record, the state cannot carry its burden of showing beyond a reasonable doubt that even a single juror relied on a valid theory. An Order to Show Cause should issue.

CONCLUSION

For all these reasons the Court should appoint counsel to represent petitioner and issue an Order to Show Cause.[5]

DATED: 12-6-19

Respectfully submitted,

Tyree Ferrell

By Tyree Ferrell
In Pro Per

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[5] In the Petition, petitioner seeks appointment of counsel. (Petition at 18.) Such an appointment is mandatory upon issuance of an Order to Show Cause. (*In re Clark* (1993) 5 Cal.4th 750, 780; Rules 4.451(c)(2) (superior court), 8.385(f) (appellate court).) This Court also possesses discretion to appoint counsel at an earlier stage, in the interests of justice.

Appointment of counsel is especially urgent here. Petitioner in indigent, he is incarcerated and he has no legal training. Numerous courts have recognized that appointment of counsel at an early stage is particularly apt where a habeas petition is based on intervening precedent, such as the decision in *Chun*. (*See, e.g., In re Moore*, 1st Dist. A126853 (order of Dec. 7, 2009) [*Chun* claim]; *see also In re Pulido*, 1st Dist. A136960 (order of Nov. 2, 2012) [cruel and unusual punishment claim under *Miller v. Alabama* (2012) 567 U.S. __[132 S.Ct. 2455]. See also, *Martinez v. Ryan* (2012) 566 U.S. ___ [132 S.Ct. 1309, 1319].) Accordingly, as stated in the Petition, petitioner respectfully prays this Court to exercise its discretion to appoint counsel at this juncture, rather than to require further briefing without the formal benefit of assigned counsel.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court 8.384(a) and 8.204(c), I certify that the accompanying Petition for Writ of Habeas Corpus is double spaced, that a 13 point proportional font was used, and that there are 3177 words in the petition and the supporting memorandum of points and authorities is double spaced, that a 13 point proportional font was used, and that there are 4672 words in the memorandum.

Dated: 12-6-19.

Tyree Ferrell

Tyree Ferrell
Petitioner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Ave, Berkeley, CA 94702. I am not a party to this action.

On November 25, 2020, I served the within

PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

upon the parties named below by mail:

Mr. Tyree Irvin Ferrell, V00002
Calipatria State Prison
P.O. Box 5002
Calipatria, CA 92233-5002

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 25, 2020, at Berkeley, California.

Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Tyree Irvin Ferrell**
Case Number: **TEMP-Q80QX536**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **casetris@aol.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR WRIT OF HABEAS CORPUS	IN_RE_FERRELL_CA_SUPREME (11-25-20)
EXHIBITS	FERRELL_EXHIBIT F_PART 1 (11-25-20)
EXHIBITS	FERRELL_EXHIBIT F_PART 2 (11-25-20)
EXHIBITS	FERRELL_EXHIBIT F_PART 3 (11-25-20)

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Office of the Attorney General	docketingLAAWT@doj.ca.gov	e-Serve	11/25/2020 1:15:49 PM
California Appellate Project	capdocs@lacap.com	e-Serve	11/25/2020 1:15:49 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/25/2020
Date

/s/Jack Adams
Signature

Gardner, Cliff (93782)
Last Name, First Name (PNum)

Law Offices of Cliff Gardner
Law Firm