

No. 23-6000 **ORIGINAL**

IN THE

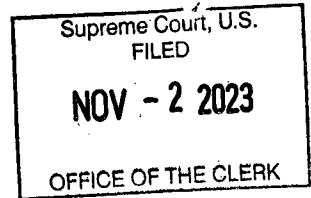
SUPREME COURT OF THE UNITED STATES

Tyler Catlin Borg, pro se – PETITIONER

vs.

The People of The State of California – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO



Court of Appeal, Fourth Appellate District, Division One, State of California
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Tyler Borg CDCR# BP7679

(Your Name)

Ironwood State Prison C3-145

P.O. Box 2199

(Address)

Blythe, CA. 92226

(City, State, Zip Code)

Questions Presented

1. Can a person be guilty of 1st degree murder without intent to kill or injure?
2. Does CALCRIM 521 unconstitutionally omit the intent element of first-degree murder by means of lying in wait by failing to require proof beyond a reasonable doubt that the defendant intended to inflict injury likely to cause death at the time he or she was lying in wait?
3. Does CALCRIM 728 unconstitutionally omit the intent element, that the purpose concealed is the intent to kill, and the intent existed during the watching and waiting?
4. Does both CALCRIM 521 and 728 unconstitutionally omit that the “surprise attack” must be the act that kills, thus severing any intent while lying in wait from the act causing death?

LIST OF PARTIES

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

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:

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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 case 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[] is unpublished.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[] is unpublished.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 case from state courts:

The opinion of the highest state court to review the merits 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.

The opinion of the _____ 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.

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).

For cases from **state courts**:

The date on which the highest state court decided my case was 08/09/2023. A copy of that decision appears at Appendix B.

A timely petition for rehearing was thereafter denied 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. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the United States Constitution [right to a jury trial]

Penal Code section 189

Penal Code section 1127

Statement of the Case and Facts

For purposes of this petition only, Borg relies on the statements of the case and the facts as set forth in the Court of Appeal's opinion. (People v. Borg (2023) Cal. App. Unpub. LEXIS 2713 at 1-14.) The only exceptions are to clarify some misstated or missing facts regarding the confrontation.

1. Tyler expected Caroline to call Justin and end the affair, choosing her husband. So he put on a show to impress her. (3 RT 533.) Caroline admitted it was a show. (2 RT 439.)
2. Caroline gave Tyler a bat. (3 RT 530.)
3. Tyler brought the Beretta and other items because Caroline giving him the bat showed she wasn't taking it seriously. (3 RT 531-533.) It was the kind of thing you see in the movies. (3 RT 532.)
4. At Caroline's parents' house, Tyler expected Caroline or her parents to call Justin and end the affair, and Tyler would never need to confront Justin. (3 RT 541.)
5. When Tyler confronted Justin, Justin tried to grab Tyler, and Tyler swiped Justin's hand away, bruising his wrist. (3 RT 546, 588.)
6. Justin shouted something, and Tyler perceived Justin wanted to fight. (3 RT 547; 2 CT 302.) Justin had a blue weapon in his hand. (3 RT 547, 548; 2 CT 285.)
7. Tyler ran away. (3 RT 547.) Then Justin exited the vehicle and chased Tyler. (2 CT 286-287.)
8. Tyler pulled out his handgun and cocked it. (3 RT 548; 2 CT 281.)
9. Justin got back in the vehicle and put his foot on the gas. (1 RT 224; 3 RT 549; People's 87.) His engine was running at a high RPM. (1 RT 145, 162, 168.)

10. Tyler saw the lights, and heard the engine (3 RT 549), he thought he was going to get run over (3 RT 549), he panicked, and the gun went off. (3 RT 549, 559, 551; 2 CT 286.)
11. He realized that he had fired after it was over. (3 RT 550; 2 CT 281, 287.)
12. The court measured the shots were fired from 38 feet away. (3 RT 590.)

Reasons the petition should be granted

A. Conflict among the courts whether lying in wait requires intent

The conflict is articulated in the concurring and dissenting opinion of the honorable Justice Dato in *People v. Borg* (2023) Cal.App. Unpub. LEXIS 2713 at pp. 51-59 (*Borg*). The conflict “boils down to the correctness of one point in a single decision – *People v. Laws* (1993) 12 Cal.App.4th 786, 15 Cal. Rptr. 2d 668 (*Laws*). According to *Laws*, “nothing in Penal Code section 189[] requires the lying in wait to have been done with the intent to kill ... [or] injure.”” (*Laws*, at p. 794.)” (*Id.* at 51.)

But in *People v. Brown* (2023) 14 Cal.5th 453, 305 Cal. Rptr. 3d 127, 524 P.3d 1088 (*Brown*) the honorable Justice Groban found “the Legislature’s intent to require proof of ‘something more’ than malice” (*Brown*, at pp. 463-464.) “*Brown* similarly tells that for murder by lying in wait, the defendant must lie in wait, planning to attack the victim with at least a “”wanton and reckless intent to inflict injury likely to cause death.””” (*Id.* at p. 465, quoting *People v. Gutierrez* (2002) 28 Cal. 4th 1083, 1148, 124 Cal. Rptr. 2d 373, 52 P.3d 572 (*Gutierrez*).)” (*Borg*, at p. 55.)

Multiple cases have confirmed that requirement since *Gutierrez*. (*People v. Moon* (2005) 37 Cal.4th 1, 24, fn.1; *People v. Streeter* (2012) 54 Cal.4th 205, 246; *People v. Cage* (2015) 62 Cal.4th 256, 278; *People v. Johnson* (2016) 62 Cal.4th 600, 633 [“wanton and reckless intent to inflict injury likely to cause death”].) And yet *Laws* continues to circumvent those findings and remains citable.

B. Lying in wait must be followed by a surprise lethal attack – element missing

A separate issue is that the period of lying in wait must be “followed by a surprise *lethal* attack on an unsuspecting victim from a position of advantage.” (People v. Johnson (2016) 62 Cal.4th 600, 637 (Johnson).) But neither the theory nor special allegation indicate that the “surprise attack on the person killed” must be lethal. (CALCRIM 521, 728.) The ambiguity instructs the jury to find the element true even if the “person killed” died by a separate act with separate intent, regardless of what may intervene between the non-lethal “surprise attack” and the act that killed. The victim may have even become the aggressor and taken the advantage, resulting in an *unsurprising* lethal attack on a *suspecting* victim from a *position of disadvantage*. This is precisely the issue faced in Borg.

C. Facts in Borg show there was no Surprise Lethal Attack

Justin was not killed by surprise from a position of advantage. The “surprise attack” bruised Justin’s wrist, Borg ran away, Justin armed himself and chased Borg, at which point Borg pulled out a firearm and cocked it (it had not been ready to fire), Justin entered the vehicle, and Borg fired fearing he would get run over. Any surprise and position of advantage was abandoned when Borg ran away. Although Justin could have left, he instead chose to escalate the situation and prevent Borg’s escape. The changing circumstances required the need for self-defense to be considered, as well as new provocations from seeing the paramour face-to-face, being threatened, and chased. All impacted the mind. Any intent formed at that point is distinct from whatever intent was had during the period of lying in wait, and the act to follow was based on that new distinct intent.

As the prosecutor acknowledged, the jury's question indicated its factual finding that Borg's intent during the lying in wait was only to commit an assault. (2 CT 434; 4 RT 750.)

D. The court's denial of relief ignores that the surprise attack must be lethal

When the court denied relief, they ignored that Justin chased Borg with a weapon, but did acknowledge it was not the "surprise attack" with the bat that killed but a separate act. (Borg, at 33-34.) The court relied on People v. Johnson (2016) 62 Cal.4th 600, 631 where the victim was shot immediately from behind, from a position of advantage, which is inapposite to Borg. In Johnson there was no face-to-face confrontation, no non-lethal surprise attack, no attempt of the defendant to flee while being chased by the victim. The court conveniently ignored that Borg fired from 38 feet away, whereas if the lying in wait were with the intent to kill, the weapon would have been ready to fire, and Justin would have been unsuspecting, and shot point-blank, as in Johnson.

The dissent found the instructional error harmless because the special allegation required that Borg "intended to kill the person by taking the person by surprise". (CALCRIM 728; Borg, at p. 60.) And in addressing the jury questions which suggest Borg intended to only assault while lying in wait, the court stated a "defendant who initially planned to assault the victim could quickly have changed his mind during the assault and decided to kill instead". (Borg, at 40.)

But the court's conclusions create two problematic scenarios. Where:

1. A defendant has no intent while lying in wait, then confronts the victim by surprise. Then he "changed his mind during the [surprise attack] and decided to kill instead". In other words, he now intends "to kill the person by taking the person by surprise".

OR 2. A defendant intends to kill while lying in wait but changes his mind before or during the "surprise attack" and no longer harbors any malice. The "surprise attack" causes no injury, and the victim dies by a separate act with separate intent after intervening events.

Both scenarios are supported by CALCRIM 521 and 728. The first ignores the intent of the act of lying in wait. And both ignore the intent of the act that actually killed. But the remedy is simple, add lethal to the "surprise [lethal] attack" in CALCRIM 521 and 728.

E. The court's denial was unreasonable

Without the jury being instructed that 1) there must be intent while lying in wait and 2) the surprise attack must be the act that killed, Borg was deprived of his right to a jury trial. The fact that jurors had to ask about the intent while lying in wait, or premeditating only assault, makes it clear CALCRIM 728 is lacking and ambiguous, and did not provide their answer. "Jurors are the exclusive judges of all questions of fact submitted to them" (§1127.)

F. Risk to the public

The risk to the public is "The omission of an element of an offense from a jury instruction violates "the right to a jury trial under the Sixth Amendment to the United States Constitution" by depriving the defendant of "a jury properly instructed in the relevant law."

(In re Martinez (2017) 3 Cal.5th 1216, 1224; Neder v. United States (1999) 527 U.S. 1, 12.)

Any person tried by the theory or special allegation of lying in wait has their “right to a jury trial” violated. As both the intent while lying in wait, and that the surprise attack must be the act that kills are missing from the instructions.

Additionally, Borg believes the public and the legislature would be horrified by the interpretation in People v. Laws (1993) 12 Cal.App.4th 786, 794 [Can be guilty of murder by accident, even if specifically intending not to kill or injure]. And *Laws* remains citable.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment in *Borg* should be reversed, *Laws* overturned, and CALCRIM 521, 728 updated to reflect the required elements.

Respectfully submitted,

Tyler C. Borg

Date: November 2nd, 2023