IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

IN RE TYREE FERRELL,	)	S265798
	)	
Petitioner,	)	
	)	
	)	
	)	
On Habeas Corpus.	)	
	)	
_____	)	

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

INTRODUCTION

This case involves the question of harmless error in a case involving "alternative-theory error" -- error occurring when a court instructs on multiple theories of guilt but one of those theories is legally incorrect. Here the state charged 18-year old Tyree Ferrell with first degree, premeditated murder in the shooting death of his boyhood friend Lawrence Rawlings. The defense theory was that the shooting was an accident -- Mr. Ferrell fired a warning shot to break up a fist fight between Rawlings and members of a neighboring gang and he accidentally fired a second shot, killing his best friend.

Jurors unanimously rejected the state's theory of premeditated murder, acquitting of first degree murder. But jurors were alternatively given three theories of second degree murder: felony murder based on the grossly negligent discharge of a weapon, implied malice murder and express malice murder without premeditation. The jury ultimately convicted Mr. Ferrell of second degree murder without specifying the theory on which it had relied.

In his Petition for Writ of Habeas Corpus ("Petition"), Mr. Ferrell contended the felony-murder theory was legally invalid. (Petition 15 citing *People v. Chun* (2009) 45 Cal.4th 1172, 1200.) In its Return, the state concedes error and recognizes relief is required unless the state can prove the error harmless beyond a reasonable doubt. (Return to Petition for Writ of Habeas Corpus ("Return") 12-13, 23, 31.) But the state claims it can meet this heavy burden under either of two different harmless error theories.

The state reviews the trial record and argues that the error in providing an invalid felony murder theory was harmless because in its view "[t]he evidence of at least implied malice was overwhelming," "the evidence overwhelmingly points to at least implied malice murder" and there was "more than enough [evidence] to prove implied malice." (Return 37-38.) Alternatively, the state argues the Court can "conclude[] beyond a reasonable doubt that the jury actually relied on a legally valid theory" because the jury found true a separate § 12022.53 enhancement. In the state's view, the true finding on this enhancement reflected a conclusion that all 12 jurors found Mr. Ferrell killed with malice. (Return 31-35.)

This Traverse follows. This Traverse will serve the traditional purposes of a Traverse to (1) incorporate the factual allegations of the Petition itself and (2) controvert any additional factual allegations of the Return. (*See People v. Romero* (1995) 8 Cal.4th 728, 738-739.) The supporting memorandum will then respond to the state's legal arguments. But especially in light of the state's suggestion that the error here was harmless because in its view "the evidence of . . . malice was overwhelming," it is important to note at the outset the nature (and risks) of the task the state is asking the Court to perform.

As Justice Cuéllar has recently noted, "virtually all forms of harmless error review risk infringing on 'the jury's factfinding role . . . .'" (*People v. Aledamat* (2019) 8 Cal.5th 1, 17 [Cuellar, J., concurring].) This observation is entirely accurate; after all, the right to a jury trial means that a jury of 12 citizens, not one or more judges, will determine whether a defendant is guilty. Thus, "courts performing harmless error review are

walking a tightrope -- where they must weigh how an error affected the proceedings without displacing the jury as finder of fact." (*Ibid*.)

Of course, these legitimate concerns about the nature of harmless error review do not mean that reviewing courts should simply abandon such review. To the contrary, harmless error review is an essential role reviewing courts must play in the criminal justice system. Instead, as Justice Cuéllar concluded, when the Court steps on to the tightrope of harmless error review, "caution's been the watchword." (*Ibid.*)

So it is here. In order to sustain the 40-year sentence imposed on this teenage defendant, the state argues that the evidence and verdicts show not only that jurors *must* have rejected the defense theory and instead found malice, but must have done so *unanimously*. There is, in the state's view, not even the possibility of doubt -- "the evidence of . . . malice was overwhelming." (Return 37.)

Mr. Ferrell's constitutional right to a jury trial on the issue of malice is all but forgotten in the state's brief. But as discussed below, this is a particularly poor case for such an approach. Jurors here heard defendant's own statements that the shooting was an accident. Jurors heard the testimony of two other eyewitnesses -- one of whom was a prosecution witness related to the victim -- directly supporting the defense theory. Because the prosecutor was very much aware of this evidence, in closing argument jurors heard the prosecutor's argument that even if they accepted the defense, they could rely on the invalid felony murder theory to convict of second degree murder without ever finding malice. Indeed, not only was

it the prosecutor who requested instructions on the felony-murder theory in the first place, but at the prosecutor's request the trial court affirmatively instructed jurors on involuntary manslaughter as a killing without malice. Jurors heard defense counsel rely on these instructions (and the supporting evidence), asking jurors to convict of involuntary manslaughter. And after hearing the evidence supporting the defense theory of accident, the very same jurors who the state now says unanimously found Mr. Ferrell killed with malice were not even sure the killing itself was unlawful; jurors actually asked for "a definition of 'unlawful killing' as it related to second degree murder."

Justice Cuéllar was correct. Caution is the watchword lest the Court intrude on the jury's factfinding role. Was there sufficient evidence for jurors to find malice in this case? Given the deferential standards of appellate review, the answer is certainly yes. But on this record the Court can say no more. The young defendant in this case, charged with killing his best friend, was entitled to a jury determination of whether he acted with malice. He did not get it; the felony murder instruction allowed jurors to convict without ever making such a finding. On this record, the state simply cannot show *beyond a reasonable doubt* that jurors nevertheless found malice.

PETITIONER REINCORPORATES THE FACTUAL ALLEGATIONS FROM THE HABEAS PETITION

The formal purposes of a Traverse are simple. First, it must incorporate the factual allegations of the Petition itself. (*People v. Romero*,

supra, 8 Cal.4th at p. 739.) Second, it must controvert any additional factual allegations of the Opposition. (*Id*. at pp. 738-739.) Taking the Return and the Traverse together, a court should be able to determine if there are disputed facts which need resolution at an evidentiary hearing.

In paragraph VII of his Petition, Mr. Ferrell set forth factual allegations establishing that provision of the felony-murder instruction was error under this Court's decision in *Chun*. (Petition 10-15.) Because the state "agrees that the [felony-murder] instruction was *Chun* error and that *Chun* applies retroactively to this case," (Return 23), there are no disputed facts which require resolution at an evidentiary hearing. The only question presented here is a legal one: whether on the trial record presented, the state can carry its burden of proving beyond a reasonable doubt that the now-conceded *Chun* error was harmless.

Petitioner hereby reincorporates the factual allegations made in his Petition and supporting memorandum. To the extent Paragraphs 7(a), (b), (c), (e) and (f) of the state's Return contain affirmative factual allegations, petitioner specifically denies each one.

DATED: August 24, 2021

Respectfully submitted,

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LAZULI WHITT

By: /s/Cliff Gardner
Attorney for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE

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INTRODUCTION

At trial there was one critical factual dispute: whether the bullet which killed Mr. Rawlings was fired intentionally into the crowd (as the state contended) or accidentally (as the defense contended). Here are the essential facts relevant to this dispute.

In 1999, 18-year old petitioner Tyree Ferrell was in the same gang as Lawrence Rawlings. (1 CT 114-115.) According to Valerie Golden, Mr. Rawlings' mother, the two grew up together and were "best friends." (1 RT 31, 52.) On July 12, 1999, their gang planned a fight with another gang; the state introduced Mr. Ferrell's pre-trial statement to police explaining that when he saw Rawlings in trouble in the fight, he fired a warning shot into the air. (1 CT 111-112; 2 RT 260, 264.) According to petitioner, and to defense eyewitness Henry Keith, as petitioner brought his arm down after firing in the air, the gun went off again. (1 CT 111-115; 2 RT 264-265, 341-343.) Rawlings was hit and killed by one shot to the head; the path of the shot was parallel to the ground. (2 RT 238-239.)

In petitioner's statement to police he said he thought the gun was pointed up when the shot went off. (1 CT 112-113.) Of course, as the interrogating officers were aware, given the horizontal trajectory of the bullet this would not explain how Rawlings got hit. (1 CT 112.) Significantly, however, interrogating officer Arciniega admitted that when Mr. Ferrell actually demonstrated his arm position for the second shot, his arm was "approaching being parallel with the ground." (2 RT 260.) This *would* explain the trajectory of the second shot.

Defense counsel questioned eyewitness Keith on this same subject, asking about Ferrell's arm position for the two shots. For the first shot, Ferrell's arm was "straight up in the air." (2 RT 342.) Keith then twice demonstrated Ferrell's arm position for the second shot. (2 RT 342, lines 9-14.) As the trial court itself summarized this demonstration, after Mr. Ferrell brought his forearm down "it would have been parallel to the ground." (2 RT 343.) Defense counsel agreed with the court, describing the same demonstration as showing that "the forearm [was] parallel to the ground." (2 RT 343.) According to Mr. Keith, it was only *after* the gun came down to this parallel position that he heard the second shot. (2 RT 344.) This version of events too fully accounts for the trajectory of the bullet that hit Mr. Rawlings.[1]

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1. After Keith's demonstration, the parties described what they saw. Defense counsel described Keith's demonstration of Ferrell lowering his arm, noting it came "down with a bend in the elbow . . . almost horizontal to the ground." (2 RT 342.) The prosecutor took a different tack, describing where the gun was pointed after the arm was lowered, noting "the [gun] barrel would have been parallel to the ground at the conclusion." (*Ibid*.)

The court then asked Keith "is that correct?" without specifying which of the two very different descriptions it was asking him about: defense counsel's description or the prosecutor's. (2 RT 342.) Keith answered this ambiguous question "No." (2 RT 342.) The state now cites this answer for the proposition that Keith "denied . . . the gun was parallel to the ground when the second shot was fired." (Return 19.)

But the discussion that *immediately* follows shows Keith was *not* responding to the prosecutor's description of where the gun was pointed, but was instead responding to defense counsel's description of how Ferrell lowered his arm. (2 RT 343, lines 1-7.) Indeed, as noted above, at the end of the exchange with Keith, the court itself described Keith's demonstration as showing that prior to the second shot, Ferrell's arm "would have been parallel to the ground" and "the jurors have seen it." (2 RT 343.)

The state presented a slightly different version of events, based on the testimony of Mr. Rawlings' cousin (Latesha Rawlings) and his girlfriend (Cussondra Davis). In contrast to Mr. Ferrell's statement to police, and Mr. Keith's eyewitness testimony, these witnesses said they did *not* see petitioner point his gun in the air -- they only saw the gun fire as it was pointed toward the crowd of people fighting. (Return 17-19 citing 1 RT 98-100, 149-151.) Of course, neither of these prosecution witness could know whether Mr. Ferrell fired the fatal shot accidentally. Despite this, however, Latesha Rawlings directly supported the defense theory of accident when she admitted that Mr. Ferrell's "hand was going all kinds of ways like he couldn't handle the gun" and he did not have "control of the gun." (1 RT 151.) All parties then agreed that after Mr. Rawlngs was hit, petitioner dropped the gun and rushed to Rawlings' side. (1 CT 111-115, 153, 171; 2 RT 264, 345.)

In other words, at trial the parties disputed whether the shot that killed Mr Rawlings was intentionally fired into the crowd (as the state argued) or fired accidentally (as the defense contended). The trial court instructed jurors they could find Mr. Ferrell guilty of second degree murder under several theories of culpability, one of which was felony murder based on the discharge of a firearm in a grossly negligent manner. (3 RT 432-435.)

In contrast to the state's post-conviction lawyers, the trial prosecutor recognized the evidence was in conflict. Thus, in closing argument the prosecutor noted that defendant's own statement as to what happened "doesn't square with [what] the people's witnesses saw." (3 RT 380.)

Indeed, precisely because there was evidence on which jurors could rely to find that the unlawful killing occurred without malice, the prosecutor asked the trial court to instruct jurors on involuntary manslaughter as a killing without malice. (1 CT 169-170.) The trial court agreed. (3 RT 437-438.) Significantly, it was also the prosecutor who specifically asked the trial court to instruct on felony murder. (1 CT 163.) Again the court agreed. (1 CT 163.)

It turns out there was a good reason the prosecutor requested felony-murder instructions. During closing argument, the prosecutor did not ignore either the defense theory of accident or the felony-murder theory she had requested. Thus, in closing argument the prosecutor told jurors that under the "second-degree felony murder" instructions they would be given, they could convict of murder even if they accepted the defense theory of accident by finding "an unlawful killing which could have been intentional, unintentional *and even accidental*, during the commission of a felony, in this case, discharging a firearm." (3 RT 382, emphasis added.) For his part, defense counsel argued the shooting was an accident, and that at most jurors should convict of involuntary manslaughter. (3 RT 404.) Later, after having heard both the testimony supporting an accidental discharge theory and the prosecutor's suggestion that even an accidental shooting could constitute felony murder, jurors specifically asked for "a definition of 'unlawful killing' as it relates to second degree murder." (1 CT 204.)

This short factual summary brings the Court to the question presented by the state's Return: has the state proven beyond a reasonable doubt that provision of the invalid felony-murder theory was harmless? As

noted, the state concedes error under *Chun* but argues that the error was harmless for two different reasons. The state cites *Chun* for the proposition that where "the evidence [presented at trial] leaves no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless." (Return 38.) The state reviews the record and argues that this is precisely the situation here. (Return 37-41.) Alternatively, the state cites *In re Martinez* (2017) 3 Cal.5th 1216 and argues that the error was harmless because this Court can rely on the jury's § 12022.53 finding to "conclude[] beyond a reasonable doubt that the jury actually relied on a legally valid theory." (Return 31-35.)

As more fully discussed below, the state is wrong on both counts. The record shows that the evidence on the question of malice was sharply conflicting. The trial prosecutor recognized this conflicting evidence and not only asked the trial court to instruct on involuntary manslaughter (as a killing without malice), but specifically requested instructions on felony murder to allow jurors to convict of second degree murder without finding malice. The trial court gave the requested instructions. And in closing argument the prosecutor told jurors that if they believed the defense theory of an accidental shooting, they could still convict of murder based on the invalid felony murder theory. In short, contrary to the state's current position, the trial record does not show why the error was harmless, it shows why the error was prejudicial.

The state's alternative § 12022.53 theory of harmless error fares no better. As numerous cases have held, § 12022.53, subdivision (d) is a

general intent enhancement. The jury instructions given here in connection with this enhancement did not require even a single juror to make a finding of express or implied malice. To be specific, the § 12022.53 instructions did not require jurors to find either an intent to kill, or a conscious disregard for danger to human life. The state's attempt to now substitute a § 12022.53 finding for the required element of malice should be rejected; not even the state can make a square peg fit a round hole. Relief is required.

ARGUMENT

I. THE RECORD AS A WHOLE -- INCLUDING THE TRIAL EVIDENCE, THE PROSECUTOR'S CLOSING ARGUMENT, THE TRIAL COURT'S INSTRUCTIONS ON INVOLUNTARY MANSLAUGHTER AND THE JURY'S QUESTION -- DOES NOT SHOW BEYOND A REASONABLE DOUBT THAT JURORS FOUND MALICE.

A. Provision Of An Invalid Felony-Murder Theory Is Harmless When The State Proves Beyond A Reasonable Doubt That Jurors Made The Findings Necessary For Implied Malice.

There is no dispute on the legal standard for assessing prejudice. As noted above, the state cites *Chun* for the proposition that where "the evidence [presented at trial] leaves no reasonable doubt that the jury made the findings necessary for conscious-disregard-for-life malice, the erroneous felony-murder instruction was harmless." (Return 38 citing *Chun*, *supra*, 45 Cal.4th at pp. 1204-1205. *See also People v. Aledemat*, *supra*, 8 Cal.5th at p. 15 ["The reviewing court examines what the jury necessarily did find and asks whether it would be impossible, on the evidence, for the jury to find that without also finding the missing fact as well."].) For this proposition, both *Chun* and *Aledemat* relied on Justice Scalia's concurring opinion in *Carella v. Roy* (1996) 519 U.S. 2.

In that concurring opinion Justice Scalia voiced some of the same concerns Justice Cuéllar (joined by Justice Groban) later expressed in *Aledemat* about the risk of infringing on the right to a jury trial. Thus, Justice Scalia noted under the Sixth Amendment "a criminal defendant is

constitutionally entitled to a *jury* verdict that he is guilty of the crime, and absent such a verdict the conviction must be reversed, 'no matter how inescapable the findings to support that verdict might be.'" (519 U.S. at p. 7, emphasis in original). He went on to emphasize that "[t]he absence of a formal verdict on this point cannot be rendered harmless by the fact that, given the evidence, no reasonable jury would have found otherwise. To allow the error to be cured in that fashion would be to dispense with trial by jury." (*Ibid*.) The focus of harmless error review is not to enable an appellate court to substitute its judgment for that of the jury:

> The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

(*Ibid*.) In Justice Scalia's view, when an instructional error removes a critical point from the jury's consideration, the goal of a proper harmless error review -- one that respects the defendant's right to a jury trial -- is to

determine "if it impossible, upon the evidence, [for the jury] to have found what the verdict did find without finding this point as well." (*Ibid.*)[2]

In the context of this case, the harmless error question *Chun* and *Carella* require the Court to answer is not complicated. Jurors convicted of second degree murder. Under the instructions and evidence, was it "impossible" for jurors to reach this verdict without also finding malice? (*See also Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 ["The [*harmless error*] inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee."].)

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2. Although it is not entirely clear, the state may be arguing for a much broader harmless error analysis. After its citation to *Chun*, the state suggests that the alternative-theory error here could be harmless if, in the reviewing court's view, "the evidence overwhelmingly points to at least implied malice murder." (Return 38.)

There is no need to decide whether this much-broader focus "risk[s] infringing on 'the jury's factfinding role." (*Aledamat*, *supra*, 8 Cal.5th at p. 17 [Cuéllar, J., concurring]. *See also People v. Merritt* (2017) 2 Cal.5th 819, 834 (Liu, J., concurring] ["when a reviewing court considers the strength of the evidence in order to fill a gap in the jury's findings, the court is wading into the factfinding role reserved for the jury"].) This very different focus is unsupported by *Chun* and is, in fact, the precise focus Justice Scalia explicitly cautioned against in *Carella*. Equally important, as discussed in text below, as a factual matter the trial record does not come close to supporting the state's thesis of overwhelming evidence of malice.

California appellate courts have employed *Chun*'s approach to alternative-theory error for some years. They have identified a number of useful factors to consider in assessing whether the state can prove alternative-theory error harmless beyond a reasonable doubt.

To start with, in performing this analysis, the reviewing court must "exhaustively review[] the trial evidence." (*People v. Gonzales* (2012) 54 Cal.4th 643, 666.) In the course of that review, one factor courts look to in assessing prejudice is whether the prosecutor relied on the improper theory during closing arguments. (*See*, *e.g.*, *In re Martinez* (2017) 3 Cal.5th 1216, 1227-1228 [alternative-theory error not harmless where prosecutor relied on improper theory in closing argument]; *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 42 [same]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1020 [error not harmless where prosecutor relied on both valid and invalid theories during closing argument]; *People v. Loza* (2018) 27 Cal.App.5th 797, 806 [same]; *People v. Lopez* (2020) 46 Cal.App.5th 505, 526 [error harmless where prosecutor did not reference the improper theory in closing argument]*; People v. Marsh* (2019) 37 Cal.App.5th 474, 490 [same]; *People v. Flores* (2016) 2 Cal.App.5th 855, 881 [same].)

But the prosecutor's argument is not the only factor courts examine. Thus, courts examine whether any questions from the jury suggest one or more jurors may have been considering the improper theory. (*Martinez*, *supra*, 3 Cal.5th at p. 1227.) And courts also look to see whether there is a conflict in the evidence which, if credited, could lead a rational juror to disbelieve the state's case. (*In re Hansen* (2014) 227 Cal.App.4th 906, 927-928; *In re Bejarano* (2007) 149 Cal.App.4th 975, 992.) This

assessment of the trial evidence has been described as "the converse of the substantial evidence test. If the record shows some evidentiary basis for a finding in the defendant's favor on the omitted element, the People have not met their burden" and relief is required. (*People v. Valenti* (2016) 243 Cal.App.4th 1140, 1166. *See also People v. Mil* (2012) 53 Cal.4th 400, 418 [instructional error prejudicial if "any rational fact finder could have" accepted the defense version of events]; *In re Hansen*, *supra*, 227 Cal.App.4th at p. 927 [improper felony-murder instruction not harmless where jurors could have believed defendant's own testimony].)

In this case, an examination of these (and other) factors establishes that jurors could indeed have taken the prosecutor at her word, accepted the defense theory of the case and convicted of second degree murder without finding malice. It is to an examination of those factors that Mr. Ferrell now turns.

B. In Light Of The Conflicting Evidence, The Prosecutor's Closing Argument And The Jury's Question, The State Cannot Prove Beyond A Reasonable Doubt That Jurors "Made The Findings Necessary For" Implied Malice Murder.

As an initial matter, the evidence itself was very much in dispute, both as to the general circumstances surrounding the shooting and, more specifically, whether the fatal wound was fired intentionally or accidentally. As to the general circumstances of the shooting -- and as the state recognizes -- jurors heard three very different versions of whether the fight was still ongoing when shots were fired. (*Compare* 1 CT 111-112 [Rawlings was being beaten up when the shots were fired] *with* 2 RT 356-

359 [Rawlings was no longer fighting but there was still fighting going on] *with* 1 RT 95-97 [there was no fighting going on at all].) And as to whether the fatal wound was fired accidentally, the state itself introduced defendant's statement to police in which he said in no uncertain terms that the shooting was an accident. (1 CT 112.)

The state accurately points out that in his statement to police, defendant also said that at the time the second shot went off, the gun was pointed up. (Return 39.) The state concludes that it was therefore "impossible" for jurors to rely on this statement and find an accidental shooting because "[t]he bullet that killed Rawlings traveled horizontal to the ground." (Return 39.)

This reasoning bears precious little resemblance to an approach requiring an "exhaustive[] review[] [of] the trial evidence." (*People v. Gonzales*, *supra*, 54 Cal.4th at p. 666.) And it bears no resemblance at all to an examination of the record which is "the converse of the substantial evidence test" and actually looks to see if "any rational fact finder" could have accepted the defense theory. (*People v. Mil*, *supra*, 53 Cal.4th at p. 418; *People v. Valenti*, *supra*, 243 Cal.App.4th at p. 1166.)

As noted above, interrogating officer Arciniega himself admitted that when Mr. Ferrell first demonstrated his arm position for the second shot, his "arm was approaching being parallel with the ground." (2 RT 260.) And even putting aside defendant's own demonstration, the fact of the matter is that defendant's statement about his arm position when the second shot was fired was not the only evidence jurors heard on this subject.

As also noted above, eyewitness Keith demonstrated Ferrell's arm position and, according to the trial court itself, this demonstration showed that after the first shot, Ferrell brought his arm down to parallel to the ground. (2 RT 343.) According to Keith, it was *after* the gun came down that he heard a second shot. (2 RT 344.) Of course, Mr. Keith's version of events fully accounts for the path of the bullet that killed Mr. Rawlings. And Latesha Rawlings, one of the state's own eyewitnesses, admitted during her testimony that as Ferrell fired, his "hand was going all kinds of ways like he couldn't handle the gun" and he did not have "control of the gun." (1 RT 151.) This too supported the accidental discharge theory; taking the evidence collectively, jurors here could certainly have convicted of second degree murder without finding that the fatal wound was fired intentionally or with malice.[3]

The state recognizes that "the prosecutor expressed skepticism about

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3. The state's reasoning -- that it was "impossible" for jurors to believe Mr. Ferrell's claim of accident because he said the gun was pointed up for the second shot -- is also flawed for a second reason: it reflects an "all-or-nothing" approach to the evaluation of testimony which this Court has long rejected. The evaluation of a defendant's statements -- as with any other witness -- is *not* an all-or-nothing proposition. "[T]he jury was perfectly justified in accepting those portions of the appellant's statement which appeal to them while rejecting those that they did not believe." (*People v. Shaver (*1936) 7 Cal.2d 586, 595. *Accord People v. Alcala* (1984) 36 Cal.3d 604, 624; *People v. Smith* (1940) 15 Cal.2d 640, 648.) This is especially true here, where Detective Arciniega admitted that when defendant demonstrated his arm position for the second shot, it was "approaching being parallel to the ground." (2 RT 260.) Contrary to the state's argument, and even without the corroborating testimony of Keith and Latesha Rawlings, jurors were free to believe that when Mr. Ferrell shot his boyhood friend, it was an accident.

the 'accidental discharge' story." (Return 26.) This is true; the prosecutor argued as follows:

> 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. (3 RT 384.)

But as the substance of the prosecutor's argument suggests, this hardly constituted an argument that no juror could reasonably find the fatal shot was an accident. To the contrary, the prosecutor's argument specifically recognized that there *was* evidence supporting that theory, and she then urged jurors to find that evidence outweighed by other evidence.

The state suggests that in closing argument the prosecutor never "incorporated Ferrell's 'accidental discharge' story into the second degree felony-murder argument." (Return 9.) The record will not support this argument. As noted above, not only did the prosecutor herself recognize there was evidence supporting the accidental discharge theory, but in closing arguments she specifically told jurors that if they found the shooting accidental, they could nevertheless rely on the felony murder theory to convict of second degree murder:

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

> discharging a firearm. (3 RT 382, emphasis added.)

This was no mere slip of the tongue. Later, after again urging jurors to reject the evidence supporting an accidental discharge theory, the prosecutor repeated her view that even if jurors found the shooting accidental, that would constitute second degree murder:

> But having said that, when you recall what the testimony was of the witnesses, there is no indication that that gun was discharged by accident, although, again, if so, it could still be second-degree murder. (3 RT 391.)

To be sure, in her closing argument the prosecutor also referenced the other, valid theories of second degree murder. (*See* 3 RT 393.) But there is no need to debate whether these alternative arguments have mitigating value in the harmless error calculus, since the prosecutor went on to repeatedly tell jurors they did not have to agree on a theory of second degree murder. (3 RT 380, 393.) She went further, correctly telling jurors that "perhaps the most important thing I can say to you if you agree that it is second-degree murder is you don't have to agree about the theory." (3 RT 380.) The prosecutor made clear that reasonable jurors could rely on any of the three theories (including the invalid felony-murder theory):

> The 12 of you will decide the case, and it could be four people for each of the theories . . . . (3 RT 380.)

It was not just the prosecutor who recognized there was, in fact, evidence supporting an accidental discharge theory. In light of the evidence

presented, the prosecutor asked the court to instruct on involuntary manslaughter. (1 CT 169-170.) The trial court who saw and heard the witnesses testify agreed with the prosecutor that jurors should be instructed they could find Mr. Ferrell guilty of involuntary manslaughter if they found he killed "without malice aforethought." (1 CT 170.) And defense counsel asked jurors to convict of this offense. (3 RT 404.)

Indeed, the record suggests it may not even have been just the prosecutor and trial court who believed there was sufficient evidence to find the shooting accidental. Jurors heard Mr. Ferrell's statement to police that the second (and fatal) shot was an accident. They heard Detective Arciniega's testimony that when Mr. Ferrell demonstrated his arm position at the second shot it was "approaching being parallel with the ground." They heard Mr. Keith's testimony that the second shot occurred when Mr. Ferrell's arm was parallel to the ground. They heard Ms. Rawlings' testimony that Ferrell's "hand was going all kinds of ways like he couldn't handle the gun" and he did not have "control of the gun." During deliberations these same jurors sent the court a question asking for "a definition of 'unlawful killing' as it relates to second degree murder." (1 CT 204.) Although as with most jury questions it is impossible to know for sure what motivated the question, one logical explanation is that jurors were trying to figure out if an accidental killing was an "unlawful killing" as required for second degree felony murder, and as the prosecutor had argued. This question too suggests jurors could have convicted of second degree murder without finding malice. Indeed, in light of the definitions of express and implied malice given to jurors, the state never explains how 12 jurors could unanimously find "overwhelming" evidence of malice under either of

these definitions, yet at the same time be seeking guidance on whether the killing was even unlawful in the first instance.

In short, the state is correct that the Court may review the record to determine "if it impossible, upon the evidence, [for the jury] to have [convicted of second degree murder] . . . without finding [malice] as well." But in light of the record in this case, the state has simply not carried its heavy burden of proving harmlessness beyond a reasonable doubt. Relief is required.

II. IN LIGHT OF THE INSTRUCTIONS GIVEN, THE JURY'S FINDING ON THE SECTION 12022.53 ENHANCEMENT ALLEGATION IS NO SUBSTITUTE FOR A FINDING OF MALICE.

A. Introduction.

In his original, 2004 appeal in this case, petitioner contended the felony murder instruction improperly permitted jurors to convict him of murder without ever finding that he harbored malice. The appellate court agreed that because of the felony-murder theory given to the jury, jurors simply did not have to "consider[] whether [defendant] acted without malice." (*People v. Ferrell* (2004) 2004 WL 2153630 at * 4.) But the appellate court ruled that this did not require reversal because "that is the nature of felony murder." (*Ibid*.) Put in terms of the factual dispute in this case, in its 2004 opinion the Court properly recognized that because jurors had been given a felony-murder theory of culpability, they did not have to find whether the fatal shot was fired intentionally or with malice.

The state disagrees, arguing that it can simply substitute the jury's § 12022.53(d) finding for the required element of malice. (Return 31-35.) As discussed below, this argument ignores not only the instructions jurors were actually given in this case on the § 12022.53(d) allegation, but the fundamental difference between proximate causation (which is the focus of the § 12022.53 finding) and actual causation. Relief is required.

B. Because The § 12022.53 Instructions Did Not Require Jurors To Find Either An Intent To Kill Or A Conscious Disregard For Danger To Human Life, The § 12022.53 Finding Does Not Reflect A Finding Of Malice.

First things first. Jurors were instructed on the § 12022.53(d) allegation. (1 CT 190.) Nothing in this instruction told jurors that in order to find this allegation true, they had to find malice, that is, that Mr. Ferrell either intended to kill or was subjectively aware of the danger to human life that his act posed. (1 CT 190.) As Mr. Ferrell noted in his original Petition, jurors were instead told they had to find two elements in order to find the allegation true: "defendant [1] intentionally and personally discharged a firearm and [2] proximately caused death to a person during the commission of the crime charged." (1 CT 190.) This straightforward analysis is precisely why appellate courts have consistently rejected arguments that a true finding under § 12022.53, subdivision (d) requires the state to prove (or jurors to find) that a defendant harbored malice. (*See*, *Offley*, *supra*, 48 Cal.App.5th at p. 598; *People v. Lucero* (2016) 246 Cal.App.4th 750, 759.)

The state does not discuss *Lucero*. But it does discuss *Offley*. The state accurately notes that *Offley* was assessing the impact of a § 12022.53, subdivision (d) enhancement in the context of assessing a defendant's petition for resentencing under Penal Code § 1170.95. (Return 37.) But it is not entirely clear what possible difference this makes.

In *Offley*, defendant, along with two others, fired into a car being driven by rival gang members. One person in the car was killed, though not by the shot that defendant fired. A jury found defendant guilty of second

degree murder as an aider and abettor under the natural and probable consequence doctrine. Jurors also found true a § 12022.53, subdivision (d) allegation that defendant had intentionally discharged a firearm and proximately caused great bodily injury or death. Defendant's conviction and sentence were affirmed on appeal. (48 Cal.App.5th at p. 493.)

Years later, after the passage of Senate Bill 1437, defendant sought resentencing pursuant to § 1170.95. As relevant to that petition, § 1170.95 permits defendants convicted of murder to seek resentencing where three conditions have been met: (1) they were not the actual killer, (2) they were convicted under a felony murder or natural or probable consequence theory and (3) they could no longer be convicted of murder because the state could not prove malice. The trial court relied on the jury's § 12022.53 true finding to deny the petition, concluding that that finding meant that jurors had found malice on defendant's part. The appellate court reversed precisely "because an enhancement under section 12022.53, subdivision (d) does not establish as a matter of law that a defendant acted with malice aforethought." (48 Cal.App.5th at p. 597.) In reaching this conclusion the court looked at the standard instructions given to jurors in connection with § 12022.53, subdivision (d) and concluded that jurors were asked to decide "whether the defendant intentionally and personally discharged a firearm and proximately caused great bodily injury or death,[] but not whether he intended to kill or was aware of the danger to life that his act posed." (*Id*. at p. 598.) The § 12022.53 finding alone did not permit the court to "exclude the possibility that the jury believed Offley acted without intending to kill . . . or consciously disregarding that risk." (*Id*. at p. 599.)

The question presented in *Offley* is the exact same question presented here: can a § 12022.53, subdivision (d) substitute for a finding on the element of malice? The fact that *Offley* presented the question in the context of a § 1170.95 petition is a distinction without a difference.

Indeed, at least one appellate court has reached this same conclusion as to the impact of a § 12022.53, subdivision (d) enhancement in the context of the very error presented here: provision of an invalid felony murder theory. (*See People v. Bejarano* (2007) 149 Cal.App.4th 975.) There, defendant fired his gun into a car, killing the driver. Just as in this case, jurors were given proper instructions on second degree unpremeditated murder and second degree implied malice murder. (*Id*. at p. 981.) Just like this case jurors were also given an invalid felony murder theory. (*Ibid*.) Just like this case, in closing argument the prosecutor referenced both the valid and invalid theories. (*Ibid*.) Just like this case, jurors convicted of second degree murder (without specifying the theory on which they relied) and found true a § 12022.53, subdivision (d) allegation. (*Id*. at pp. 978-979.) The appellate court reversed notwithstanding the true finding on the § 12022.53 allegation, finding that nothing in the record established that jurors found malice. (*Id*. at pp. 990-993.)[4]

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4. Here, the two elements jurors were instructed on to find true the § 12022.53 enhancement -- whether defendant intentionally discharged a gun and whether he proximately caused death -- were never disputed. Mr. Ferrell admitted both intentionally firing (the first shot) and proximately causing death (the second shot). As such, during closing arguments, neither party devoted even a single word to arguing the enhancement. (3 RT 378-395, 395-407, 407-413.) Now, however, the state argues the jury's finding on this undisputed allegation actually represented a unanimous conclusion that Mr. Ferrell harbored the malice necessary for a murder conviction.

Offley and *Bejarano* should govern this case. Here too the § 12022.53 instructions did not require jurors to find either an intent to kill or a conscious disregard for danger to human life. The parties themselves understood this at trial; as noted, although malice was very much at issue in this case, neither party even addressed the § 12022.53(d) allegation in closing arguments. Contrary to the suggestion of the state's post-conviction counsel, § 12022.53 was not a Trojan horse for a finding of malice.

C. The State's "Three-Interconnected Principles" Do Not Compel A Conclusion That Jurors Found What They Were Never Asked To Find.

Despite the actual instructions which jurors were given, the state nevertheless seeks to bootstrap an implicit finding of malice into the jury's § 12022.53 finding. The state argues that "three interconnected principles compel the conclusion" that the jury's § 12022.53 finding shows "the jury relied on a still-valid theory of liability." (Return 31.) According to the state, the first of these principles is the proximate cause requirement; in the state's view, the proximate cause requirement of § 12022.53, subdivision (d) means that jurors "found the proximate cause of death was an intentional gunshot . . . ." (Return 34.)

Yet again, however, the state's argument runs headlong into the actual instructions given. As noted, these instructions told jurors that to find the § 12022.53 enhancement true, they must find two elements: (1) defendant intentionally fired a gun during the crime and (2) defendant proximately caused death. (1 CT 190.) As also noted above, neither of

these two elements was genuinely in dispute here. Significantly, the instructions did not require jurors to find a causal relationship between the two elements -- that is, they did not require jurors to find that it was the intentional shot that proximately caused the death.

The state resists this plain reading of the instructions, instead proposing an understanding of "proximate cause" that is in considerable tension with the position the state advocated (and the Court adopted) in *People v. Bland* (2002) 28 Cal.4th 313. There, defendant and a co-defendant both fired guns at the victim who was killed by a gunshot wound to the chest. It was unclear who fired the fatal wound. Although § 12022.53, subdivision (d) requires jurors to find that a defendant's discharge of a weapon "proximate[ly] caused" injury or death, the trial court gave no definition of proximate cause. (28 Cal.4th at p. 334.) Jurors found the allegation true. On appeal, this Court held that a definition of proximate cause was required, and set about to decide "what instruction the court should have given." (*Id*. at p. 335.) The state contended in *Bland* that "defendant could indeed proximately cause injury or death even if his own bullets did not hit anyone." (*Id*. at p. 336.) Accordingly the state urged the Court to adopt a definition of proximate cause which would convey this to jurors:

> 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. (*Id*. at p. 335.)

The Court noted that in § 12022.53, the Legislature elected not to require personal infliction of harm as an element of the enhancement. (28 cal.4th at p. 336.) Thus, the Court agreed with the state that the proximate cause element of § 12022.53 did *not* require jurors to find the discharge of a weapon actually inflicted injury. (*Ibid*.) The Court adopted the very language proposed by the state (and indented above). In the Court's view, this language was broad enough to permit jurors to properly find true a § 12022.53 enhancement *without* finding "that the defendant fire[d] a bullet that directly inflicts the harm." (*Id*. at p. 338.) In accord with the state's position, the Court held "[t]he enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Ibid*.) In the years since *Bland* intermediate appellate courts have made very clear that jurors need *not* find that a shot actually hit the victim in order for it to support a true finding under § 12022.53, subdivision (d). (*See*, *e.g. People v. Palmer* (2005) 133 Cal.App.4th 1141, 1150-1151.)

As the state notes, jurors in this case were instructed in accord with the very language which the state proposed in *Bland*. (Return 25; c*ompare* 1 CT 190 *with* 28 Cal.4th at p. 335.)[5] But in sharp contrast to *Bland* -- where the state argued that this language permitted a true finding even where defendant's discharge of a gun did *not* cause injury -- the state now argues that this same language actually means just the opposite and required all 12 jurors to base their true finding on the shot which *did* cause

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5. In a footnote the state correctly notes that petitioner inaccurately contended that no definition of proximate cause was given. (Return 32, n.11.) The state is correct. Petitioner apologizes for the oversight.

injury -- the shot that killed Mr. Rawlings. (Return 34.)

As made clear by the state's position in *Bland*, and the Court's decision embracing that position, the true finding shows nothing of the sort. Fairly read (and understood by lay jurors), the proximate cause instruction set forth in *Bland* and used here reflects exactly what *Bland* said it reflects: a finding that the defendant's discharge of a weapon was a "substantial factor contributing to the result." Here, there was never any real dispute as to whether the proximate cause of death was the discharge of a gun by Mr. Ferrell. Of course it was. But contrary to the state's position, nothing in the proximate cause instruction also required jurors to find that of the two shots fired -- one accidental and one intentional -- it was the intentional shot which was fatal.[6]

The state's second principle is no more helpful to its case. This second principle actually contains three steps. First, the state argues that in connection with the § 12022.53 allegation, "the jury found that an intentional gunshot was fired 'in the commission of' the murder." (Return 34.) Next, citing *Bland*, the state argues the phrase "in the commission of" actually "connotes a facilitative nexus." (Return 34.) Third, all 12 jurors,

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6. Indeed, given that neither party referenced the § 12022.53 instructions in closing argument, jurors could have reasonably found that firing a shot in the air -- the shot which Mr. Ferrell admitted was intentional -- constituted the "intentional and personal discharge [of] a firearm" which was a substantial factor contributing to the result. But this too would not constitute a finding "that the proximate cause of death was an intentional gunshot . . . ." (Return 34.)

aware of this facilitative nexus, would have inferred they were actually required to find that the discharge occurred "in the furtherance of the felony" and "to aid [defendant's] commission of the murder." (Return 34.) Putting all these pieces together yields the precise result the state wants: the § 12022.53 finding reflects a unanimous finding that Mr. Ferrell intentionally fired the gun at Mr. Rawlings to aid in the commission of murder.

Accepting the state's thesis for a moment -- and assuming lay jurors were not only aware of the facilitative nexus doctrine but also aware that such a nexus required them to find that the shooting was specifically done to "aid in the commission of murder" -- leads to a puzzling result. After all, jurors had unanimously acquitted Mr. Ferrell of premeditated first degree murder. But now the state says that the § 12022.53 finding actually reflects a unanimous jury finding that defendant intentionally shot with the specific intent to aid the commission of murder. The state never explains why 12 jurors unanimously concluding Mr. Ferrell intentionally fired at Rawlings to aid in the commission of murder would just as unanimously acquit him of first degree murder. Nor does the state explain why these same 12 jurors -- jurors who in the state's view have unanimously found that Mr. Ferrell intentionally fired at Rawlings to aid in a murder -- would ask the court for "a definition of 'unlawful killing' as it relates to second degree murder." (1 CT 204.)

As this Court has recognized, however, "juror[s] [are] not some kind of dithering nincompoop[s] brought in from never-never land . . . ." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253.) If jurors had

genuinely found that Mr. Ferrell intentionally fired to aid a murder, they would not have had to ask for a definition of unlawful killing.

The Court need not linger over the tension between the jury's actual verdict and the state's current thesis as to what the § 12022.53 finding means. Even putting aside this anomaly, the state's "second principle" – its facilitative nexus thesis -- flounders at the outset.

To be sure, the state accurately notes that jurors were told they had to find whether the intentional discharge occurred "in the commission of that felony." (Return 25, 34.) As noted above, the state's thesis is that from this language jurors would infer a facilitative nexus which required them to unanimously find the intentional discharge occurred "to aid [defendant's] commission of the murder." (Return 34.)

There is, of course, a fundamental question as to whether 12 jurors would uniformly infer that an instruction broadly telling them they could find the § 12022.53 enhancement true if the discharge occurred "in the commission" of a crime *actually* required them to additionally find that defendant specifically intended "to aid commission of the murder." Certainly there is nothing in the trial evidence or the instructions explaining why all 12 jurors would draw such an inference. But there is an even more fundamental problem with the state's position here: even accepting that all 12 jurors would draw this inference, the state's argument depends on isolating one portion of the instruction which jurors were given, and ignoring the instructions as a whole.

Significantly, however, the jurors themselves were instructed they should *not* "single out any particular sentence or any individual point or instruction and ignore the others." (1 CT 128.) Indeed, this same rule applies to reviewing courts assessing how reasonable jurors would interpret an instruction: the court must "consider the instructions as a whole, in light of one another, and . . . *not* single out a word or phrase . . . ." (*People v. Holmes* (2007) 153 Cal.App.4th 539, 545–546, emphasis added.)

Here, as the state correctly notes elsewhere in its Return, jurors were also instructed they could find the § 12022.53 allegation true if they found that the intentional discharge occurred "during the commission of the crime charged." (Return 25 citing 1 CT 190.) And as the state properly recognizes, "[t]he term 'during' suggests temporal overlap: something that occurs throughout the duration of an event or at some point in its course." (Return 40 citing *People v. Estrada* (2017) 3 Cal.5th 661, 670.) Thus, *in the context of the jury instruction as a whole*, and using a plain, non-technical understanding of the phrase "during the commission of the crime charged," jurors would have understood they could find the § 12022.53 enhancement true if the intentional shot occurred "at some point" in the course of the crime. Given that the shots here were fired in immediate succession to one another, this instruction permitted jurors to find the enhancement true by relying on the concededly intentional first shot. (*Compare People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127 ["We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors . . . ."].)

People v. Palmer, *supra*, 133 Cal.App.4th 1141 illustrates how a lay jury would interpret the instructions at issue in this case. There, defendant shot at a police officer. The officer dove to avoid the shot and broke his ankle. Jurors convicted of attempted murder, along with a § 12022.53, subdivision (d) enhancement. As in this case, jurors were instructed they could find the enhancement true if they found the discharge occurred "in the commission of" the offense and "during the commission of the crime charged." (*Id*. at p. 1155.) On appeal, defendant urged a technical and very narrow reading of these phrases, contending there was insufficient evidence to sustain the § 12022.53 allegation because the officer broke his ankle when defendant pointed the gun, not seconds later when defendant discharged the gun. (*Id*. at p. 1153.) In other words, defendant argued the discharge was not "in the commission of" or "during" the actual offense, but occurred seconds later. The appellate court properly rejected the argument as "unduly crabbed." (*Id*. at p. 1154.) Because the crime occurred "all in one essentially seamless motion" the court rejected defendant's "attempt to artificially compartmentalize the circumstances of the shooting." (*Ibid*.) The same is true here -- both shots were fired one

after the other during commission of the crime.[7]

The third principle on which the state relies is its view that "in light of these first two principles, the jury must have rejected Ferrell's accidental shooting story . . . ." (Return 32.) The short response is that because neither of the first two principles yields the result the state seeks, and because the third principle is entirely dependent on the validity of the first two principles, it does not advance the ball.

The slightly longer answer is to simplify the analysis. Whether the § 12022.53 finding means "the jury must have rejected" the defense theory,

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7. With respect to the state's second principle, and at the end of the day, there are two possibilities:

- Jurors followed the instructions and found the shot occurred at some time "during" the crime.

- Although jurors were instructed they could find the § 12022.53 enhancement true by finding that the intentional shot occurred "during the commission" of the crime, they were aware of the facilitative nexus thesis set forth in *Bland.* Jurors therefore understood that despite the instructions they could only find the enhancement true if they unanimously found the shot occurred "in the furtherance of the felony" and "to aid [defendant's] commission of the murder." Despite finding that Ferrell intentionally shot to aid in the commission of murder, these same jurors not only acquitted of premeditated murder, but asked for further instruction to determine if the killing was even unlawful in the first instance.

Occam's razor.

and instead unanimously found malice, should not depend on such implausible speculations as whether jurors were aware of the facilitative nexus doctrine of *Bland* or whether jurors understood the phrase "during the commission of the crime charged" to mean something other than what a lay jury would understand the term to mean. It should depend, at least in part, on a straightforward examination of the instructions given to the jury. In *Offley* the appellate court did just that, concluding that the same instructions as given here asked jurors to decide "whether the defendant intentionally and personally discharged a firearm and proximately caused great bodily injury or death,[] but not whether he intended to kill or was aware of the danger to life that his act posed." (48 Cal.App.5th at p. 598.) Given the language of the instructions, *Offley* is entirely correct. The true finding on the § 12022.53 enhancement is a general intent finding only and does not reflect a finding of malice.

But an evaluation of the state's thesis that jurors "must have rejected Ferrell's accidental shooting story" should also depend on the record. And for the many reasons discussed in Argument I, *supra*, the record here does not come close to proving, much less proving beyond a reasonable doubt, that all 12 jurors "must have rejected" the defense theory. To the contrary, considering the record as a whole -- including the conflicting evidence, the instructions requested by the prosecutor, the prosecutor's closing arguments, the fact although malice was very much at issue neither party even referenced the § 12022.53 enhancement during closing, and the jury's expressed concern as to whether the killing in this case was unlawful -- the state cannot prove beyond a reasonable doubt that all 12 jurors necessarily found malice. Relief is required.

CONCLUSION

The record raises a strong possibility that the defendant in this case -- convicted for a crime occurring when he was 18 years old -- has served nearly 20 years for a crime that has not existed since 2005. The state's harmless error argument ignores completely Mr. Ferrell's right to a jury trial on the question of malice. Although "caution's the watchword" when walking the tightrope of harmless error review, the state has thrown caution to the winds. Relief is proper.

DATED: August 24, 2021

Respectfully submitted,

CLIFF GARDNER
LAZULI WHITT

By: /s/Cliff Gardner
Cliff Gardner
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I certify that the accompanying Traverse and Supporting Memorandum are 1.5 spaced and that a 13 point proportional font was used. I also certify that there are 1,222 words in the Traverse and 8,159 words in the memorandum.

Dated: August 24, 2021

/s/Cliff Gardner
Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows:

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

On August 24, 2021, I served the within

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

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

Mr. Tyree Ferrell V-00002
Calipatria State Prison
P.O. Box 5002
Calipatria, CA, 92233

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

and upon the parties named below by submitting an electronic copy through TrueFiling:

Office of the Attorney General
300 S. Spring Street, 5th Floor
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California Appellate Project
CapDocs@lacap.com

I declare under penalty of perjury that the foregoing is true. Executed on August 24, 2021 in Berkeley, California.

Declarant

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FERRELL (TYREE) ON H.C.**
Case Number: **S265798**
Lower Court Case Number:

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

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

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

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

8/24/2021
Date

/s/Jack Adams
Signature

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

Law Offices of Cliff Gardner
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