No. S265798

In the Supreme Court of the State of California

IN RE TYREE FERRELL ON HABEAS CORPUS,
Petitioner

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

RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES

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RETURN

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

The Secretary of the Department of Corrections and Rehabilitation submits this Return to the Petition for Writ of Habeas Corpus, as required by the Court's April 28, 2021, Order to Show Cause. The Secretary admits, denies, and alleges as follows:

1. The Secretary admits that petitioner Tyree Ferrell is in the custody of the California Department of Corrections and Rehabilitation pursuant to a judgment of conviction in Los Angeles County Superior Court case number BA212763. Ferrell is incarcerated at Calipatria State Prison, in Calipatria, California. The Secretary denies that Ferrell's incarceration is unlawful.

2. The Secretary admits that Ferrell was convicted of second-degree murder, that the trial court instructed the jury that a violation of Penal Code section 246.3 was a proper predicate offense for second-degree felony murder, that the jury found firearm enhancements true pursuant to Penal Code section 12022.53, and that Ferrell received a cumulative 40-years-to-life sentence.

3. The Secretary admits that Ferrell appealed his convictions, that the convictions were affirmed, and that this Court denied review.

4. The Secretary admits that Ferrell has previously filed two habeas corpus petitions, one of which was denied by the Los Angeles County Superior Court, and the other denied by the Second District Court of Appeal, Division Six.

5. The Secretary admits that the Court of Appeal denied relief after issuing an Order to Show Cause, holding any error to be harmless.

6. The Secretary admits that this habeas petition is based on a substantive change in law that took place after Ferrell's direct appeal became final, when this Court held second-degree felony murder instructions to be erroneous when based on violations of Penal Code section 246.3. (See *People v. Chun* (2009) 45 Cal.4th 1172.) The Secretary likewise admits that *Chun* applies retroactively to cases that were final before *Chun* was issued.

7. The Secretary denies that the erroneous instruction entitles Ferrell to relief. As set forth in greater detail in the accompanying Memorandum of Points and Authorities, the Secretary alleges that the *Chun* error was harmless under the specific facts and circumstances of this case. The Statement of Facts and of the Case contained in the Memorandum of Points and Authorities is hereby incorporated by reference. However, in part:

a. The Secretary admits that Ferrell spoke with police, but denies that Ferrell told police the truth about the murder. (See Petn. ¶ VII(C).)

b. The Secretary denies that Ferrell fired a gun into the air in order to stop a fight when he saw that a friend was in trouble. (See Petn. ¶ VII(D).) In fact, the testimony at trial shows that Ferrell did not fire his gun until after the fight had ended, and did not fire his gun until the friend was walking and talking peacefully with two other individuals.

c. The Secretary denies that Ferrell fired the fatal gunshot accidentally. (See Petn. ¶ VII(D).) In fact, the testimony at trial was that Ferrell deliberately shot toward a crowd of people.

d. The Secretary admits that the only eyewitnesses who were not members of Ferrell's gang—Cussondra Davis and Latesha Rawlings—saw Ferrell shoot toward a crowd of people, and neither eyewitness saw him fire into the air at any time. (See Petn. ¶ VII(G).)

e. The Secretary admits that the prosecutor told jurors they could rely on second-degree felony murder to convict Ferrell. (See Petn. ¶ VII(I).) However, the Secretary denies that the prosecutor incorporated Ferrell's "accidental discharge" story into the second-degree felony murder argument. Instead, the prosecutor argued that *deliberately* firing at a crowd of people would constitute a violation of section 246.3, and thereby form a basis for a second-degree felony murder conviction.

f. The Secretary denies that the erroneous submission of a felony-murder theory cannot be held harmless in this case. (See Petn. ¶ VII(Q)-(S).) The jury's true finding on the section 12022.53, subdivision (d), enhancement, viewed in the context of the jury instructions as a whole, and in light of the facts introduced and the parties' arguments at trial, demonstrate that the instruction was harmless beyond a reasonable doubt. In finding the 12022.53, subdivision (d), enhancement true, Ferrell's jury implicitly found at a minimum that he committed the killing with implied malice.

8. The Secretary admits that the People did not challenge the timeliness of the petition Ferrell filed in the Court of Appeal to raise this claim in the first instance, and that this Court may reach the merits of the petition.

WHEREFORE, RESPONDENT REQUESTS THAT THE ORDER TO SHOW CAUSE BE DISCHARGED AND THE PETITION BE DENIED.

Dated: July 28, 2021 Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

ISSUE PRESENTED

The Court ordered the Secretary of the Department of Corrections and Rehabilitation to explain:

> why relief should not be granted on the ground that the jury's true finding on the Penal Code section 12022.53, subdivision (d) enhancement did not render the *People v. Chun* (2009) 45 Cal.4th 1172 error harmless beyond a reasonable doubt.

(Apr. 28, 2021, Order to Show Cause at 1.)

INTRODUCTION

In 1999, after a street brawl involving dozens of gang members had broken up, petitioner Tyree Ferrell shot at a crowd of people. One of the bullets struck and killed Lawrence Rawlings, and Ferrell was subsequently tried for Rawlings's murder.

The jury was instructed on three separate theories of second-degree murder: (1) killing with express malice; (2) killing with implied malice; and (3) killing during the reckless or negligent discharge of a firearm in violation of Penal Code section 246.3,[1] i.e., second-degree felony murder. The jury found Ferrell guilty, but did not specify a theory of liability.

After Ferrell's conviction and sentence became final, this Court held that the last type of murder instruction was improper in *People v. Chun* (2009) 45 Cal.4th 1172. Under *Chun*, all assaultive-type crimes, such as violations of section 246.3, are

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[1] Unless noted, statutory references are to the Penal Code.

deemed to merge with a charged homicide and cannot be the basis for a second-degree felony murder instruction or conviction.

Ferrell now argues (and the Secretary agrees) that *Chun* applies retroactively to final convictions such as his. However, given the particular circumstances of this case—including forensic evidence, eyewitness testimony, and a true finding for intentionally shooting a firearm proximately causing death (§ 12022.53, subd. (d))—the *Chun* error was harmless beyond a reasonable doubt.

Rawlings was killed by a horizontal gunshot to the head. Ferrell himself fired the fatal shot. And Ferrell had recently shot another person intentionally with a handgun. These undisputed facts, coupled with the elements of the firearm enhancement—that an intentional gunshot, fired to aid in the commission of a murder, proximately caused the death—show beyond a reasonable doubt that the jury found Ferrell guilty of at least implied malice murder.

Nevertheless, in light of a story he told during a *Mirandized*[2] interview, Ferrell contends that the *Chun* error may have led to his conviction. He told the police that he fired two shots: an intentional, reckless, and harmless warning shot up into the air (in violation of section 246.3), followed by an accidental but fatal shot as he lowered his arm to his side. According to Ferrell, the jury could have relied on this story and found that the intentional and reckless gunshot into the air proximately caused the

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

accidental gunshot that killed Rawlings. If so, he claims, the jury could have found him guilty of second-degree felony murder based on the initial gunshot.

This argument fails because there was no evidence that the fatal gunshot fired directly at Rawlings's head was the "direct, natural and probable consequence" of a warning shot fired up into the air. That is, even if Ferrell did fire his first shot into the air as a mere warning, there was no evidence that doing so "proximately caused" a second shot, which in turn killed Rawlings. (§ 12022.53, subd. (d).) To be sure, multiple shots were fired, and one shot preceded another. But that is all. There is simply no reason to believe the jury convicted Ferrell based upon a post hoc causal fallacy.

Not only that, but the jury found that the fatal shot was intentionally fired "in the commission of" a murder. (§ 12022.53, subd. (d).) That is, under this Court's case law, the jury found that an intentional gunshot was fired *to aid in* the commission of a murder. These findings preclude reliance on a warning shot, even if intentionally fired, as the predicate "act" for felony murder.

Moreover, eyewitnesses testified at trial that Ferrell fired multiple shots, and that all the shots were fired directly into a crowd of people. Indeed, all the witnesses agreed that the fighting involving Rawlings had ended before Ferrell fired the gunshots, thereby obviating any rational need for a supposed warning shot. Finally, Ferrell's own explanation to the police—that the second, supposedly inadvertent gunshot was actually

fired while the gun was still pointing upward—was inconsistent with the uncontradicted forensic testimony that the fatal gunshot was fired horizontally.

Ferrell also relies upon recent case law holding that a defendant can violate section 12022.53, subdivision (d), during a murder even if that defendant lacks malice. (See *People v. Offley* (2020) 48 Cal.App.5th 588.) But this case law is not implicated here. Cases like *Offley* describe the bounds of murder liability in the aftermath of Senate Bill No. 1437 (2017-2018 Reg. Sess.) which, among other things, statutorily changed the definition of malice and eliminated the "natural and probable consequences doctrine" for aiders and abettors. Neither of those changes is implicated in this case.

For the purposes of deciding whether the *Chun* error was harmless here, the Court must consider all theories upon which the jury could have validly relied at the time of trial. Unlike *Offley*, which was concerned with aider-and-abettor liability, malice is implied as to a principal (like Ferrell) from any act if the "natural consequences" of that act were dangerous to human life. Intentionally firing a gun at a crowd plainly falls within the scope of that doctrine. This is especially true in light of the jury's true finding on the section 12022.53 firearm enhancement which, while not dispositive, is highly informative. The order to show cause should therefore be discharged.

STATEMENT OF FACTS AND OF THE CASE

On June 25, 1999, Ferrell "got into it" with Danny Hughey. (1RT 24.[3]) Ferrell's mother had grown up with Hughey's cousin, Valerie Golden, and Ferrell himself had known Golden for years. (1RT 22-23.) But on June 25, while Golden and Hughey were talking to one another on a porch, Ferrell interrupted and accused Hughey of stealing his bicycle. (1RT 24-25.) Hughey denied the accusation, then the two men shoved one another, and Hughey started to walk away. (1RT 24-26.) Ferrell, though, pulled out a small black gun and shot Hughey in the groin. (1RT 26-29.) The bullet lodged in his thigh, in "the main artery," but Hughey survived. (1RT 30-31.)

About two weeks later, Ferrell shot another man. This time, though, the shooting was fatal.

On July 12, 1999, Ferrell participated in a gang fight. (1RT 82, 94-95, 148-149, 2RT 326-328.) Ferrell and several other members of the All for Crime ("AFC") gang brawled with members of the 40 Piru gang. (1RT 82, 94-95, 142, 148-149, 2RT 326-328.) As many as 30 individuals took part in the street melee. (2RT 335.) But no weapons were used. (See 1RT 148-149, 2RT 336.)

In fact, AFC and 40 Piru generally got along with one another. (1RT 147-148.) Both gangs were Bloods, and their members often played dice with one another. (1RT 147-148.)

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[3] The reporter's and clerk's transcripts from Ferrell's trial and original appeal are attached to the Petition as Exhibit F. The Secretary cites them as "RT" and "1CT," respectively.

Dicing together sometimes led to arguments—such as the fight on July 12 (2RT 289, 347-348)—but those fights would not last long, and the worst injuries were generally "bloody lips." (2RT 351; see 2RT 347-350.) The fights could even feature "time outs," allowing combatants to catch their breath. (2RT 350.) They were more "like an athletic contest," with the gang members "trying to be fair" to one another before making up at the end of the dispute. (2RT 350.)

The July 12 fight followed that pattern. After 15 to 40 minutes, AFC and 40 Piru members began hugging, shaking hands, and making up with one another. (1RT 101, 137, 2RT 273, 279, 287, 337, 360; see 1RT 163.) The fighting was over when an AFC member named Lawrence Rawlings and a 40 Piru member called Diggum approached one another. (See 1RT 101.) Like some of the other combatants, the two men hugged. (1RT 101, 150.) As Rawlings and Diggum separated, though, Ferrell approached them, pulled out a gun, and shot in their direction. Several witnesses described the shooting.

Cussondra Davis, Rawlings's girlfriend, testified that everyone was "shaking hands, like the beef was over," when Ferrell ran past her and into the street. (1RT 95-97.) Then, even though the fight was "completely over," he shot at "all of the 40 Pirus" as they were walking away. (1RT 100; see 1RT 98-101.) Ferrell was about 15 feet away from Diggum and Rawlings at the time, and he fired two shots: the first toward the crowd of 40 Pirus, the second "[t]he same as the first." (1RT 102.) Both shots were fired "parallel to the ground . . . shooting from side to side."

(1RT 98; see 1RT 102.) Lawrence, who was standing between Ferrell and the group of 40 Pirus, fell to the ground bleeding. (See 1RT 100, 103, 110-113.)

Latesha Rawlings, the victim's cousin, also saw the fighting end. (1RT 140, 149-150.) "Lawrence [Rawlings], Roddell[4], and Diggum . . . was all leaving the scene, and that's when [Ferrell] came out with the gun and started shooting." (1RT 150.) He pointed his gun "toward [Rawlings]" and kept his arm parallel to the ground the whole time, though his "hand was going all kinds of ways like he couldn't handle the gun." (1RT 151.) In other words, his hand "bounc[ed]" around while he shot toward Rawlings and the crowd. But he fired all of his shots in quick succession: he "got started, and he didn't stop until . . . all the bullets were done." (1RT 153.) Everyone ducked down when they heard the first shot—then "everybody got up but [Rawlings]" when the shooting ended. (1RT 152.) Ferrell then ran to Rawlings's side, told him he "didn't mean to do it," and ran off. (1RT 153-154.)[5]

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[4] Roddell was also known as Henry Keith. (1RT 167.) Keith would subsequently testify for the defense. (2RT 325.)

[5] Detectives testified that Davis and Latesha told them someone else fired a gunshot too. (See 2RT 222, 288-289.) Both women denied saying this at trial. (See 1RT 121-122, 135, 167-168.) Regardless, Ferrell no longer claims that another person fired the fatal shot. (Contrast 3RT 396-397 [arguing in defense closing statements that another individual fired a gun, and "no one knows what shot killed Lawrence Rawlings"] with Petn. 30 [claiming that Ferrell "did not deny the shooting"].) Additionally,

(continued…)

Henry Keith, one of Ferrell's friends and a fellow AFC gang member, described the shooting during the defense case. He testified that he was walking with Rawlings and Diggum when he heard a gunshot, then looked around to see where it had come from. (2RT 338-340, 352-353.)[6] He saw Ferrell holding a gun and pointing his arm "straight up into the air." (2RT 343-344.) Ferrell lowered his arm and Keith heard another gunshot, but he did not see the gun go off. (2RT 343-344.) However, Keith denied that the gun was parallel to the ground when the second shot went off. (2RT 342.) Rawlings then fell to the ground next to Keith and, like Latesha, Keith saw Ferrell approach Rawlings, say he "didn't mean it," then flee. (2RT 344-346.)

(…continued)

the jury necessarily rejected any testimony about another shooter when it convicted Ferrell of murder.

[6] According to the Petition, Keith testified that the shooting took place "shortly after" a 40 Piru gang member had forced Rawlings to his knees, and the shooting even occurred "as the fighting continued." (Petn. 31, citing 2RT 334-335, 340, 356, 359.) However, Keith actually testified that Rawlings was knocked down earlier in the brawl, and that the 40 Piru gang member who did it was "Kool Aid," not Diggum. (2RT 334.)

Indeed, while Keith stated that some fighting was going on elsewhere (see 2RT 356), even he agreed that Rawlings and Diggum were walking together peacefully at the time of the shooting; they were simply chatting, and Rawlings was not in any danger when Ferrell opened fire. (Contrast 2RT 338-340, 352-353 with Petn. 30 [asserting that "when [Ferrell] saw Lawrence getting beat up . . . he took out a gun and fired a shot into the air"].)

An autopsy subsequently indicated that Rawlings died from a single bullet wound to the head. (2RT 232, 243.) The bullet entered above his left ear and traveled through his head parallel to the ground, with no significant upward or downward trajectory. (2RT 229-241.)

After the shooting, Ferrell disappeared for two-and-a-half years. (See 2RT 256; 1CT 114.) He was arrested in 2001 in Missouri, then brought back to California. (2RT 256.) Once back in the state, he gave a *Mirandized* and tape-recorded statement to the police. (See 1CT 110-115.) He also signed a written statement, indicating that:

> we were gambling. We all got into a big fight . . . . The guy that Lawrence [Rawlings] was fighting got the best of him, and . . . I, took [a gun] from [my] friend, and [I] shot one round into the air, and as [I] brought the gun down, it went off again. When it went off, I saw Lawrence was shot. . . . [I] ran and in about two days took a plane to Kansas City to hide out.

(2RT 263-264.) Ferrell specified that the gun "went off the second time on accident, and that's when [Rawlings] got shot." (2RT 265.) However, he also told police that the second shot went off while the barrel was still pointed up in the air:

> [Q:] So the first shot goes off up in the air and you bring the gun down or what
> [A:] Nah, when I shot in the air I was going like this and it just went off
> [Q:] But if you bring it down like that its go[i]ng to off straight up, too isn't it
> [A:] When I shot like this, I was holding it like that and it just went off and he was right there
> [Q:] So you brought it down in front of you again
> [A:] Like I was bringing it down like this. I didn't bring it like that, I didn't point it at nobody.

> [Q:] So when you say you're bringing it down, you're still pointing the barrel up in the air
> [A:] Yeah I still pointed the barrel up in the air

(1CT 113; but see 2RT 229-236 [autopsy showing the bullet actually traveled parallel to the ground].)

Ferrell and Rawlings had been close friends before the shooting. (1RT 31, 51-52.) However, Rawlings's cousin Latesha testified that they also "used to argue all the time." (1RT 162.) They would make up within a few days, but when Latesha came around that summer, they would often be arguing about "all the gambling." (1RT 162.)

In 2003, a jury found Ferrell guilty of the second-degree murder of Rawlings (§ 187, subd. (a)) and the assault with a firearm against Hughey (§ 245, subd. (a)(2)).[7] In pertinent part, they also found various firearm enhancements to be true as to the murder: he personally used a firearm (§ 12022.5, subd. (a)(1) & 12022.53, subd. (b)), and he personally and intentionally discharged a firearm, proximately causing great bodily injury or death (§ 12022.53, subd. (c) & (d)). (1CT 205-208.) The trial court sentenced Ferrell 40 years to life in prison: 15 years to life for second-degree murder, plus 25 years to life for a firearm enhancement, and 4 concurrent years for assault with a firearm. (1CT 213-217.)

In 2004, the Court of Appeal affirmed the judgment. It found, among other things, that a violation of section 246.3

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[7] Ferrell was found not guilty of first-degree premeditated murder. (1CT 205.)

(reckless discharge of a firearm) could form the predicate offense for a second-degree felony murder conviction. (See Petn., Exh. A at pp. 2-3, citing *People v. Robertson* (2004) 34 Cal.4th 156.) This Court denied review. (Petn., Exh. B.) However, in 2009, this Court reversed its *Robertson* decision and held that second-degree felony murder could *not* be premised on a violation of section 246.3. (*Chun*, *supra*, 45 Cal.4th at p. 1200.)

In 2019, Ferrell filed a habeas petition in the Court of Appeal seeking relief under *Chun*. The matter was transferred to the Los Angeles County Superior Court, which denied the petition because it was untimely and because no prima facie case was shown. (See Petn., Exh. G & Exh. H.)

In 2020, Ferrell filed another habeas petition in the Court of Appeal. (Petn., Exh. K.) That court issued an order to show cause on June 9, 2020, but ultimately denied relief. (Petn., Exh. J.) Ferrell then filed the current habeas petition in this Court on November 25, 2020, and the Court ordered the Secretary to file a return.

ARGUMENT

I. THE *CHUN* ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

Ferrell claims the trial court erred by instructing the jury that a violation of section 246.3 could form the predicate offense for a second-degree felony murder conviction. He also claims the error was prejudicial because the record does not foreclose the reasonable possibility that the jury found the fatal gunshot was an accident, which would not support either an implied or express malice finding.

The Secretary agrees that the instruction was *Chun* error, and that *Chun* applies retroactively to this case. However, in light of the jury's other findings, the trial testimony, and the parties' arguments at trial, the error was harmless beyond a reasonable doubt.

The jury found that Ferrell intentionally shot his gun in the commission of a murder, proximately causing death (§ 12022.53, subd. (d))—thereby rejecting Ferrell's claim that fatal shot was fired by accident. Additionally, the evidence of implied malice at trial was simply overwhelming, and there was no evidence that the death occurred "during" an intentional warning shot (a requirement if the jury were to have relied on the second-degree felony murder theory). The *Chun* error was therefore harmless.

A. Relevant proceedings

The trial court instructed the jury on three different theories of second-degree murder: (1) express malice murder, i.e., murder with a specific intent to kill, but without premeditation; (2) implied malice murder, i.e., murder resulting from the commission of an intentional act, the natural consequences of which are dangerous to human life; and (3) second-degree felony murder, i.e., intentionally and recklessly discharging a firearm, causing death.[8] All three theories were mentioned in the basic instructions on murder. (See 3RT 429-430; see 1CT 155-156;

[8] The jury was also instructed on first-degree premeditated murder. Those instructions are omitted here because Ferrell was acquitted of that charge.

CALJIC No. 8.10 (Murder—Defined); CALJIC Nos. 8.11 (Malice Aforethought—Defined).) They were then individually explained to the jury.

First, the court described express malice murder, as well as the theory of transferred intent. (See 3RT 432-433; 1CT 159-160; CALJIC No. 8.30 (Unpremeditated Murder of the Second Degree); CALJIC No. 8.65 (Transferred Intent).)

Second, the court described implied malice murder, encompassing the "natural consequences" theory of liability:

> Murder of the second degree is also the unlawful killing of a human being when, one, the killing resulted from an intentional act;
>
> Two, the natural consequences of the act are dangerous to human life;
>
> And three, the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life.
>
> When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being.

(3RT 433-434; see 1CT 162; CALJIC No. 8.31 (Second Degree Murder—Killing Resulting from Unlawful Act Dangerous to Life).)

Third, the court described second-degree felony murder, with reckless discharge of a firearm as the chosen predicate offense: "The unlawful killing of a human being . . . which occurred during the commission of the crime of willful discharge of a firearm in a grossly negligent manner is murder of the second degree when the perpetrator had the specific intent to commit that crime." (3RT 434; see 1CT 163; CALJIC No. 8.32 (Second Degree Felony Murder).) It also described the elements of recklessly discharging

a firearm: "Every person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of violation of Penal Code section 246.3, a crime. . . . ." (3RT 434-435; see 1CT 164; CALJIC No. 9.03.3 (Grossly Negligent Discharge of Firearm).)

Finally, after describing various lesser included offenses, the court instructed the jury regarding a firearm enhancement under section 12022.53, subdivision (d):

> It is alleged in count 1, which is the murder, that the defendant intentionally and personally discharged a firearm and proximately caused death to a person during the commission of the crime charged. If you find the defendant guilty of the crime thus charged in count 1, you must determine whether the defendant intentionally and personally discharged a firearm and proximately caused death to a person in the commission of that felony.
>
> The word firearm includes a handgun.
>
> The term intentionally and personally discharged a firearm as used in this instruction means that the defendant himself must have intentionally discharged it.
>
> 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.

(3RT 448-449; 1CT 190; CALJIC No. 17.19.5 (Intentional and Personal Discharge of Firearm/Great Bodily Injury).)

The prosecutor addressed each of the three second-degree murder theories during closing argument. (See 3RT 381-384.) However, he linked the second-degree felony murder theory to testimony by Davis and Latesha that Ferrell intentionally fired into a crowd; he said it would apply "when you have so little

regard for the human beings around you that you bring out a firearm and you fire it off into a crowd." (3RT 383.)

The prosecutor also expressed skepticism about the "accidental discharge" story. (3RT 384 ["I don't know that you will find that believable, particularly in light of the fact that two weeks prior the defendant had intentionally fired and shot a man in the groin, that the defendant does know what he is doing with firearms."].) However, even if it were believed, the prosecutor did not link the accidental discharge to the supposed warning shot. Instead, he argued that "[t]he natural consequences of pointing a loaded firearm around in a crowd are clearly dangerous, and clearly it was done with knowledge of that danger, because the defendant had shot someone two weeks prior." (3RT 384.) The prosecution never argued that a first "warning" shot could have caused a second "accidental" discharge.

B. Relevant law governing second-degree murder

"Second degree murder is the unlawful killing of a human being with malice aforethought . . . ." (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368, citing *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) "Malice may be either express or implied." (*People v. Knoller* (2007) 41 Cal.4th 139, 151; § 188.)

Express malice murder requires an intent to kill. (*People v. Saille* (1991) 54 Cal.3d 1103, 1114; § 188.) By contrast, implied malice murder requires "an intent to do some act, the natural consequences of which are dangerous to human life." (*People v. Swain* (1996) 12 Cal.4th 593, 602.) "In such circumstances, . . . it is not necessary to establish that the defendant intended that his

act would result in the death of a human being." (*Id.* at p. 603, quotation marks omitted.) "The element of malice aforethought in implied malice murder cases is therefore derived or 'implied,' . . . from (i) proof of the specific intent to do some act dangerous to human life and (ii) the circumstance that a killing has resulted therefrom." (*Ibid.*; see *Knoller*, *supra*, 41 Cal.4th at pp. 143, 152, 157; see also *People v. Cleaves* (1991) 229 Cal.App.3d 367, 378 [a "high probability [of death]" is "synonymous" with being "dangerous to human life . . . i.e., an act for which the natural consequences are dangerous to human life by its nature involves a high probability of death"].)[9]

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[9] Senate Bill 1437 has amended the "natural and probable consequences doctrine"—a distinct (but related) theory of murder for aiders and abettors. (See *People v. Soto* (2020) 51 Cal.App.5th 1043, 1056 ["Although the instructions related to implied malice and the natural and probable consequences doctrine of aiding and abetting include similar language regarding a "natural consequence," they are distinctly different concepts."]; *People v. Martinez* (2019) 31 Cal.App.5th 719, 723 [describing consequences of Senate Bill 1437]; *People v. Martinez* (2007) 154 Cal.App.4th 314, 334 ["use of the term 'natural consequences' in the CALCRIM No. 520 definition of implied malice does not import into the crime of murder . . . the distinct 'natural and probable consequences' doctrine developed in the context of aiding and abetting liability"].)

However, Senate Bill 1437 did not come into effect until after Ferrell's trial, and the current habeas petition does not seek relief under that law. Additionally, since Ferrell was the actual killer, rather than an aider and abettor, relief under Senate Bill 1437 is likely unavailable to him. (See Stats. 2018, ch. 1015, § 1, subd. (f) [statute enacted "to ensure that murder liability is not imposed on a person who is not the actual killer"]; see *People v. Gentile* (2020) 10 Cal.5th 830, 842.)

Additionally, at the time of Ferrell's trial, a "killing in the course of the commission of certain enumerated felonies . . . constitute[d] murder in the first degree." (*People v. Robertson* (2004) 34 Cal.4th 156, 164, citing § 189.) And "an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but [was] *not* included among the felonies enumerated in section 189, constitute[d] at least murder in the second degree." (*Ibid.*, italics added, citing *People v. Ford* (1964) 60 Cal.2d 772, 795; accord, *People v. Hansen* (1994) 9 Cal.4th 300, 307.)

While Ferrell's direct appeal was pending, this Court held that a violation of section 246.3 constituted an inherently dangerous felony for the purpose of the second-degree felony murder rule. (See *Robertson*, *supra*, 34 Cal.4th at pp. 172-173.) However, in 2009, the Court reversed its *Robertson* decision and held that second-degree felony murder could *not* be premised on a violation of section 246.3. (*Chun*, *supra*, 45 Cal.4th at p. 1200.) Under *Chun*, "all assaultive-type crimes," such as a violation of section 246.3, "merge with the charged homicide and cannot be the basis for a second degree felony-murder instruction." (*Id.* at p. 1178.)

C. *Chun* applies retroactively to final judgments

As an initial matter, the Secretary notes that this Court has never expressly considered whether *Chun* applies retroactively to cases that are already final. (See *In re Hansen* (2014) 227 Cal.App.4th 906, 916 ["The *Chun* opinion does not state whether it applies retroactively to convictions . . . that were final on

appeal when *Chun* was decided."].) However, Ferrell claims that it does apply retroactively. (Petn. 9.) And the Secretary agrees.

"It is well-settled that a habeas corpus petitioner may obtain relief where 'there has been a change in the law affecting the petitioner.'" (*Hansen*, 227 Cal.App.4th at p. 916, quoting *In re Harris* (1993) 5 Cal.4th 813, 841.) Of course, this Court changed the law in *Chun* when it overruled *Robertson*. (See *Chun*, *supra*, 45 Cal.4th at pp. 1198-1199; *In re Lucero* (2011) 200 Cal.App.4th 38, 45 ["a decision establishes a 'new rule' when it '(1) *explicitly overrules a precedent of this court* . . . ."'].) And the change of law in *Chun* affects Ferrell, since his original appeal was expressly decided under the rationale of *Robertson*. (See Petn., Exh. A at pp. 2-3.)

Additionally, "the standard articulated in *In re Johnson* (1970) 3 Cal.3d 404 (*Johnson*) governs the determination whether to apply a new rule retroactively to a final judgment such as this one." (*Lucero*, *supra*, 200 Cal.App.4th at p. 45.) "Under this test, the retroactivity of a new rule 'is to be determined by (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' " (*Ibid.*, *quoting Johnson*, *supra*, 3 Cal.3d at p. 410, some quotation marks omitted.) "[T]he more directly the new rule in question serves to preclude the conviction of innocent persons, the more likely it is that the rule will be afforded retrospective application.'" *(Lucero*, *supra*, 200 Cal.App.4th at p. 45.)

Since "[t]he purpose of *Chun* was to separate those actions that are punishable as second degree murder from those that are not," "[t]he expanded merger doctrine announced in *Chun* could render some defendants who were previously convicted under the second degree felony-murder rule entirely innocent of murder." (*Hansen*, *supra*, 227 Cal.App.4th at p. 919.) "The *Chun* decision therefore goes directly to the question of guilt or innocence of a defendant and the validity of his conviction." (*Ibid.*; accord, *Lucero*, *supra*, 200 Cal.App.4th at p. 46.)

In short, *Chun* explicitly overruled prior precedent, and in doing so it directly affected the guilt or innocence of at least some defendants. It should therefore be applied retroactively on habeas even to final judgments.[10]

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[10] Ferrell waited a decade before deciding to invoke *Chun*. The trial court therefore denied his request for *Chun* relief as untimely. (See Petn., Exh. G; *In re Clark* (1993) 5 Cal.4th 750, 765.) However, the Secretary does not rely on that procedural bar. "[T]here is no express time window in which a petitioner must seek habeas corpus relief. [Citation.] Rather, the general rule is that the petition must be filed 'as promptly as the circumstances allow . . . .'" (*In re Douglas* (2011) 200 Cal.App.4th 236, 242, quoting *In re Clark* (1993) 5 Cal.4th 750, 765, fn. 5.) And, as Ferrell notes in the petition, "the state did not contend" the current proceedings were untimely in the Court of Appeal. (Petn. 19; see *In re Moser* (1993) 6 Cal.4th 342, 350, fn. 7 ["In view of the People's failure to raise the timeliness issue in the trial court, we deem that issue to have been waived."].)

D. Given the facts of this case, section 12022.53's "intent," "proximate cause," and "in the commission of" elements demonstrate at least implied malice

While *Chun* applies retroactively, it does not require relief here. It is beyond a reasonable doubt that Ferrell killed Rawlings by intentionally firing toward a crowd of people.

When a jury receives an instruction permitting it to convict on a subsequently invalidated legal theory, reversal is required "on a petition for writ of habeas corpus . . . unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory . . . ." (*In re Martinez* (2017) 3 Cal.5th 1216, 1218 [considering prejudice in the context of an instructional error under *People v. Chiu* (2014) 59 Cal.4th 155].) But the record in this case provides compelling evidence that the jury in fact relied upon a still-valid theory.

Notably, in finding the section 12022.53 enhancement to be true, the jury found that Ferrell "intentionally . . . discharged a firearm and proximately caused death . . . in the commission of [the murder]." (3RT 448-449; see § 12022.53, subd. (d).) That is, the jury found that an *intentional* shot, fired "in the commission of" the murder, "proximately caused" death. In light of this finding, three interconnected principles compel the conclusion that the jury relied upon a still-valid theory of liability.

First, the "proximate cause" element of section 12022.53 required a direct and probable link between the intentional gunshot and Rawlings's death. *Second*, the "in the commission of" element demanded a facilitative nexus between events. That is, under the Court's own precedent, this part of section 12022.53

can only have been satisfied if the intentional gunshot was fired in furtherance of the murder. And *third*, in light of these first two principles, the jury must have rejected Ferrell's accidental shooting story altogether, and relied upon either an express or implied malice theory of liability, rather than a section 246.3 felony murder theory.

As to the first item, proximate causation is only present when an act "is directly connected with the resulting injury, with no intervening force operating.'" (*People v. Cervantes* (2001) 26 Cal.4th 860, 866, quoting 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 36, p. 242.) "'A proximate cause of great bodily injury or 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 great bodily injury or death and without which the great bodily injury or death would not have occurred.'" (*People v. Bland* (2002) 28 Cal.4th 313, 335, quoting CALJIC No. 17.19.5 (2002 rev.) (6th ed. 1996); see 1CT 190; 3RT 449.) "A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (*People v. Carrillo* (2008) 163 Cal.App.4th 1028, 1038.)[11]

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[11] Ferrell asserts that no definition of "proximate cause" was given to the jury, and objects that "absent instruction . . . 'when jurors hear the term "proximate cause" they may misunderstand its meaning.'" (Petn. 35, quoting *Bland*, *supra*, 28 Cal.4th at p. 334.)

He is wrong. A proximate cause definition was provided. (See 1CT 190; 3RT 449.) Indeed, the trial court instructed the

(continued…)

Ferrell claims that this proximate cause requirement could have been met if the jury "found the first shot intentional and . . . believed that this first shot set in motion a series of events which proximately caused Mr. Rawlings' death." (Petn. 36.) But given the facts of this case, such a finding would have required the jury to decide that the "direct, natural and probable consequence" (1CT 190; 3RT 449) of firing a warning shot into the air would be the accidental firing of a second shot. (*Bland*, *supra*, 28 Cal.4th at p. 335; cf. *Garcia v. United States* (9th Cir. 1987) 826 F.2d 806, 811 ["A warning shot itself is not deadly force."].)

Whether or not firing one shot intentionally could potentially lead a second shot to be fired by accident, there was simply no evidence at trial to suggest such a connection—and therefore no reason for the jury to make such a leap. (See 3RT 416-417; 1CT 130 [instructing the jury to "decide all questions of fact . . . from the evidence received in this trial and not from any other source"].) A second-accidental gunshot certainly is not "likely to happen if nothing unusual intervenes" after a first-intentional gunshot. (*Carrillo*, *supra*, 163 Cal.App.4th at p. 1038.)[12] In fact, the only evidence cuts the other way—Ferrell had previously

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(…continued)

jury with CALJIC 17.9.5, the very instruction approved by this Court in *Bland*.

[12] And if it *were* likely to happen, then pointing a gun at a crowd after shooting into the air would be an act "the natural consequences" of which must be "dangerous to human life" within the meaning of implied malice murder. (*Swain*, *supra*, 12 Cal.4th at p. 602.)

fired a gun two weeks before Rawlings's death. (1RT 24-29.) And, on that occasion, he successfully managed to fire only one time, directly into Hughey's groin. (1RT 29-31.) Accordingly, by finding that the proximate cause of death was an intentional gunshot, the jury rejected Ferrell's story about an accidental second shot, and instead found that Ferrell intentionally shot toward Rawlings.

As to the second item, the jury found that an intentional gunshot was fired "in the commission of" the murder. The phrase "in the commission of" connotes a "facilitative nexus." (See *Bland*, *supra*, 10 Cal.4th at p. 1002.) In the context of other firearm enhancements, this Court has "concluded that the phrase 'in the commission of' a felony . . . means during and *in furtherance of* the felony." (*In re Tameka C.* (2000) 22 Cal.4th 190, 198, citing *People v. Fierro* (1991) 1 Cal.4th 173, 225-227; accord, *Bland*, *supra*, 10 Cal.4th at p. 1000 [facilitative language means firearm possession was "to aid [defendant's] commission" of another offense].)

Following this reasoning, since the jury found that a gunshot was intentionally fired "in the commission of" murder (3RT 448-449; 1CT 190), it must have found that the intentional gunshot was fired "to aid his commission" of the murder. (*Bland*, *supra*, 10 Cal.4th at p. 1000; *Fierro*, *supra*, 1 Cal.4th at p. 227.) Such a finding is facially incompatible with the accidental shooting described by Ferrell—who still claims that the intentional gunshot was merely a warning shot intended to disperse a crowd, while the fatal shot was simply a mistake. (See Petn. 36.)

Instead, again, the only reasonable inference from the relevant instruction and finding is this: the jury found that Ferrell intentionally (rather than accidentally) shot at Rawlings *in order to facilitate* a murder.

And as to the third item: the jury's double rejection of the accidental discharge story is dispositive of Ferrell's *Chun* claim. The undisputed evidence showed that Rawlings was killed by a shot fired parallel to the ground. (See 2RT 229-241.) By rejecting the accidental discharge story, the jury must have found that this fatal shot was intentional. And an intentional gunshot fired parallel to the ground at a crowd of people is more than a mere reckless discharge. (Compare *Swain*, *supra*, 12 Cal.4th at p. 602 [malice implied from "an intent to do some act, the natural consequences of which are dangerous to human life"] with CALJIC No. 3.36 [section 246.3 reckless discharge requires merely "indifference to" human life].) Such a gunshot is definite evidence of, at a minimum, implicit malice. (See *People v. Stone* (2009) 46 Cal.4th 131, 134, 137-141 [firing at a crowd actually constitutes evidence of *express* malice].)

Nevertheless, Ferrell relies on relies on *People v. Offley* (2020) 48 Cal.App.5th 588 for the proposition that an enhancement under section 12022.53, subdivision (d), does *not* imply malice. (Petn. 35.) His reliance is misplaced for three reasons.

First, *Offley* correctly pointed out that "an enhancement under section 12022.53, subdivision (d) does not establish *as a matter of law* that a defendant acted with malice aforethought."

(*Offley*, *supra*, 48 Cal.App.5th at p. 597, italics added.) But, while not determinative, a section 12022.53, subdivision (d), enhancement is highly informative when assessing harmless error. As the Secretary has shown, the relevant question is whether that the jury found malice based on the particular circumstances of the case. And the various elements of the firearm enhancement shed substantial light on this inquiry.

Second, *Offley* does not appear to have considered the facilitative component of section 12022.53, subdivision (d). It mentions the relevant phrase, "in the commission of," only once, without placing any weight on it. (See *Offley*, *supra*, 48 Cal.App.5th at p. 597.) With this component in mind, the enhancement contains an important intent aspect. True, it is only a general intent enhancement, rather than specific intent: "to aid [the] commission" of another offense, without a specific outcome in mind. (*Bland*, *supra*, 10 Cal.4th at p. 1000; see *Offley*, *supra*, 48 Cal.App.5th at p. 598.) But when that other offense is murder, and the enhancement in question requires proximately causing death by intentionally shooting a firearm (as described by section 12022.53, subdivision (d)), it would be an exceptional case in which even acting with a general intent could be rationally described as something less than "an intent to do some act, the natural consequences of which are dangerous to human life." (*Swain*, *supra*, 12 Cal.4th at p. 602; see Petn., Exh. J at pp. 6 [Court of Appeal opinion in this case "respectfully disagree[ing] with *Offley*. . . . 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."].)

Offley is inapposite for a third, simpler reason too: it was interpreting the malice rules in the context of liability for aiders and abettors in the aftermath of Senate Bill 1437. (See *Offley*, *supra*, 48 Cal.App.5th at pp. 593-594.) Thus, it was concerned with defendants who personally and intentionally shot a firearm—but were not themselves the actual killers. (*Ibid.*) Under such circumstances, it might be said that the defendant did not share the intent of whoever the actual killer might have been, and intended only to aid in some other offense apart from shooting someone. (See fn. 9, above; *Soto*, *supra*, 51 Cal.App.5th at p. 1056 [distinguishing the "natural consequences" theory of implied malice for principals from the "natural and probable consequences doctrine" for aiders and abettors].) Ferrell, though, cannot make the same claim; as the sole shooter, he remains responsible for the natural consequences of his actions. (See *Swain*, *supra*, 12 Cal.4th at p. 602.)

In short, the proximate cause and facilitative nexus elements of the section 12022.53 finding are dispositive under the circumstances of this case. They show beyond a reasonable doubt that the jury did not rely upon a reckless discharge theory when it found Ferrell guilty of second-degree murder.

E. The evidence of at least implied malice was overwhelming

Additionally, as this Court held in *Chun*, analyzing the jury's other verdicts or findings is not the only way a reviewing court may find an instructional error harmless. (See *Chun*,

supra, 45 Cal.4th at p. 1203.) "If other aspects of the verdict *or the evidence* leave no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless." (*Id.* at pp. 1204-1205, italics added; see *People v. Cross* (2008) 45 Cal.4th 58, 70 (conc. opn. of Baxter, J.) ["reliance on other portions of the verdict is "[o]ne way" of finding an instructional error harmless [citation], we have never intimated that this was the *only* way to do so"].) And the evidence here overwhelmingly points to at least implied malice murder.[13]

Certainly, the testimony by Davis and Latesha would compel at least an implied malice murder verdict. According to them, Ferrell shot directly at Rawlings and Diggum, with a crowd of 40 Pirus standing behind them in the line of fire, even though they were not fighting and there was no need to "break up" a fight. (See 1RT 98-102, 149-151; see *Stone*, *supra*, 46 Cal.4th at pp. 134, 137-141 [firing at a crowd is so dangerous that it constitutes evidence of *express* malice].)

But even Keith's testimony, and the version of events Ferrell told to the police, was more than enough to prove implied malice. Keith acknowledged that there was no need to fire a gun in the first place: the fighting was mostly over, no one else had a

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[13] Of course, the jury was also instructed as to the most plausible theory of guilt: that Ferrell killed Rawlings with *express* malice, when he tried to shoot one of the 40 Piru gang members and mistakenly hit Rawlings instead. (See 3RT 432-433; 1CT 159-160; CALJIC No. 8.30 (Unpremeditated Murder of the Second Degree); CALJIC No. 8.65 (Transferred Intent).)

weapon, and indeed, the fighting had never been very serious in the first place. (2RT 336, 350, 356.) Since such fights between AFC and 40 Pirus were commonplace "athletic contest[s]" (2RT 350), Ferrell would have known that it was unnecessary to start shooting, even to fire a warning shot. Perhaps most significantly, though, Keith was unable to testify about the critical moments of the shooting. He did not actually see either gunshot, nor did he see Ferrell approach the crowd. (See 2RT 338-340, 343-344, 352-353.) Accordingly, he could not provide any detail about what Ferrell was doing when he opened fire.

Ferrell, meanwhile, told police that he never fired at the crowd at all: according to him, the second shot went off while his arm was still raised. (See 1CT 113; accord, 2RT 342 [while inconsistent with testimony that he did not see either gunshot, Keith also denied that the gun was parallel to the ground when the second shot was fired].) This story, of course, was impossible. The bullet that killed Rawlings traveled horizontal to the ground. It cannot have been fired into the air at an angle as he claimed. (2RT 229-236.) But the impossibility of Ferrell's story only serves to show the harmlessness of any instructional error. (See *People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 ["the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application"].)

Indeed, even setting aside evidence about the trajectory of the bullet, the story told by Ferrell and Keith was still inconsistent with the second-degree felony murder instruction. That is, notwithstanding the trial court's decision to give CALJIC

No. 8.32 (Second Degree Felony Murder), there was in fact no testimony that could have supported a second-degree felony murder conviction.

According to Ferrell, "[t]he instructions simply asked jurors to find whether the defendant intentionally discharged a firearm and whether he proximately caused the victim's death." (Petn. 37.) That is, if the first shot were reckless, and he subsequently caused death, no additional connection between the two incidents was necessary.[14] (See Petn. 36.) But Ferrell's description does not include everything the instruction said.

As the trial court instructed, a violation of section 246.3 could only support a second-degree felony murder verdict if the death occurred "during" the reckless discharge itself. (See 3RT 434 [describing "unlawful killing of a human being . . . which occurred *during* the commission of the crime of willful discharge of a firearm in a grossly negligent manner"], italics added; see 1CT 163.) "The term 'during' suggests temporal overlap: something that occurs throughout the duration of an event or at some point in its course." (*People v. Estrada* (2017) 3 Cal.5th 661,

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[14] This reasoning, taken at face value, would suggest that no causal relationship whatsoever is required between the intentional gunshot and the death. For instance, if a partygoer intentionally shot a gun to celebrate the New Year, then killed someone in a car crash while driving home later that night, Ferrell's description would allow for the use of an enhancement under section 12022.53, subdivision (d).

This cannot possibly be the rule, and the Secretary is unaware of any case authorizing such an expansive interpretation.

670.) And, under Ferrell's version of events, the fatal wound did not occur "in [the] course" of a willful discharge. (See 3RT 434; § 246.3.)

According to Ferrell, the fatal wound occurred *after* the willful and reckless shot had been fired. (See Petn. 36-37; 1CT 113; accord, 2RT 342.) If anything, according to Ferrell, the death occurred in the course of a subsequent, accidental, and therefore non-willful shooting. (See *People v. Clem* (1974) 39 Cal.App.3d 539, 542 ["Among several connotations conveyed in common usage by the word 'willfully' the one most fitting to the statutory context is 'done deliberately: not accidental or without purpose.'"].) So, since there was no version of events under which Rawlings's death could have occurred "during" a reckless discharge, it was harmless error to provide the reckless discharge felony murder instructions. (See *People v. Cross* (2008) 45 Cal.4th 58, 67 ["giving an irrelevant or inapplicable instruction is generally "'only a technical error which does not constitute ground for reversal'""]; *Frandsen*, *supra*, 196 Cal.App.4th at p. 278 ["the jury is presumed to disregard an instruction if the jury finds the evidence does not support its application"].)

In other words, while the felony murder instruction was given, no factual scenario was presented to the jury that could have given rise to a conviction under that instruction. The only version of events that is consistent with the testimony and the uncontroverted forensic evidence is that Ferrell killed Rawlings with at least implied malice. The *Chun* error was therefore harmless in this case.

CONCLUSION

For the foregoing reasons, this Court should recall the Order to Show Cause and deny relief.

Respectfully submitted,

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July 28, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES** uses a 13 point Century Schoolbook font and contains 7,834 words.

ROB BONTA
Attorney General of California

/s/ David W. Williams

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July 28, 2021

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

Case Name***: In re Tyree Ferrell on Habeas Corpus*** No. **S265798**

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 placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case 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 28, 2021,** I electronically served the attached **RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES** by transmitting a true copy via this Court's TrueFiling system. 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 28, 2021,** I have caused to be mailed 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

Clerk of the Court, delivery to
The Honorable Marsha N. Revel, Judge
Los Angeles County Superior Court
Beverly Hills Courthouse
9355 Burton Way, Department 304
Beverly Hills, CA 90210

On **July 28, 2021,** I electronically served the attached **RETURN TO PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS AND AUTHORITIES** by transmitting a true copy via the Court's TrueFiling system and electronic mail to:

Cliff Gardner
Counsel for Appellant
(served via TrueFiling)

Gretchen Ford
Deputy District Attorney
(courtesy copy via email)

California Appellate Project (CAP LA)
(courtesy copy served via TrueFiling)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 28, 2021**, at Los Angeles, California.

M. Hunglau
Declarant

/s/ Hunglau
Signature

DWW:mfh/LA2021601694

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Williams, David (295204)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
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