20-5883

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

KYLE PATRICK COMRIE — PETITIONER
(Your Name)

vs.

W. L. MONTGOMERY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEAL STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

KYLE PATRICK COMRIE CDCR BG7818
(Your Name)

7018 Blair Road/P.O. Box 5002
(Address)

Calipatria, CA 92233-5002
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Petitioner's first degree murder conviction was invalid under People v. Chiu as there was no basis to find that the jury did not rely on aiding and abetting under the natural and probable consequences theory as argued by the prosecutor. The Trial Court read the verdict forms Count 1, for first degree murder, with no special findings; Count 2, first degree residential robbery; Count 3, first degree burglary. The jury made a specific finding that a person was present during the commission of the first degree burglary to be true. No other findings were made. (1 CT 238.)

The due process clause found in both the Fourteenth and Fifth amendments to the United States Constitution requires proof beyond a reasonable doubt of every fact necessary to constitute the crime in order to convict the accused. This should hold true for felony murder cases, but the doctrine of felony murder circumvents this important principle and allows for conviction and punishment to be the same as for those who committed a murder with malice aforethought.

DID THE TRIAL COURT PERMIT PREJUDICIAL ERROR BY ALLOWING THE JURY FIND FIRST DEGREE MURDER IN A CASE WHERE THEY MADE NO SPECIFIC FINDINGS OF FACT ON EACH AND EVERY REQUIRED ELEMENT OF THE OFFENCE?

WAS PETITIONER GIVEN DUE PROCESS PROTECTIONS WHEN THE PROSECUTOR WAS RELIEVED OF PROVING ALL ELEMENTS TO FIRST DEGREE MURDER BEYOND A REASONABLE DOUBT?

DID THE COURT OF APPEAL VIOLATE THE PROSCRIPTION IN SANDSTROM?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

California Attorney General
San Diego Office
600 W. Broadway St., Suite 1800
San Diego, CA 92101

California Appellate Project
Appellate Defenders, Inc.
555 Weat Beech St., Suite 300
San Diego, CA 92101

RELATED CASES

People of the State of California
Vs.
Jacob Bock, et al., Appellate Case No. E070783.

TABLE OF AUTHORITIES CITED

FEDERAL CASES — PAGE NUMBER

UNITED STATES CONSTITUTION

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STATE COURT CASES

CALIFORNIA STATUTES

OTHER STATUTES

CALIFORNIA

CALIFORNIA CRIMINAL JURY INSTRUCTIONS

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the Court of Appeal, Fourth District, Div. Two court appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts**:

The date on which the highest state court decided my case was June 24, 2020. A copy of that decision appears at Appendix ___B___.

[x] A timely petition for rehearing was thereafter denied on the following date: June 24, 2020, and a copy of the order denying rehearing appears at Appendix ___B___.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory and constitutional provisions are involved in this case.

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST., AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST., AMEND. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST., AMEND. XIV

Section 1. All Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(a)

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

On September 15, 2016, the San Bernardino County District Attorney filed an information alleging that Bock and Comrie committed premeditated murder (Pen. Code.[1] §§ 187, subd. (a), & 664, subd. (a); count 1), first degree residential robbery (§§ 211 & 212.5; count 2), and first degree burglary with a person present (§ 459; count 3), (1 CT 65-70.) The information further alleged that, with respect to counts 1 and 2, Bock personally and intentionally discharged a firearm, proximately causing great bodily injury (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (12022.53, subd. (c)), and personally used a firearm (§ 12022.53, subd. (b)). (1 CT 66-68.) With respect to count 3, the information alleged that Bock personally used a firearm (§ 1203.6. subd. (a)(1)). (1 CT 70.) Finally, the information alleged that Bock was a minor who was at least 14 years of age at the time of the commission of the offenses. (Welfare & Inst. Code, § 707, subds. (d)(2)(A) [with respect to count 1] & (d)(2)(B) [with respect to all counts].)(1 CT 67-70.)

The trial court held a joint trial with separate juries. On April 17, 2018, a jury convicted Comrie of all charges. (2 CT 293-296; 3 RT 641-642.) The next day, a jury convicted Bock of all charges and returned true findings on all allegations. (2 CT 309-319; 4 RT 675-682.)

On May 17, 2018, the trial court sentenced Bock to a total indeterminate term of 50 years to life in prison. (2 CT 480-482; 4 RT 698-700.) On June 22, 2018, the trial court sentenced Comrie to an indeterminate term of 25 years to life in prison. (2 CT 498-501; 4 RT 706-707.) On June 25, 2018, Petitioner filed his notice of appeal. (2 CT 505-506.)

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

STATEMENT ON APPEAL

On April 28, 2020, the Appeals Court after briefing by the parties affirmed the judgment. Petitioner contends the Attorney General who represented the People mistakenly conflated the retrospective and prospective applications of Senate Bill 1437 as it pertains to retrial. The AG's argument is that they get to ex post facto determine Comrie acted with reckless indifference to human life and was a major participant pursuant to changes to § 189, subd. (e), amended by Senate Bill 1437 on January 1, 2019. Although the People did not charge Comrie with § 190.2, which carries similiar language. The Petitioner on appeal contended that S.B. 1437 established a retroactive relief for those who were convicted of felony murder under the natural and probable consequences doctrine. The Legislature changed the Penal Code § 188, subd. (a)(3) now states, "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

PETITION FOR WRIT OF CERTIORARI

The People have argued successfully on countless appeals that S.B. 1437 does not provide relief on direct appeal.

Petitioner petitions this Court for a Writ of Certiorari to remedy this absurd result which manifests a fundamental constitutional error which affects the whole State of California and gives clear Legislative intent by, giving clear direction on the state of the law through it's construction.

Therefore, this Court issuing a Writ directing the Court of Appeal to consider the California Government Code §§ 9604-9608, as/and it's direction of the In re Estrada (1995) 11 Cal.4th 568, Rule.

STATEMENT OF PERTINENT FACTS

Trial Court's Failure to Properly Instruct Jury

The Petitioner's defense was that he intended only to commit robbery and burglary, that he did not intend to kill victim "Merrigan," and that his felony murder liability terminated before a codefendant returned and shot Merrigan. (3 RT 463-478.)

There was also overwhelming evidence that codefendant Bock was the shooter. He admitted shooting Merrigan in the head. He also admitted that, he did it to escape being identified. a witness interview corroborated his account. The autopsy showed that Merrigan was alive when Bock shot him. (2 RT 288.) Indeed, the jury returned a true finding on the personal gun use allegation. Thus, the uncontroverted evidence overwhelmingly showed that Bock intended to kill.

An aider and abettor acts with reckless indifference to human life when he appreciates that his conduct involves a grave risk to human life. But, the People chose for strategic purposes not to charge or put before the jury a § 190.2 allegation for them to decide whether Petitioner "was a major participant and acted with reckless indifference"in this case.

The forensic pathologist testified that the blunt force trauma injuries were so severe that Merrigan would have died within minutes. (2 RT 293.) Comrie's defense Attorney pressed to get a more definitive statement about "minutes," but, the pathologist had refused to give an answer. It should be noted that Merrigan was alive before Bock shot him, and petitioner had already left approximately ten to fifteen minutes prior to the shooting.

The jury being given instructions which omitted Petitioner was a major participant acting with reckless indifference in the killing of Merrigan, was a prejudicial error when on appeal it is a significant factor to affirm the conviction. This fact must have been proved beyond a reasonable doubt.

REQUEST FOR JUDICIAL NOTICE PURSUANT TO SECTION 452 OF THE EVIDENCE CODE

The Petitioner (herein, "Comrie" or "Petitioner"), respectfully request that this Court take judicial notice of the following:

1. The decision and records in People v. Jacob Bock et al., [unpublished opinion] Court of Appeal Case No. E070783. A true and correct copy of the opinion, Petitioner's Opening Brief, Respondent's Opening Brief, and Comrie's Reply Brief filed in the Court Appeal which is attached hereto as APPENDIX "A". Comrie was the codefendant of Jacob Bock. Included is the Petition for Review.

2. The denial and records in the Supreme Court of the State of California Case No. S262424. A true and correct copy of the denial and Petition for Review to Exhaust State Remedies is attached hereto as APPENDIX "B", for the Court's reference.

3. The Superior Court of California, County of San Bernardino excerpts of Reporters Transscripts from the trial's Closing Arguments, Counsel's Closing Arguments, and Peoples Redirect to the jury for Case No. FVI1502171-2. A true and correct copy is attached hereto as APPENDIX "C", for the Court's referrence.

4. The Information filed in People v. Bock etal., San Bernardino County Superior Court, Case Number FVI1502171-2. A true and correct copy of the Information, two questions posed by juror's at trial, Jury Instructions given, Verdict, Special verdict forms, and Abstract of Judgment forms is attached hereto as APPENDIX "D", for the Court's reference.

5. The letters to and from Appellate Counsel Joshua L. Siegel. Regarding his tactic's in S.B. 1437's claim on direct appeal is included as APPENDIX "E", for the Court's reference.

6. The California Penal Code § 1170.95 effective August 20, 2020., Senate Concurrent Resolution 48, Senate Bill 1437, and the San Bernardino County District Attorney's office response to the petition filed on June 3, 2020., A true and correct copy is attached hereto as APPENDIX "F", for the Court's reference.

Note: California Rules of Court, Rule *.1115, subd. b, permits citation or reliance upon an unpublished opinion: 1) "when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel" (subd. b(1)); or 2) "when the opinion is relevant to a criminal or disciplinary action because it States reasons for a decision affecting the same defendant or respondent in another such action." (Subd. b(2).

REASONS FOR GRANTING THE PETITION

The following factors were all present in this case:

(1) The jury was instructed on flight. (CALCRIM No. 372.)

(2) The jury was instructed on Robbery; Intent of Aider and Abettor. (CALCRIM No. 1603.)

(3) The jury was instructed with Murder While Committing a Felony. (CALCRIM No. 3261.)

(4) The jury was instructed on Natural and Probable Consequences. (CALCRIM No. 240.)

(5) The jury was instructed with Implied Malice. (CALCRIM No. 520.)

(6) The jury was instructed with Felony Murder Theory. (CALCRIM No. 540A.)

(7) The jury was instructed with Felony Murder Theory. (CALCRIM No, 540B.)

(8) The jury was instructed with Two Theories of Murder. (CALCRIM No. 548.)

(9) The jury was instructed with Voluntary Intoxication. (CALCRIM No. 625.)

(10) The jury was instructed with Perpetrator or Aider and Abettor. (CALCRIM No. 400.)

(11) The jury was instructed with Aiding and Abetting. (CALCRIM No. 401.)

(12) The jury was instructed with Escape Rule. (CALCRIM No. 3261.)

(13) The jury was instructed with Reasonable Doubt. (CALCRIM No. 220.)

(14) The jury was instructed with Union and Act and Wrongful Intent. (CALCRIM No. No. 251.)

The Prosecution's primary theories of first degree murder were:

(1) Direct Aiding and Abetting a Willful, Deliberate, and Premeditated Murder;

(2) Felony Murder Rule based on the participation in the underlying felonies of robbery and burglary "target crimes" during which afterwards killing occurred.

I. THE STATE COURT'S RULING ON THE CLAIM BEING PRESENTED IN THIS COURT WAS SO LACKING IN JUSTIFICATION THAT THERE WAS AN ERROR WELL UNDERSTOOD AND COMPREHENDED IN EXISTING LAW BEYOND ANY POSSIBILITY FOR FAIR-MINDED DISAGREEMENT.

In the instant case, when the record is viewed in light most favorable to the verdict, it establishes at most Petitioner had an intent to rob and assualt the victim Mr. Merrigan (herein, "Bart" or "Merrigan"), independent/apart from his [co-defendant's] intent to kill. However, "[evidence] which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not sufficient basis for an inference of fact." People v. Redmond (1969) 71 Cal.2d 745, 755 [79 Cal.Rptr. 529, 457 P.2d 321].

The evidence against Petitioner on the question of the truth of the first degree is so "fraught with uncertainty as to preclude a confident [] determination of guilt beyond a reasonable doubt." See People v. Reyes (1974) 12 Cal.3d 486, 500 [116 Cal.Rptr. 217, 526 P.2d 225] (citation omitted).

The admission of the Felony-Murder rule which does away with a finding of malice aforethought, premeditation and deliberation as applied to Petitioner for the deliberate act [of another] (See RT 411-414, 428, 435-437), attributed to him was and continues to deny a fundamentally fair trial, and due process clauses of the 5th and 14th Amendments and excessive/disproportionate sentences of the 8th Amendment.

This also raises a claim of actual innocence to the actual charge of first degree murder by an impermissible instruction given to the jury denying Petitioner a fundamentally fair trial. Therefore, Petitioner was denied a reliable determination of the facts. See Jackson v. Virginia (1979) 443 U.S. 307; In re Winship (1970) 397 U.S. 358; Holmes v. S. Carolina (2006) 126 S.Ct. 1727; Osborne v. Ohio (1990) 495 U.S. 103; Estelle v. McGuire (1991) 502 U.S. 62; Chapman v. California (1967) 386 U.S. 18.

1. The Direct Aiding and Abetting Theory

"[A]n aider and abettor is chargeable as a principal only to the extent he or she knows and shares the full extent of the perpetrator's specific criminal intent, and actively promotes, encourages, or assists the perpetrator with the intent and purpose of advancing the perpetrator's successful commission of the target offense." (People v. Snyder (2003) 112 Cal.App.4th 1200, 1220.) The "specific criminal intent" for first degree murder is "'willful, deliberate, and premeditated killing.'" (People v. Nazeri (2010) 187 Cal.App.4th 1101, 1111, quoting § 189.) "First degree willful, deliberate, and premeditated murder involves a cold, calculated judgment, including one arrived at quickly [citations] and is evidenced by planning activity, a motive to kill, or an exacting manner of death." (People v. Carasi (2008) 44 Cal.4th 1263, 1306.) "A first degree murder conviction will be upheld when there is extremely strong evidence of planning, or when there is evidence of motive with either planning or manner." (People v. Romero (2008) 44 Cal.4th 386, 401, underlinning added.)

In the instant case, the plan was to rob and tune up Mr. Merrigan for molesting Bock's niece. This was in no way for Comrie to settle a score. Was why he was reluctant to go at first. Bock, on the otherhand, admitted to the police when questioned that his decision to shoot Merrigan was a personal one, stating: "I told him if he ... came near my niece again before he ... left I was going to ... kill him." (See Appellate Opinion p. 9.) This was not shared with Comrie, and this he did. The second reason Bock admitted why he shot Merrigan was: '"he was lying unconscious and unmoving—but he shot him anyway: he "[d]idn't want to take the chance because he knew who I was."' (See Appellate Opinion p. 9.) This decision to kill was with the sole contemplation of Bock. It was not shared with Comrie, was not his plan nor reasoning. The

prosecution took this nebulous gossamer web of acts and tried to build a concrete conspiracy of some unreported preplaning of a murder. Yet, no one testified about their actual plan to kill, or that Comrie had actually knew about this threat or Bocks propensity to kill. Stiles, Bock's past girlfriend, testified not even she knew of this propensity to want to kill. Stiles, also testified that she only knew they were going to rob Merrigan. But, it's undisputed, that at no time before or during the hatching of this "plan" did Comrie give any inducement, encouragement, nor coerce Bock to kill. Niether did he aid and abet a first degree murder, in which he intended a killing to occur.

2. The Felony-Murder Theory

The problem with "felony-murder" theory - that the killings were "committed in the perpetration" of the assualt, robbery, or burglary - is essentially one of timing, or "temporal relationship." (People v. Cavitt (2004) 33 Cal.4th 187, 193.) First degree murder liability depends upon the existence of both a "causal relationship" - "a logical nexus, beyond mere coincidence of time and place," between the homicide and the underlying felony - and a "temporal relationship" - "proof the felony and the homicidal act were part of one continuous transaction." (Id. at p. 193; see also People v. wilkins (2013) 56 Cal.4th 333, 344-345.) The "one transaction doctrine" defines "the duration of felony-murder liability," by ensuring liability attaches "only to those engaged in the felonious scheme before or during the killing." (Cavitt, supra, 33 Cal.4th at p. 207, quoting People v. Pulido (1997) 15 Cal.4th 713, 729.) the "escape rule" defines the duration of the underlying felony itself, "by deeming the felony to continue until the felon has reached a place of temporary safety." (Cavitt, at p. 208.) "[P]rovided that the felony and the act resulting in death constitute one continuous transaction," the relation between these

doctrines means liability "may extend beyond the termination of the felony itself" in some cases." (Ibid.) Thus, "[F]elony-murder liability continues throughout the flight of a perpetrator from the scene of a robbery until the perpetrator reaches a place of temporary safety because the robbery and the ... death, in such a case, are parts of a 'continuous transaction.'" (Wilkins, at p. 345, citations and italics omitted.)

But a killing during the flight "establishes the outer limits of the 'continuous transaction' theory." (Wilkins, supra, 56 Cal.4th at p. 345, citation omitted." Beyond that, liability under the felony-murder doctrine generaly may no longer properly attach (See People v. Johnson (1992) 5 Cal.App. 4th 552, 559 [a killing is "in the perpetration of a robbery" for murder liability liability purposes up until the point the "the robber has won his or her way even momentarily to a place of temporary safety"]; Wilkins, at p. 350 [the jury could have reasonably concluded defendant had reached such a place of temporary safety before the victim's death because "he had been driving for about an hour at normal speeds and was not being followed'].)

In the instant case, it is fundamentally unfair and in violation of basic principles of individual criminal culpability to hold one felon liable for the unforeseen results of another felon's action, especially when such conduct was not agreed upon. The tactical purpose the prosecutor choose not to prosecute under P.C. § 190.2, is in California, to be liable for special circumstance felony murder ..., pursuant to Section 190.2 of the penal code, the prosecution must prove the defendant intended to commit the underlying felony and also prove two additional elements: that the person who did not commit the homicidal act acted as a major participant in the felony and acted with reckless indifference to human life; (see People v. Banks (2015) 61 Cal.4th 788.)(underlining added.)

These special circumstance findings have a proscription found in § 190.4, which states: "(a) .... In a case of a reasonable doubt as to whether a special is true, the defendant is entitled to a finding that it is not true. (fn, So in copy. Probably should read "...that is not true.") The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted comission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime. ..." (Id.) The trial court did not put these findings before the jury. The People forfeited these findings at trial when they chose to charge deliberation, willfulness, and premeditation pursuant to P.C. § 664(a), in attempts to escape these special circumstance findings by the jury. The Appellate Court determined that these findings now had to be made by petition process pursuant to P.C. § 1170.95's remedial process. That process which legislatively changed P.C. § 189(e), cannot now be applied to Petitioner on Appeal because it inserts an ex post facto law into his appeal that was not charged or found true by the trier of fact. This is happening in all appellate districts within California because the California Supreme Court refuses to issue a guiding opinion about this issue. Petitioner's case is also significant as to how P.C. § 664(a) is charged in the information. Yet, Petitioner is not designated as committing attempted Murder. And does this Court have the authority to rule that S.B. 1437 apply to attempted murder as well as murder. An issue California still graples with.

Here, the entirety of the assualt was contemplated and completed by Comrie. He left the crime scene to a place of temporary safety (3 RT 531, 551-553; 1 CT 258-259, 274-275; CALCRIM No.'s 540A, 3261; Wilkins, supra, at 340-348.) And was hidden from any possible detection or direct sight, as he was in the cover of darkness, it was approximately 11:00 p.m. at night. But, the trial

court also instructed on "flight," i.e., that if the defendant left the crime scene, that conduct could be used to infer consciousness of guilt. (3 RT 523-524; 1 CT 254; CALCRIM No. 372; People v. Paysinger (2009) 174 Cal.App.4th 26, 30-32.) Bock admitted to the investigating officer's as to the why he independently decided to kill. In the Respondents Brief at p. 34, the following is stated: "According to Destani's account, Comrie beat Bart [Merrigan] with the bat, Bock burglarized Bart's home, and while Comrie was waiting at the quad, he heard the fatal gunshot. (3 CT 777-783.) Thus under either account the underlying robbery and burglary were still ongoing when the killing occurred. There was no evidence that Bock had reached a place of temporary safety before Bart was killed." (Respondents Brief at p. 34.)

These instructions listed, supra, as (1) - (14), are flawed as applied to Comrie. Like potassium metal and water which are harmless in themselves but can be lethal when mixed, Comrie maintains instructing his jury under CALCRIM No.'s 540A, 3261, & 372, were not only lethal but fundamentally unfair. (See Bock's AOB, Section III.) [For the specific reasons detailed in Appellant's Opening Brief and below, as Bock's arguments, which Comrie joined, on this point (See Notice of Joinder by Comrie under Cal. Rules of Court, rule 8.200(a)(5)), apply equally to Petitioner.), which did produce harmful, prejudicial results. The harm was, the jury was instructed that the felony-murder rule required in for a penny in for a pound principal, so that even though Comrie went to the quad, then Bock carrying the loot he burgled and robbed, who couldn't carry all that he stole returned to the crime scene to retrieve more goods. Bock of his own reasoning, then decided to kill Merrigan because, as he admitted, to escape identification by Merrigan. Not as a plan between Bock and Comrie, who shot and killed Merrigan by reason only shared by himself, expressed in his confession.

II. THE DECISION OF THE FOURTH DISTRICT IS IN CONFLICT WITH THE DECISION OF OTHER DISTRICTS.

Petitioner was denied his state and federal rights to the effective assistance of counsel insofar as trial counsel's failure to object to the presentation of the invalid theories og guilt for the charges under 664(a) attached to his first degree murder charge which precludes obtaining relief from the prejudicial impact of presenting those theories on appeal appellate attorney failed to raise it on appeal.

The prosecutor relied upon the felony-murder rule as if its doctrinal basis equally applied. (See RT 411-414, 428, 435-437.) There is obviously no such thing as the crime of felony attempted murder since the gravamen of attempted murder — an intent to kill — need not be proved under the felony-murder rule. citing People v. Billa (2003) 31 Cal.4th 1064, 1071, fn. 4, and People v. Bland (2002) 28 Cal.4th 313, 328. And the presentation of this legally invalid theory cannot be set aside based upon the other instructions. The instruction on the elements of attempted murder said "[t]he defendant must have intended to kill," but also said the same "defendant" must have taken "at least one direct but ineffectual step toward killing" the victim. Given that niether Petitioner nor Bock was ever alleged to have planned or conspired to kill a "direct step" toward killing Merrigan, the jury would have just understood this to mean that only perpetrators had to act with the required "intent to kill." Similarly, the jury would have understood the instruction on the sentencing enhancement allegation, which required willfulness, premeditation, and deliberation, to have just applied to the actual perpetrators of the killing — not that Petitioner had to personally harbor this state of mind.

Basedupon the weakness of any such evidence, such findings preclude any conclusion that the jury necessarily did not rely upon this invalid theory.

A. ANALYSIS OF "CURRENT STATE OF THE LAW" AT TRIAL

Due to the P.C. § 664(a) reference, rather than, the § 190.2(a)(17), law it is pertinent to brief both. Beginning with People v. Favor (2012) 54 Cal.4th 868, 143 Cal.Rptr.3d 659, 279 P.3d 1131 [(Favor)] was: "In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? Should Favor be reconsidered in light of Alleyne v. United States (2013) 570 U.S. 99 [133 S.Ct. 2151, 186 L.Ed.2d 314 [(Alleyne)] and People v. Chiu (2014) 59 Cal.4th 155, 172 Cal.Rptr.3d 438, 325 P.3d 972 [(Chiu)]?"

While Comrie's direct appeal was pending, the Legislature enacted and the governor signed into law Senate Bill No. 1437 (S.B. 1437), which "amend[s] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder" (Stats. 2018, ch. 1015, § 1, subd. (f)). On appeal Petitioner's counsel argued that this law should have been applied during trial to no avail. Respondent argued effectively that S.B. 1437 can only be availed through a petition to the trial court pursuant to P.C. § 1170.95, petition. and no relief can be sought by appeal. Although, S.B. 1437, is an ameliorative change in the law that applies to cases pending on appeal at the time of its enactment under the Estrada Rule. See In re Estrada (1965) 63 Cal.2d 740; Gov. Code § 9608. The Legislature did not inact a savings clause. but, added inclusion of a statutory procedure whereby defendants convicted of first degree felony murder under the old law can seek relief from their first degree murder convictions (§ 1170.95) does not change this fact, because this statutory procedure does not make the defendant's entitlement to the ameliorative relief contingent on some additional showing such as a lack of dangerousness. People v. Martinez (Jan. 24, 2019, B287255) ___Cal.App.5th___, in which the Second

District held that defendants whose cases were pending on appeal at the time of Senate Bill 1437's enactment must seek relief in the superior court under section 1170.95 and are not entitled to relief on direct appeal (Id. at___-___[at pp. 23-34]), was wrongly decided on this point and should not be continued as precedent. Cases are not final for purposes of determining retroactivity of a statute until the expiration of the time for petitioning for a writ of certiorari in the United States Supreme Court. (In re Pedro T. (1994) 8 Cal.4th 1041, 1046.)

The Estrada rule of retroactivity reflects the particular considerations that arise in construing changes in penal statutes. (Evangelatos v. Superior Court (1988) 44 Cal.3d 1188, 1210, fn. 15.) To hold that reductions in punishment do not apply to pending cases would be to conclude that the enacting body was "motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (Estrada, supra, 62 Cal.2d at 745.) "The Estrada rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not." (People v. Conley (2016) 63 Cal.4th 646, 657 (Conley).) In People v. Francis (1969) 71 Cal.2d 66; People v. White (1969) 71 Cal.2d 80, 83-84. Compare with People v. Martinez, supra, at pp. 23-34. The United States Supreme Court should issue a Writ of Certiorari to address these disparities in decisions.

B. Alleyne and Chiu

Petitioner contends the rationales underlying the ruling in Favor have "been throughly repudiated" by two subsequent cases, Alleyne and Chiu. In Alleyne, Supra, 133 S.Ct. 2151, 2155, 2156, the U.S. Supreme Court held that the Sixth Amendment requires any fact that increases the mandatory minimum pen-

alty for a crime to be treated as an "element" of the crime that must be submitted to the jury and found true beyond a reasonable doubt. This holding was based upon and followed from the court's earlier decision in Apprendi v. New Jersey (2000) 530 U.S. 466, 494, fn. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 which held that any fact which increases the maximum penalty for a crime is an element of the offense that a jury must find true beyond a reasonable doubt.

Approximately one year after the decision in Alleyne, the California Supreme Court held in Chiu, supra, 59 Cal.4th at pp. 158-159 that "an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." The Chiu [] court reasoned that the mental state underlying premeditated murder is "uniquely subjective and personal," and that the "connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine." Chiu, supra, 59 Cal.4th at p. 166.

The Chiu court discussed Favor at length. "[T]he Chiu Court did consider its earlier holding in Favor, and specifically did not disapprove its Favor reasoning." Comrie contends it didn't address it because it was distinguishable in several respects. The Chiu court found Favor "distinguishable in several respects" and "not dispositive" of the issues presented in Chiu. Chiu, supra, 59 Cal.4th at p. 163. [in otherwords, not an issue they could change.] The court explained: "unlike Favor, the issue in [Chiu] does not involve the determination of legislative intent as to whom a statute applies. Also, unlike Favor, which involved the determination of premeditation as a requirement for a statutory penalty provision, premeditation and deliberation as it relates to murder is an element of first degree murder. In reaching the result in Favor, they expressly distinguished the penalty provision at issue there from the sub-

stantive crime of first degree premeditated murder on the ground that the latter statute involved a different degree of the offense.

The consequence of imposing liability for the penalty provision in Favor is considerably less severe than imposing liability for first degree murder under the natural and probable consequences doctrine. Section 664(a) provides that a defendant convicted of attempted murder is subject to a determinate term of five, seven, or nine years. If the jury finds the premeditation allegation true, the defendant is subject to a sentence of life with the possibility of parole. With that life sentence, a defendant is eligible for parole after serving a term of at least seven years. § 3046, subd. (a)(1). On the other hand, a defendant convicted of first degree murder must serve a sentence of 25 years to life. § 190. subd. (a). He or she must serve a minimum term of 25 years before parole eligibility. § 3046, subd. (a)(2). A defendant convicted of second degree murder must serve a sentence of 15 years to life, with a minimum term of 15 years before parole eligibility. §§ 190, subd. (a), 3046, subd. (a)(2)." (Ibid.)

Petitioner contends that the reasons the Chiu court used to distinguish Favor are like Favor itself, "readily undermined" by Alleyne. Petitioner's contention is a reasonably plausible one. Alleyne held that a fact that increases the minimum punishment associated with an offense "is by definition an element of the offense" that must be found true beyond a reasonable doubt by a jury Alleyne, supra, 133 S.Ct at p. 2158, and Chiu continued to characterize section 664, subdivision (a), which increases the minimum punishment for an attempted murder that is premeditated, as a "statutory penalty provision. Chiu, supra, 59 Cal 4th at p 163 However, California Supreme Court offered additional state law basis in support of the continued vitality of Favor [and its predecessor case People v. Lee (2003) 31 Cal.4th 613. 616, 3 Cal.Rptr.3d 402, 74 P.3d 176 (Lee), in which it held that the premeditation penalty provis-

ion set forth in section 664, subdivision (a), "must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor." In Lee, the court reasoned that section 664, subdivision (a), "makes no distinction between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor" and does not distinguish "between an attemoted murderer who personally acted with willfulness, deliberation, and premeditation and an attempted murderer who did not so act." Lee, supra, 31 Cal.4th at p. 623. It accordingly concluded that premeditation is not a required "component" of an aider and abettor's mental state. Favor, supra, 54 Cal.4th at p. 877. Although the defendant in Lee was tried as a direct aider and abettor, the court recognized that an aider and abettor convicted under the natural and probable consequences doctrine "may be less blameworthy" than a direct aider and abettor, and noted that it "would not have been irrational for the Legislature to limit section 664(a) only to those attempted murderers who personally acted willfully and with deliberation and premeditation." Lee, supra, 31 Cal.4th at pp. 624-625. The court added, "But the Legislature has declined to do so." Id. at p. 625. The court reiterated these observations in Favor. Favor, supra, 54 Cal.4th at pp. 877-878, and further noted that the Legislature had modified other portions of section 664, including portions of subdivision (a) but left the penalty provision unchanged (Id. at p. 879.)

The Favor court supported its conclusion with one additional rationale: "the jury does not decide the truth of the penalty premeditation allegation until it fist has reached a verdict on the substantive offense of attempted murder." Favor, supra, 54 Cal.4th at p. 879. The court reasoned that the demarcation between the juriy's findings means that "attempted murder-not

attempted premeditated murder-qualifies as the nontarget offense to which the jury must find foreseeability." (Ibid.)

Moreover, nothing in Chiu indicates the California Supreme Court was unaware of or incorrectly understood federal constitutional law. Although Chiu did not rely upon or even cite Alleyne (see generally) Chiu, supra, 59 Cal. 4th 155, the appellate courts presume the California Supreme Court was aware of Alleyne. See People v. Harden (2003) 110 Cal.App.4th 848, 865, 2 Cal.Rptr.3d 105. The court previously noted Alleyne in two cases. People v. Nunez (2013) 57 Cal.4th 1, 39, fn. 6, 158 Cal.Rptr.3d 585, 302 P.3d 981 and People v. Harris (2013) 57 Cal.4th 804, 880, 161 Cal.Rptr.3d 364, 306 P.3d 1195 (conc. opn. of Kennard, J.). Notwithstanding Alleyne, California Supreme Court in Chiu elected to leave Favor and Lee intact, and maintain a distinction between first degree murder and attempted premeditated murder for purposes of the natural and probable consequences doctrine.

"[A]ll tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." Auto Equity Sales Inc. v. Superior Court of Santa Clara County (1962) 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937. It is not the Fourth Appellate Court's "function to attempt to overrule decisions of a higher court." Alleyne's discussion of Sixth Amendment principles is not so "clear and unavoidable" as to present the "unusual circumstances" which warrant a departure from the general mandate of stare decisis. People v. Saez (2015) 237 Cal.App.4th 1177, 1207, 189 Cal.Rptr.3d 72.

C. S.B. 1437

Petitioner contends that S.B. 1437 must now reach attempted murder as well as murder, and that this court is empowered to issue a Writ of Certiorari directed to the Fourth Appellate District because S.B. 1437's ameliorative

provisions are presumptively retroactive to all murder convictions ([attempted or not], if not the actual killer, and no finding by the trier of fact as to the major participant and acted with reckless indifference to human life" being found true). on his nonfinal conviction under Estrada, supra, 63 Cal.2d 740. The Attorney General responds that section 1170.95 provides the exclusive procedureby which defendants may seek relief under S.B. 1437 and the Courts of Appeals in California have all decided that section 664 is not cognizable under S.B. 1437, and for murder that statute requires Petitioner to file a petition in the trial court in the first instance. This procedure as interpreted by the Attorney General is that they get to argue Petitioner was a "major participant and acted with reckless indifference to human life" a fact that they forfeited when they decided to try petitioner under section 664(a) rather than under section 190.2, which requires that fact presented to the jury. This act would necessitate an ex post facto consideration. The change in the law which put an ameliorative section 188 is reroactive to all cases not yet final. When the new legislation goes into effect, it will apply retroactively to all cases not yet final. See, e.g., In re Estrada, supra, at pp. 745-748. Petitioner's conviction was not final on January 1, 2020. See California Rules of Court, rules 8.360(c)(3)[time to file appellant's reply brief], 8.366(b)(1) [finality of Court of Appeal decision], 8.500(e)(1)[time to file petition for review], 8.532(b)(1)[finallity of Supreme Court decision]; see also, e.g., In re Diaz (2017) 8 Cal.App.5th 812, 822 ["a judgment is 'final' for purposes of the Estrada rule when courts on direct review can no longer provide a remedy, including the time within which to petition to the United States Supreme Court for writ of certiorari"].) Petitioner raises the issues a a matter of right and in the interest of fundamental fairness and judicial economy, equally. Although, U.S. Supreme Court review, is discretionary the issue is of statewide importance involving constitututional prejudicial harm to 8,000+ individuals.

D. Determining Whether Issue Has Been Preserved for Appeal

Some errors may be raised on appeal even without a timely trial court objection. See e.g., Pen. C § 1259 (appellate court may review any instruction given, refused, or modified, even when no objection was made in the lower court, if the instruction affected any substantial rights of the defendant); People v. Scott (1994) 9 C.4th 331, 354, 36 CR2d 627 ("unauthorized sentence" correctable by reviewing court in first instance); People v. Ary (2004) 118 CA4th 1016, 13 CR3d 482 (issue of competence to stand trial may not be waived).

Even if it appears that an otherwise viable claim has been forfeited by a failure to object in the trial court, appellate counsel should still strongly consider raising it on appeal. For one thing, the fact that the right to raise an issue on appeal may have been forfeited by failure to raise it below does not preclude the appellate court from considering the issue and granting relief. See People v. Smith (2003) 31 C4th 1207, 1215, 7 CR3d 559; People v. Johnson (2004) 119 CA4th 976,984, 14 CR3d 780; Hamling v. U.S., 418 U.S. 87, 102 (1974).

Moreover, if trial counsel has forfeited an important claim of error by failing to object, appellate counsel can then raise the issue through a claim of ineffective assistance of counsel, asserted either on direct appeal, in a habeas corpus petition, or both. If the underlying issue is raised on direct appeal, and the respondent's brief depends entirely or primarily on the asserted waiver (as oppose to arguing the merrits of the issue), that can help frame a subsequent ineffective assistance claim on habeas corpus.

Although there is no established federal constitutional right to appeal a criminal conviction, when that right is provided by state law—as it is in California—the federal Constitution guarantees an indigent defendant the right to counsel on appeal at public expense. In re Barnett (2003) 31 C4th 466, 473, 3 CR3d 108; See Douglas v. California (1963) 372 US 353, 9 L.Ed.2d 811, 83 S.Ct. 814; In re Kevin S. (2003) 113 CA4th 97, 6 CR3d 178.

E. Ineffective Assistance of Counsel

There is no Sixth Amendment right to self-representation on direct appeal. Martinez v. Court of Appeal (2000) 528 US 152, 145 L.Ed.2d 597, 120 S.Ct. 684. Therefore, appellate counsel has an obligation to raise meritorious claims of error on appeal. Anders v. California (1967) 386 U.S. 738, 743-744; People v. Johnson (1981) 123 Cal.App.3d 106, 111. Meritorious claims include those of sufficient substance to have a reasonably strong potential for obtaining reversal or other relief or for making new law. Johnson, at p. 111; People v. Von Staich (1980) 101 Cal.App.3d 172, 175. The Petitioner's right to effective assistance of appointed appellate counsel requires that when a meritorious claim of error is omitted from the initial briefing, appellant's counsel take steps to present that claim of error to the reviewing court in supplemental briefing. See In re Smith (1970) 3 Cal.3d 192, 202-204. Petitioner's counsel instead abandoned his duty to present it when requested.

Neither justice nor judicial economy is served by refusing supplemental briefing and consequently failing to consider the issue properly on appeal. Later writ proceedings and claims of ineffective assistance of appellate counsel or other grounds for collateral attack are costly, indirect, duplicative, and less effective than proper appellate processes in the first place.

The California Court has described two types of accomplices who fall within a Penal Code § 31, statutory definition such as: Those who directly encourage or assist in the commission of the charged offense and those who are liable under the natural and probable consequences rule. But this was pre Chiu, and S.B. 1437.

A defendant is a direct aider and abettor if "'he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing; facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.'" People v. Delgado (2013) 56 Cal.4th 480, 486, quoting People v. Cooper

(1991) 53 Cal.3d 1158, 1164.

Indirect liability of the aider and abettor, under the natural and probable consequences rule, is more complex, requiring a five-step process. The jury must find that "the defendant (1) with knowledge of the confederate's unlawful purpose; and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s); (3) aided, promoted, encouraged, or instigated the commission of the target crimes," People v. Prettyman (1996) 14 Cal.4th 248 at p. 271 The jury must also find that "(4) the defendant's confederate committed an offense other than the target crime(s); and ... (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated." (Ibid., italics omitted. Requirements (4) and (5) are at issue here.

Under the natural and probable consequences rule, liability "is 'derivative,' that is, it results from an act by the perpetrator to which the accomplice contributed." Prettyman, supra, 14 Cal.4th at p. 259. A crime is the natural and probable consequence of an intended or target crime if its commission by the perpetrator was reasonable foreseeable. "The ... question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable." People v. Medina (2009) 46 Cal.4th 913, 920

"A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case . . and is a factual issue to be resolved by the jury." (Ibid.)(underlining added.)

Here, in the istant case, the trial court erred in its instructions to the jury. The jury was instructed that it could convict him of first degree murder solely because he aided the underlying robbery and burglary where a murder occurred and that some form of murder (irrespective of degree) was a natural and probable consequence of the target crime of either the assault or the burglaries

or robbery that defendant had aided and abetted. Under the instructions, the jury was not required to decide whether the increased punishment of first degree murder had met the requirement that every offense is made up of factual elements, each of which must be proven by the prosecution to establish the commission of the offense. Richardson v. U.S. (1999) 526 U.S. 813, 817.

Here, the jury convicted Petitioner of first degree murder, which, as pertinent here, is statutorily defined as a willful, deliberate, and premeditated killing with malice aforethought. But the trial court did not instruct the jury that to convict Petitioner of accomplice first degree murder the jury must find that it was reasonably foreseeable that the actual perpetrator, Bock, would commit a premeditated murder. Instead, the court essentially instructed the jury that it could convict petitioner of first degree murder if any murder occurred while burglary and robbery was committed. Murder includes not only premeditated (first degree) murder, but also unpremeditated (second degree) murder. Thus, the trial court's instructions here permitted the jury, applying the felony murder rule, to convict defendant of premeditated first degree murder based on a conclusion that only second degree murder was a reasonable foreseeable consequence of the target crime of assault.

The presentation of this legally invalid theory can be set aside based upon the other instructions. The instruction on the elements of attempted murder said "]t]he defendant must have intended to kill,". Given that Petitioner was ever alleged to have intended to kill (3 RT 427-428.), the jury would have just understtod this to mean the perpetrator had to act with the required "intent to kill." Similiarly, the jury would have understood the instruction on the sentencing enhancement allegation, which required willfulness, premeditation, and deliberation, to have just applied to the actual perpetrator of the killing — not that Petitioner had to personally harbor this state of mind.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kyle Patrick Comrie

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