IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S190713
Plaintiff and Respondent,	(Fourth Dist., Div. 3, No. G040716
v.	(Orange County Superior Court No. 06NF2339)
COLE ALLEN WILKINS,	
Defendant and Appellant.	

Appeal from the Superior Court of Orange County
Hon. Richard F. Toohey, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

Richard A. Levy (SBN 126824)
21535 Hawthorne Blvd., Suite 200
Torrance, CA 90503-6612
(310) 944-3311

Attorney for
Cole Wilkins

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I.

Erroneous refusal of instruction

***Cavitt* did not involve the actual killer.** The People concur that "this Court in Cavitt did state that it involved the 'complicity aspect' of felony murder." (Resp. B. at 27, quoting People v. Cavitt (2004) 33 Cal.4th 187, 196.) Indeed, the case did not merely "involve[]" the complicity aspect but was explicitly limited to that aspect:

> [W]e are not concerned with that part of the felony-murder rule making a *killer* liable for first degree murder if the homicide is committed in the perpetration of a robbery or burglary. Rather, the question here involves "a *nonkiller's* liability for the felony murder committed by another.

(Cavitt at p. 196, italics in original, internal citation and quotation marks omitted.) Yet, the People assert that "both Cavitt and Williams *were* direct perpetrators in the home invasion and killing of the victim." (Resp. B. at 27, italics in original.) This does not accurately reflect the posture of the case. The opinion recognized that there was some evidence from which the jury could have found that the two defendants on appeal, Cavitt and Williams, were the actual killers, but it analyzed their culpability on the basis of the evidence tending to show that they were merely aiders and abettors:

> Because the jury could have convicted defendants

ARGUMENT

> without finding they were the direct perpetrators of the murder, we granted review to clarify a nonkiller's liability for a killing "committed in the perpetration" of an inherently dangerous felony under Penal Code section 187's felony-murder rule.

(Cavitt at p. 193.) Thus, the People's apparent argument that the holding of Cavitt must apply equally to the actual killer because Cavitt and Williams were the actual killers is contrary to the view of the evidence on which the opinion was based.

For the actual killer, the "continuous transaction" rule and the escape rule are coterminous as to flight. The People observe that the continuous-transaction rule applies to the actual killer. (Resp. B. at 15-18, 27.) Wilkins has made the identical point. (E.g., AOB at 15.) The issue, however, is whether the jury may find that the transaction continues beyond the time when the actual killer reaches a place of temporary safety. As this court has repeatedly held, the answer is no; the transaction terminates when defendant has reached a place of temporary safety. (See, e.g., In re Malone (1996) 12 Cal.4th 935, 967 ("The jury was correctly instructed that for felony-murder purposes a robbery continues until the perpetrator has reached a place of temporary safety and is in unchallenged possession of the stolen property") (internal quotation marks and citation omitted); People v. Milan (1973) 9 Cal.3d 185, 195 ("Here the jury was warranted in concluding that defendant had not won a place of temporary safety when he shot Burney. Accordingly, the court did not err in

giving instructions on the felony-murder rule").) Put another way, the continuous-transaction rule, as applied to the actual killer, incorporates the escape rule with respect to flight. (See People v. Thongvilay (1998) 62 Cal.App.4th 71, 77 ("Felony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery until the perpetrator reaches a place of temporary safety because the robbery and the accidental death, in such a case, are parts of a 'continuous transaction'").) As explained in the opening brief (AOB at 16), this court's post-Cavitt opinion applies the same principle. (See People v. Young (2005) 34 Cal.4th 1149, 1177.)

The People argue that this consistent body of case authority does "not undermine the clear holding in Cavitt which discussed the exact issue in this case." (Resp. B. at 31.) As explained above, Cavitt did not discuss the "exact issue"; to the contrary, it emphasized that its holding was limited to nonkillers, that is, to the complicity aspect of felony murder. (People v. Cavitt, supra, 33 Cal.4th at p. 196 ("This case involves the 'complicity aspect' of the felony-murder rule").)

The People assert that "[a] review of the language regarding escape and temporary safety in these cases reveals that the term was used descriptively but not as a limitation on felony murder liability." (Resp. B. at 30.) This is perplexing. People v. Young, supra, squarely held that for purposes of felony murder "[a] robbery is not complete *until* the perpetrator reaches a place of temporary safety." (34 Cal.4th at p. 1177, emphasis added.) It is hard to see how this is anything but a holding. The

People indeed recognize this: "Respondent acknowledges that Young is a post-Cavitt decision and references the escape rule." (Resp. B. at 32.) (Of course, Young does not merely "reference[] the escape rule" but overtly relies on that rule to determine whether there was sufficient evidence from which the jury could find defendant guilty of felony murder. (See id. at p. 1177.))

The People attempt to modify Young's holding by hypothesizing that "[w]hile admittedly this Court in Young did refer to reaching a place of temporary safety as defining the underlying felony, it also stated that the ultimate question for determining felony murder liability is whether the underlying felony and the homicide are 'part of one continuous transaction.'" (Resp. B. at 32, quoting Young at p. 1175.) As explained above, however, these are merely two formulations of the same criterion when applied to the flight of the actual killer, for once the killer has reached a place of temporary safety, the transaction is no longer deemed to be continuing. (See People v. Thongvilay, supra, 62 Cal.App.4th at p. 77; People v. Russell (2010) 187 Cal.App.4th 981, 988 ("In determining whether the killing is part of a continuous transaction, the courts have applied what is known as the escape doctrine"); People v. Bodely (1995) 32 Cal.App.4th 311, 314 ("Since the application of the escape rule to burglary is consistent with the 'one continuous transaction' test, we conclude that felony-murder liability continues during the escape of a burglar from the scene of the burglary until the burglar reaches a place of temporary safety").) For example, in People v. Stankewitz (1990) 51 Cal.3d 72, 101, the defendant

argued that "the murder could not have been committed during the commission or attempted commission of a robbery because [defendant] had reached a 'place of temporary safety.'" This court did not dispute the premise that *if* defendant had reached a place of temporary safety he would not have been culpable for felony murder. The court simply held that "[t]here was never a moment when defendant could reasonably be said to have reached a place of temporary safety." (Ibid.)

The People attempt to distinguish the Court of Appeal opinions on the theory that "they are all factually distinguishable because they involved or discussed situations where a pursuit following the commission of the underlying felony occurred." (Resp. B. at 31.) The People do not explain the significance of this distinction. If culpability for felony murder terminates when defendant has evaded his immediate pursuers, a fortiori it terminates when he has not been pursued at all and is beyond the reach of any potential immediate pursuers. The Court of Appeal has indeed rejected the People's current argument. In People v. Russell, supra, 187 Cal.App.4th at p. 990, defendant argued "that even if the escape rule applies to burglary, it can only apply where there is some immediate pursuit from the scene." The Court of Appeal disagreed, holding: "we are satisfied that the felony-murder escape rule does apply to the felony of burglary and that it is not necessary to show the felon was either chased from the scene or that without the felon's knowledge police had been called." (Id. at p. 991.)

The People attempt to distinguish the cases applying the

escape rule because "many of the cases appellant cites involved a robbery and an immediate pursuit following the underlying felony." (Resp. B. at 31.) According to the People, robbery is an ongoing crime whereas burglary "is complete upon entry of the building with the requisite intent." (Resp. B. at 31.) Although burglary is complete upon entry for purposes of fixing criminal liability for that crime (see People v. Montoya (1994) 7 Cal.4th 1027, 1041-1042), the crime continues beyond that point for purposes of felony-murder culpability. For example, in People v. Mason (1960) 54 Cal.2d 164, 168, the defendant, who entered the house with intent to commit a felony, did not commit the crime until he had been in the house a full 20 hours. Yet, though the burglary itself was "complete" upon entry, the crime continued for purposes of felony murder. (Id. at pp. 168-169.) The Courts of Appeal have applied the same principle. (E.g., People v. Russell, supra, 187 Cal.App.4th at p. 989; People v. Fuller (1998) 86 Cal.App.3d 618, 623-624 (specifically rejecting the distinction between burglary and robbery in applying the escape rule to felony murder).) The People cite no authority to the contrary.

The People next suppose that even if "failure to reach a place of temporary safety will result in liability under the one continuous transaction doctrine, the converse is not necessarily true; reaching a place of temporary safety does not mean that the causal chain has been broken." (Resp. B. at 33.) The People do not cite a single authority supporting that view as to the actual killer. People v. Young, supra, is squarely to the contrary, for if

"[a] robbery is not complete *until* the perpetrator reaches a place of temporary safety" (id., 34 Cal.4th at p. 1177, emphasis added), it follows that the robbery is in fact complete – that is, the continuous transaction is terminated for purposes of felony murder – when the perpetrator *has* reached a place of temporary safety. The plain meaning of *until* does not allow a contrary inference. For example, the Court of Appeal has cited with approval a standard dictionary in which *until* "is defined as 'During the whole time before; up to the time of, *implying cessation or reversal at that time.*'" (English v. City of Long Beach (1952) 114 Cal.App.2d 311, 320, emphasis added.) So, too, Young's holding that the robbery is not complete for purposes of felony murder *until* the perpetrator has reached a place of temporary safety implies that it *is* complete when he *has* reached that place.[1]

It must be emphasized that Young was specifically dealing with completion of the robbery for purposes of felony-murder

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[1] Sister-state and federal opinions, consistent with English v. City of Long Beach, reach the same conclusion as that case: The word *until* implies that when the point is reached, the condition no longer applies. For example, where a contract specified that a specified increase in benefits was available "until age 40," the "plain meaning" was that such an increase was not available thereafter. (Curtis v. Treloar (D.N.J. 1998) 1998 WL 1110448, *6; see also, e.g., Driscoll v. Karroo Land Co. (R.I. 1991) 600 A.2d 722, 725 ("In the instant case the use of the word 'until' means that upon the arrival of the one-year period following the tax collector's sale, the prohibition against possessing or collecting rents by the tax-sale purchase, will end").)

culpability. (See Young at pp. 1176-1177.) Thus, it was applying the escape rule in order to determine whether the homicide and underlying felony were part of one continuous transaction. If Young had intended to apply the Cavitt rule that is applicable to accomplices, it would not have specifically invoked and applied, as dispositive, the escape rule, for Cavitt made it reasonably clear that for purposes of determining the culpability of aiders and abettors under the complicity aspect, whether the crime itself is complete does not resolve whether the transaction is continuing. (See People v. Cavitt, supra, 33 Cal.4th at p. 208.)

The People erroneously treat felony-murder culpability as the exclusive ground of culpability for a dangerous act. The People argue that "application of the escape rule would relieve appellant of *all liability* after he went to Doherty's house if the jury found that he had reached a place of temporary safety there despite the fact that there was a logical causal nexus between his careless driving of the stolen loot and the homicide it caused." (Resp. B. at 34-35, emphasis added.) The theory that Wilkins would get off scot free if not for the felony-murder rule is hard to fathom. If Wilkins recklessly or negligently drove at freeway speed with a load that was unsafely secured for those conditions, he would likely be guilty of implied-malice murder or at least vehicular manslaughter. (See Pen. Code, § 192, subd. (c) (vehicular manslaughter); People v. Contreras (1994) 26 Cal.App.4th 944, 955-957 ("bandit" tow truck driver with a history of poor driving was properly found guilty of implied-

malice murder where, knowing that his brakes were not good, he sped to a potential customer and collided with a car, killing the occupant); People v. Ross (1956) 139 Cal.App.2d 706, 710-711 (defendant properly found guilty of manslaughter where he drove too fast for the conditions and struck a pedestrian).)[2]

As this court observed long ago, just because a defendant is not culpable for felony murder does not mean he will be "insulate[d]" from punishment for his unlawful acts. (People v. Satchell (1971) 6 Cal.3d 28, 43, overruled on other grounds in People v. Flood (1998) 18 Cal.4th 470.)

The People present two hypotheticals involving the taking of a nap. (Resp. B. at 35-36.) In one case, defendant *B* secured the load after taking a nap, but then lost control of his truck because an animal crossed his path, causing the stove to fall out, resulting in a fatal collision; in the other case, defendant *A* failed to secure the load after he took his nap, which caused the stove to fall out, again resulting in a fatal collision. (Resp. B. at 35-36.) The People find it unfair that neither person would be guilty of

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[2] The predicate crime for gross vehicular manslaughter would be driving with a load that was unsafe for the particular conditions:

> It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard.

(Veh. Code, § 24002, subd. (a).) Here, the actus reus was driving at a high rate of speed on the freeway for a long distance (at least 62 miles) with a load that was not safely secured for those conditions.

felony murder under the escape rule even though "A is clearly more culpable than B." (Resp. B. at 35-36.) The solution to the People's dilemma is straightforward: *A* could be found guilty of implied-malice murder or vehicular manslaughter because he recklessly or negligently drove with a load that was not safely secured for the conditions at the time the stove fell off, whereas *B* would likely not be guilty of any crime because he was driving with reasonable care but had an unforeseeable accident. Thus, because *A* is more culpable than *B*, he is exposed to a sentence of up to 15 years to life for implied-malice murder, whereas *B* has no criminal liability whatsoever. The People do not explain why this result is unfair.

The People observe that the felony-murder rule was adopted to protect the community, not to benefit the lawbreaker. (Resp. B. at 36.) Of course the same could be said for any penal statute that criminalizes particular conduct. This obvious truth does not go far to illuminate the limits of the felony-murder rule. This court has provided guidance that is somewhat more specific. (People v. Washington (1965) 62 Cal.2d 777, 783 ("Although it [the felony-murder rule] is the law in this state (Pen. Code, § 189), it should not be extended beyond any rational function that it is designed to serve"), quoted with approval in People v. Pulido (1997) 15 Cal.4th 713, 724.) Applying this principle to the People's hypotheticals involving a nap, it is hard to see what rational function is served by extending the felony-murder rule beyond the point at which defendant has reached a place of temporary safety, given that defendant's recklessness or

negligence beyond that point would be punishable in any event by imprisonment up to life.

Retention of the existing escape rule would not require an inquiry into defendant's state of mind. The People argue that the current rule would "require an inquiry into the subjective state of whether the perpetrator believed he was safe." (Resp. B. at 38.) This is not so. The Court of Appeal, after reviewing this court's opinions, squarely "conclude[d] that the issue to be resolved is whether a robber had actually reached a place of temporary safety, not whether the defendant thought that he or she had reached such a location." (People v. Johnson (1992) 5 Cal.App.4th 552, 560.) It may be that in some cases defendant's subjective belief would be relevant to the objective ultimate fact. (See id. at p. 561; but cf. People v. Ramirez (1995) 39 Cal.App.4th 1369, 1374 ("Appellant's subjective feeling of security, i.e., his inability to appreciate the risk of staying at the scene of the crime, is irrelevant" to whether he had reached a place of temporary safety).) This, however, is far different from "requir[ing] an inquiry" (Resp. B. at 38) into his state of mind in all cases.

In any event, the felony-murder rule dispenses with mens rea only with respect to the element of malice aforethought. (People v. Caldwell (1984) 36 Cal.3d 210, 227, fn. 1 ("The felony-murder rule relieves the prosecution of proving the element of malice for a killing committed in the course of a felony by one of the perpetrators").) The rule does not demand that defendant's state of mind be excluded for all other purposes in the entire

trial, regardless of the issue. Indeed, the pattern instruction on the continuous-transaction rule specifically contemplates that the jury will consider defendant's state of mind on that issue. (CALCRIM No. 549, item 3 ("Whether the fatal act was committed *for the purpose* of aiding the commission of the felony or escape after the felony") (emphasis added).) Thus, the People's concern about introducing evidence of defendant's state of mind would remain even under their theory that CALCRIM No. 549, not the escape rule, is applicable to the actual killer.

The jury did not necessarily find that the fatal act was the initial failure to tie the load properly. The People argue that Wilkins "fails to consider the situation in which he has set in motion actions during the felony which ultimately caused a death, actions which could possibly occur after a defendant has reached a place of temporary safety." (Resp. B. at 37.) The People offer up another hypothetical: during a burglary the perpetrator knocks over a candle, which causes a fire and leads to the death of a firefighter. (Resp. B. at 37.) In that hypothetical, however, the fatal act is the setting of the fire before defendant has reached a place of temporary safety. Thus, the hypothetical is easily resolved by applying the same principle that underlies the delayed-death statute. If a burglar shoots the homeowner, who does not die until months or even years later, long after the burglar has reached a place of temporary safety, he is still culpable for felony murder based on the act of shooting at the scene of the crime, for it is the shooting that is the fatal act. (See

Pen. Code, § 194; People v. Dillon (1983) 34 Cal.3d 441, 450, 452 (upholding felony-murder conviction in a case in which the victim did not die until several days later, long after defendant gunman had left the scene).)

As explained in the opening brief, however (AOB at 54-55), a properly instructed jury would not necessarily find that the fatal act or actus reus of the homicide in this case took place at the scene of the burglary. The fatal act that caused the stove to fall off the truck was the *driving* under conditions that were unsafe under the circumstances, namely, traveling a long distance at a high speed with a load that was insufficiently secured *for those conditions* at that time. After all, whether a load is unsafely secured cannot be determined in the abstract, but only in light of the conditions under which the load is transported. For example, a load may be safe for purposes of driving to the next block at a slow speed, and yet be unsafe when speeding 50 miles on a road with many sharp curves. Thus, the actus reus took place at that later time, not long beforehand at the scene.

This principle is illustrated by the fact that the statute prohibits *driving* (operating the vehicle) with a load that presents an *immediate* safety hazard. (See Veh. Code, § 24002, subd. (a) ("It is unlawful to operate any vehicle or combination of vehicles which is in an unsafe condition, or which is not safely loaded, and which presents an immediate safety hazard").) The act of loading the truck was therefore not the fatal act because it did not present an immediate hazard; the immediate hazard was the

driving at a high speed on the freeway for at least an hour, for under those conditions there was a risk that the load would shift and a box would fall unless everything was adequately tied down.

The People indeed appear to concede as much. In another hypothetical, the People assume defendant had gone home for the night, taking "smaller items out of *the cab*" (but apparently leaving the bed of the truck just as it was), and then drove the truck the next day, causing the stove to fall. (Resp. B. at 39, emphasis added.) According to the People, "no reasonable jury instructed on the continuous transaction doctrine would have found him liable under a felony murder theory." (Resp. B. at 39.) Yet, in that hypothetical, the initial act at the scene was the same as in Wilkins's case, namely, the defendant did not tie down the load before driving away from the scene. Thus, the only reasonable explanation for the different result in the two cases is that the jury in the People's hypothetical grasped that the fatal act was the driving with an unsafe load, not the failure to properly tie the load initially. For if the fatal act had been the failure to tie the load at the scene, it would not have mattered whether Wilkins drove the unsafely loaded truck an hour later, a day later, or a week later: whenever the mishap occurred, it would have related back to Wilkins's initial conduct at the scene.

In any event, it is for the jury to determine what act caused the homicide, and hence whether that act was committed before or after defendant had reached a place of temporary safety. (Cf. People v. Ainsworth (1988) 45 Cal.3d 984, 1017 (jury must determine which act was the actus reus of malice murder); People

v. Spector (2011) 194 Cal.App.4th 1335, 1385 ("the key question for the jury was whether there had been an actus reus at all"); People v. Cervantes (2001) 26 Cal.4th 860, 871-872 (proximate causation is question for the jury).) Thus, even if one juror could reasonably suppose that the fatal act was the loading of the truck at the scene, another juror could conclude, with at least as much reason, that the fatal act was driving a long distance with such a load, or driving at a high speed with such a load, or a combination, or perhaps Wilkins's decision to *resume* driving after he had stopped at a gas station shortly beforehand and had an opportunity to inspect the load. (See RT (5) 868:11-869:5.)

The instruction on the *Cavitt* rule was not adequate. The People argue that "under the continuous transaction instruction, a defendant is not foreclosed from arguing that he has reached a place of temporary safety." (Resp. B. at 40.) Argument without the benefit of instruction, however, is not sufficient to cure the instructional omission. (Taylor v. Kentucky (1978) 436 U.S. 478, 488-89 ("But arguments of counsel cannot substitute for instructions by the court"); People v. Fudge (1994) 7 Cal.4th 1075, 1111; Ho v. Carey (9th Cir. 2003) 332 F.3d 587, 594 ("The arguments of counsel that the jury must find implied malice to convict Ho of second-degree murder were not binding on the jury and could not serve to remedy the court's erroneous general-intent instruction").)

The People also overlook the fact that the Cavitt instruction the court gave *did not refer to the concept of*

temporary safety at all. (See CT (2) 353-354.) It mentioned only that the jury could consider "[w]hether the fatal act occurred while the perpetrator was fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime." (CT (2) 353.) Of course, flight can continue long after a defendant has reached a place of temporary safety. The very word, *temporary*, implies that the perpetrator is not yet fully or permanently safe and therefore needs to continue his flight or take some other evasive action if he wants to be certain he will not be caught.

Further, the instruction did not specify that a successful escape (whether temporary or permanent) is dispositive. Under the plain language of the instruction, "[i]t is not required that the People prove any one of these factors or any particular combination of these factors." (CT (2) 354.) Thus, even if Wilkins had long since reached a place of temporary or even permanent safety, Wilkins's jury could have found a continuous transaction if it determined that "[t]he time period" (CT (2) 353) was short enough, or that the "death was a natural and probable consequence of the felony" (CT (2) 353) or even that any of innumerable other possible factors that jurors thought up on their own was satisfied.

In light of the open-ended instruction, the jurors would have paid no attention to any argument of counsel that there was no felony once Wilkins had reached a place of temporary safety. After all, the court specifically admonished that if counsel's argument conflicted with the instructions, jurors must follow the

instructions. (CT (2) 326.) It is presumed that jurors follow this admonition. (People v. Avila (2009) 46 Cal.4th 680, 719; see also Morales v. Woodford (9th Cir. 2004) 388 F.3d 1159, 1170.)

The People state that "any suggestion that the one continuous transaction rule is unworkable or has no outer limits is entirely without merit." (Resp. B. at 39.) Wilkins has never made such a "suggestion." He argues solely that the escape rule is coterminous with the continuous-transaction rule for the actual killer with respect to flight (or, formulated slightly differently, that the continuous-transaction rule incorporates the escape rule for the actual killer with respect to flight), as the courts have repeatedly held. That rule has worked well over many decades, as the cases cited above illustrate.

The People fail to address the ex post facto limitation of their proposed new rule. As noted above, this court and the Courts of Appeal have consistently applied the escape rule in determining culpability of the actual killer for felony murder, both pre-Cavitt and post-Cavitt. Thus, if the rule is to be changed, the new rule cannot be applied retrospectively to Wilkins under ex post facto principles, which under the due process clause of the Fourteenth Amendment are applicable to the unforeseen change of a judicial interpretation to defendant's detriment. (See generally Rogers v. Tennessee (2001) 532 U.S. 451, 456-457; People v. Farley (2009) 46 Cal.4th 1053, 1121; see AOB at 35.) The People do not contest this. The People rely

solely on their position that their new interpretation, expanding Cavitt beyond its stated limitation to the complicity aspect, of the law is consistent with prior opinions.

The People fail to address the fundamental distinction between the circumstances in which the actual killer and the aider and abettor find themselves, which necessitates a different rule for the complicity aspect from the aggravation aspect of felony murder. As noted earlier, for both the actual killer and the aider and abettor, felony murder applies when the predicate crime and fatal act are part of one continuous transaction. For the actual killer, the continuous transaction ends when defendant has reached a place of temporary safety; for aiders and abettors, there is no such cut-off, but rather, under the Cavitt rule (the application of the continuous-transaction rule to aiders and abettors rather than to the actual killer), the jury considers the logical and temporal connection between the predicate crime and the homicide.

The reason for the distinct applications of the continuous-transaction rule is evident: an aider and abettor, who, under the complicity aspect of the felony-murder rule, should be equally culpable with the actual killer, would unfairly get a windfall if he managed to escape to a place of temporary safety while his confederates were still committing the crime but had not yet killed the victim. In fact, an aider and abettor, who need not be present at the scene at all (People v. Beeman (1984) 35 Cal.3d 547, 554-555), could escape all culpability for the murder by not

showing up in the first place. For example, the mastermind of a sophisticated armed robbery, who hired some gangsters to commit the crime while he waited a thousand miles away to collect his loot, would be untouchable under the escape rule. Even if the homicide and felony were indisputably part of the same continuing transaction (say, the shooting of a victim who was resisting), such an aider and abettor would not be culpable for the homicide, but only for the underlying felony, because he had already escaped or was never at the scene to begin with. (This was the very argument of the aiders and abettors in People v. Cavitt, supra, 33 Cal.4th at p. 206.) In short, the escape rule does not work well for aider and abettor culpability (the complicity aspect); instead, the jury must consider the overall logical and temporal connection, as described in People v. Cavitt.

There is no such problem as to the actual killer, for by definition he is always present when the fatal act is committed (even if it does not lead to death until sometime later, as discussed above). Accordingly, there is no need to carve out a new rule for the aggravation aspect of felony murder. The long-standing escape rule adequately governs the question of the circumstances under which a defendant who kills the victim after commencing his flight is culpable for felony murder: under the escape rule, the homicide and felony are part of a continuing transaction only until the actual killer has reached a place of temporary safety.

Thus, the People's fundamental error is their attempt to shoehorn the standard for the *complicity* aspect of felony murder

into the standard for the *aggravation* aspect, without recognizing that the two standards deal with distinct aspects of felony murder and distinct factual problems. (See Robinson, *Imputed Criminal Liability* (1984) 93 Yale L.J. 609, 618, 663-660 (distinguishing the two aspects of felony murder).)

The lesser remedy of a specific reference to the escape rule is fully preserved for review. The People assert that Wilkins forfeited his argument that the court should have instructed, at least, on the concept of escape to a place of *temporary safety* as a significant factor. (Resp. B. at 41-42; see AOB at 32-34.) According to the People, the issue was forfeited because Wilkins "never asked the trial court to modify the standard jury instruction." (Resp. B. at 41.) This court has disagreed with the People's premise. Where the court rejects defendant's requested instruction as defective, it should provide a correct instruction, not deny it outright. (People v. Falsetta (1999) 21 Cal.4th 903, 924.) Thus, having determined that Wilkins's proposed instruction on temporary safety was defective because (in the court's apparent belief) escape did not necessarily terminate liability (see RT (5) 727:4-734:6), the court should have corrected the purported defect and inserted the escape rule as a factor for the jury to consider. Even the People concur that this would have been an accurate statement of the law, for the People concede that "a defendant is not foreclosed from arguing that he had reached a place of temporary safety." (Resp. B. at 40.)

According to the People, this would have been a pinpoint

instruction which was not required except upon request. (Resp. B. at 42.) Under People v. Falsetta, supra, however, even assuming arguendo that the lesser instruction would have been a pinpoint instruction, Wilkins did indeed request it, by virtue of his request for an instruction on the escape rule.

Further, as discussed above, the court's instruction never referred to a place of temporary safety as a factor. (See CT (2) 353-354.) Having undertaken to instruct on the relevant factors, the court was obliged to provide complete and correct guidance sua sponte. (See People v. Castillo (1997) 16 Cal.4th 1009, 1015.)

Finally, a request for a lesser instruction would have been futile in light of the trial court's apparent belief that even though flight itself was relevant, the escape rule was incorrect because it defined when the burglary ended. (See RT (5) 733:10-734:6 (court rejects instruction following prosecutor's argument that the escape rule had no bearing on felony murder in light of Cavitt); see People v. McKinnon (2011) 52 Cal.4th 610, 654 (applying futility doctrine to excuse objection in light of court's prior treatment of a similar issue); People v. O'Connell (1995) 39 Cal.App.4th 1182, 1190 (specifically applying this doctrine to defendant's failure to request a clarifying instruction).)

II.

Prejudice

The People argue that the *Watson* standard applies because "appellant's requested instruction on the escape rule is a pinpoint instruction." (Resp. B. at 43.) This is not so. Pinpoint instructions "relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi." (People v. Saille (1991) 54 Cal.3d 1103, 1119.) Here, the rejected instruction on the escape rule did not apply the evidence to the legal issues or principles of law on which the jury was already instructed. As explained above, the court never instructed on the principle that the homicide is no longer part of a continuous transaction with the burglary once defendant has reached a place of temporary safety. The court did not even instruct on the concept of a place of temporary safety at all. The jury was allowed to find Wilkins guilty of murder based on factors occurring long after he had reached a place of temporary safety. (See CT (2) 353-354.) The error thus went to the elements of the crime of felony murder; it did not involve the pinpoint application of the evidence to instructions that were already correct and complete.

The People find the error harmless because "the jury still found appellant liable for felony murder" even though it was instructed that flight was a potential factor in determining whether the homicide and felony were part of one continuous transaction. (Resp. B. at 43-44.) As explained above, the jury

was not instructed that reaching a place of temporary safety *terminated* culpability for felony murder. It was not instructed on the concept of a place of temporary safety at all, much less that this was a dispositive factor that could not be ignored or outweighed by other factors, as the court's instruction allowed. (See CT (2) 353-354.)

Next, the People argue that "the only evidence that appellant did not head straight from the burglary site to his home in Long Beach was based on appellant's self-serving, uncorroborated, and inconsistent testimony." (Resp. B. at 44.) But *the error was prejudicial even if the jury did not believe a word of what Wilkins said.* As explained at length in the opening brief, even if the jury credited only the prosecutor's version of events, it had ample basis to find that Wilkins had reached a place of temporary safety, if only it had been instructed on that concept. (See AOB at 41-43.) He had driven 62 miles over the course of at least an hour, was in an entirely different county, and was not being pursued because no one even knew yet that the goods had been stolen. (RT (2) 113:16-20; (2) 121:16-122:5; (2) 131:20-25; (3) 389:7-390:5; (4) 548:7-12.) A juror therefore could easily find that he was thus in unchallenged possession of the loot, at least temporarily (which is all that matters under the escape rule). Indeed, this court found insufficient evidence of felony murder as a matter of law under similar facts. (People v. Ford (1966) 65 Cal.2d 41, 56-57, overruled on other grounds in People v. Satchell, supra, 6 Cal.3d 28, 35.)

The People's arguments as to the alternative ground of

prejudice, namely, the evidence that Wilkins went to Doherty's house, which was certainly a place of temporary safety, are not well considered. First, the People reason that because the jury evidently did not believe Wilkins's testimony that he had bought the goods from someone else, there was "no reasonable possibility that the jury believed appellant's other story about going to Doherty's house immediately after the obtaining [of] the items." (Resp. B. at 44.) This court, however, has observed that the finder of fact may disbelieve a witness on some points and yet credit him on others (or, more precisely, harbor a reasonable doubt as to the other points). (In re Hamilton (1999) 20 Cal.4th 273, 297, fn. 18; People v. Williams (1992) 4 Cal.4th 354, 364; see also, e.g., People v. Tufunga (1999) 21 Cal.4th 935, 957 (reversing a conviction for instructional error even though the jury must have disbelieved part of defendant's testimony); People v. Lawson (2005) 131 Cal.App.4th 1242, 1249 (finding instructional error and another error prejudicial even though the jury "disbelieved appellant's protestations of complete innocence").) In particular, a jury is more likely to accept those portions of a defendant's testimony that are corroborated. (E.g., Greene v. Henry (9th Cir. 2002) 302 F.3d 1067, 1072 ("Frequently in a criminal trial, a prosecution witness says one thing, a defendant another, and the jury is likely to disbelieve the defendant unless he is corroborated").) Here, as explained at length in the opening brief, there was significant circumstantial corroboration that Wilkins had ample time to go to Doherty's house and did in fact go there. (See AOB at 45-52.)

The People attempt to undermine the evidence that Wilkins first went to Doherty's house by supposing that if, as Wilkins said, he left Doherty's house at "around 3 a.m.," he would have driven the 85 miles to the scene of the collision "much earlier than 5 a.m. when it was uncontested that he dropped the stove." (Resp. B. at 45.) The People ignore the fact that Wilkins himself testified that though he left "[a]round 3:00" (RT (5) 869:12-15), it was in fact somewhat after 3:

> Q It's your testimony you left Sean Doherty's house around 3:00 in the morning and then you drove straight back to Long Beach in the fast lane doing about a 65 to 70 miles an hour?
>
> A It was a little after 3:00 to be honest. I didn't drive straight home, I stopped one time at the gas station, made the call.

(RT (5) 868:11-17.) Further, Wilkins was not on the freeway the entire time, for he had to take the surface street to get to the freeway from Doherty's house, and he must have taken a cutoff to stop at the gas station. (See RT (5) 869:16-22.) The People also overlook the fact that according to independent eyewitness Lay (the man who signaled Wilkins to stop), Wilkins was driving for at least part of the trip in the number 2 lane, not the fast lane, and his speed was only 60 to 65 miles per hour. (RT (2) 164:18-165:2; (2) 167:13-17.) Given all of these facts that the People have not taken into account, Wilkins's time estimates are entirely consistent with his version of events. In any event, the People do not explain how a discrepancy of, at most, a few minutes in his

time estimate must have been viewed as significant by all 12 jurors, or indeed by any reasonable juror.

The People argue that even if Wilkins had gone to Doherty's house, the jury "still would not have found he had reached a place of temporary safety" because "the large items were still piled in the back of and in the cab of appellant's truck parked in front of Doherty's house, visible to police and passers-by." (Resp. B. at 45.) This is beyond speculative. The People do not explain why anyone would be suspicious of a work truck loaded with boxes, particularly given that the burglary that was committed many miles away would not even have been discovered yet; or why any passers-by would be walking the streets of a residential neighborhood at 2 a.m. *and* paying close attention to parked vehicles while on their stroll; or why there would be any significant chance of a police cruiser patrolling that particular street during the one hour Wilkins was there (see RT (5) 866:21-26); or how the load in the bed of the truck would even be visible from the street in the middle of the night, given that Wilkins parked in the driveway *with the cab facing the street and thus partially blocking the load* (RT (5) 776:18-20 ("I parked my truck, I backed my truck into the driveway")). (The People's careful formulation that Wilkins "parked in front of Doherty's house" (Resp. B. at 45), which tends to suggest that he parked on the street, obscures the fact that the truck was in the driveway, backed in, such that the part closer to the 2 a.m. passer-by would have been the cab, not the bed.)

In short, the People's theory that *as a matter of law* no

reasonable juror could have found that Doherty's house was a place of at least *temporary* safety relies on highly implausible assumptions and an incomplete consideration of the facts.

The People's current position is also at odds with their own hypothetical. As noted earlier, according to the People, if Wilkins had gone home for the night, leaving the bed of the truck intact, and had then driven out the next day, "no reasonable jury" would have found him guilty of felony murder. (Resp. B. at 39.) Yet, just as at Doherty's house, passers-by and police cruisers could have spotted the truck and raised the alarm, particularly after the burglary had been discovered. In fact, observation of the purportedly suspicious-looking truck would have been inevitable once Wilkins drove on the public street the next morning.

The People assert that Wilkins's "credibility as a witness was also thoroughly undermined" because he had committed theft previously and lied to the man who alerted him on the freeway. (Resp. B. at 44.) This court, however, has recognized that a juror may well believe a witness who had committed crimes. (People v. Silva (1988) 45 Cal.3d 604, 626.) (In Silva, the witness's criminal conduct was not a couple of minor thefts committed when he was 17, as in Wilkins's case (RT (5) 743:3-19), but rather the recent chopping up of the body of a kidnap victim as an accomplice to the very crime charged against defendant. (Ibid.) Yet, even given that grisly criminal history of the witness, the jury "evidently believed his version of the events." (Ibid.)) Wilkins's jury was specifically instructed that "[t]he fact that a witness may have committed a crime or other misconduct does

not necessarily destroy or impair a witness's credibility." (CT (2) 335.) Further, as explained above, though the jury rejected Wilkins's unsupported testimony that he had bought the goods outside a Home Depot, one or more jurors might well have credited the evidence that he stopped at Doherty's house because there was independent corroboration.

For all of these reasons, the error was prejudicial under any standard, whether or not any of the jurors believed a word of Wilkins's testimony.

CONCLUSION

For the foregoing reasons, defendant and appellant respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: December 12, 2011. Respectfully submitted,

Richard A. Levy
Attorney for
Cole Wilkins

CERTIFICATION OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.520(c)(1) of the Rules of Court, does not exceed 8,400 words, and that the actual count is: **7,540** words.

Richard A. Levy

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I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 21535 Hawthorne Blvd., Suite 200, Torrance, CA 90503-6612. On the date of execution set forth below, I served the foregoing document described as:

APPELLANT'S REPLY BRIEF ON THE MERITS

on all parties to this action and the trial court by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Attorney General of California
Attn: Susan Miller, Esq.
P.O. Box 85266
San Diego, CA 92186-5266

and placing such envelopes with postage thereon fully prepaid in the United States mail at Torrance, California. **Executed on December 12, 2011**, at Torrance, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.