

SUPREME COURT COPY

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In the Supreme Court of the State of California

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

WARREN JUSTIN HARDY,

Defendant and Appellant.

CAPITAL CASE

Case No. S113421

**SUPREME COURT
FILED**

JUL 31 2014

Frank A. McGuire Clerk

Deputy

Los Angeles County Superior Court Case No. NA039436
The Honorable John David Lord, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

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On July 7, 2014, appellant filed a supplemental opening brief addressing the impact of *People v. Chiu* (2014) 59 Cal.4th 155. (See Cal. Rules of Court, rule 8.520(d)(1).) Respondent respectfully submits the instant response.

ARGUMENT

I. APPELLANT CANNOT SHOW PREJUDICE FROM ERROR IN INSTRUCTING ON NATURAL AND PROBABLE CONSEQUENCES IN LIGHT OF THE TRUE FINDINGS FOR FOUR FELONY-MURDER SPECIAL CIRCUMSTANCE ALLEGATIONS

Based on the Court's recent decision in *Chiu*, appellant claims that his first degree murder conviction must be reversed because the jury was improperly instructed on the natural and probable consequences doctrine as a basis for first degree murder. But the error was harmless beyond a reasonable doubt. The jury's true findings on the four felony-murder special circumstances allegations demonstrate that the jury properly found appellant guilty of first degree murder based on an alternative theory: felony murder.

A. The decision in *Chiu*

It is well settled that one who aids and abets an offense is guilty as a principal. (Pen. Code, § 31.) To be guilty as an aider and abettor, a person must "act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. [Citations.]" (*People v. Beeman* (1984) 35 Cal.3d 547, 560, italics omitted; accord, *People v. Jurado* (2006) 38 Cal.4th 72, 136.)

In addition, "[t]he liability of an aider and abettor extends also to the natural and probable consequence of the acts he knowingly and

intentionally aids and encourages. [Citation.]” (*People v. Beeman, supra*, 35 Cal.3d at p. 560; accord, *People v. Avila* (2006) 38 Cal.4th 491, 567.)

“When the prosecution relies on the natural and probable consequences doctrine to hold a defendant liable as an aider and abettor, the trial court has a sua sponte duty to identify and describe any potential target offense or offenses allegedly aided and abetted by the defendant” (*People v. Avila, supra*, at p. 567; *People v. Prettyman* (1996) 14 Cal.4th 248, 266-267.)

In *People v. Chiu*, this Court granted review on the issue of whether the trial court erred in instructing that an accomplice could be found guilty of first degree murder if “murder,” rather than *premeditated* murder, was a natural and probable consequence. In a somewhat surprising turn, the Court held an accomplice can never be found guilty of “first degree *premeditated* murder under the natural and probable consequences doctrine.” (*People v. Chiu, supra*, 59 Cal.4th at pp. 158-159, original italics.)

The Court noted that it had previously reached a different result with regard to attempted murder. Specifically, the Court held in *People v. Favor* (2012) 54 Cal.4th 868, that it was proper to find an accomplice guilty of attempted murder with premeditation where the instructions only referred to “attempted murder,” i.e., without reference to premeditation, as a natural and probable consequence. The court noted that premeditation for attempted murder, a feature of Penal Code section 664, subdivision (a), was a penalty provision and not an element of the offense. The Court concluded, based on this distinct feature created by the Legislature, that an accomplice could be liable for the perpetrator’s premeditation, regardless of whether the premeditation was a natural and probable consequence. Instead, a jury should determine whether an accomplice was liable for “attempted murder” as a natural and probable consequence, and then

determine if the attempted murder was premeditated, based on the perpetrator's mental state. (*People v. Chiu, supra*, 59 Cal.4th at pp. 162-163.)

But the Court held that *Favor* did not require the same result with regard to murder. The Court noted that premeditation for first degree murder involved an element of the offense, not just a penalty provision. Further, the Court found there was no statutory provision like the one in *Favor* that reflected a legislative intent. (*People v. Chiu, supra*, 59 Cal.4th at p. 163.)

Instead, the Court looked to the common law basis for the natural and probable consequences doctrine. The Court noted, "In the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing." (*People v. Chiu, supra*, 59 Cal.4th at p. 165.) The Court found that this public policy lost its force, however, when applied to premeditated murder, because the additional elements of willfulness, premeditation, and deliberation are intimately connected to the perpetrator, not the accomplice. (*Id.* at p. 166.)

Accordingly, the Court held that punishment for second degree murder was commensurate punishment for one who aids and abets a target crime that naturally and foreseeably results in a first degree premeditated murder. The Court was careful to note that accomplices could still be found guilty of first degree murder for directly aiding and abetting a premeditated murder. (*People v. Chiu, supra*, 59 Cal.4th at p. 166.) The Court noted that "Because the mental state component — consisting of intent and knowledge — extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder.

[Citation.]” (*Id.* at p. 167.) The Court also expressly noted that its decision did “not affect or limit an aider and abettor’s liability for first degree felony murder under [Penal Code] section 189.” (*Id.* at p. 166.)

The Court then addressed prejudice. Given that the jury had been instructed on an improper theory of guilt, the Court said that the first degree murder conviction could only be upheld if it could conclude “beyond a reasonable doubt that the jury based its verdict on the legally valid theory . . . ,” citing *People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1203-1205. (*People v. Chiu, supra*, 59 Cal.4th at p. 167; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129 [discussing analysis for cases where jury has been allowed to convict on theory that is factually insufficient].) In *Chun*, the Court explained that the test for prejudice in the context of instructional error that presents an invalid theory to the jury is as follows: “‘The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict did find without finding this point as well.’ [Citation.]” (*People v. Chun, supra*, 45 Cal.4th at p. 1204, citing *California v. Roy* (1996) 519 U.S. 2, 7 [117 S.Ct. 337, 136 L.Ed.2d 266].) The Court expressly noted, however, that it was not holding that this test was the *only* way of demonstrating harmless error. (*People v. Chun, supra*, at p. 1204-1205 [“Without holding that this is the only way to find error harmless, we think this test works well here, and we will use it”].)

In *Chiu*, the Court rejected the argument that some jury questions demonstrated reliance on a particular theory, and the Court could not otherwise conclude the error was harmless beyond a reasonable doubt as to first degree murder. (*People v. Chiu, supra*, 59 Cal.4th at pp. 167-168.)¹

¹ The court found that the error was not prejudicial as to second degree murder because the error only went to the degree of the crime. Therefore, the
(continued...)

B. Appellant was not prejudiced by the erroneous instruction

In the instant case, the jury was instructed on three types of first degree murder: (1) felony murder, based on the underlying felonies of robbery, rape, rape in concert, kidnapping for rape, sexual penetration by a foreign object, and torture; (2) murder that was willful, deliberate, and premeditated; and (3) torture murder. (2CT 545, 548-549, 551; CALJIC Nos. 8.10, 8.20, 8.24; see Pen. Code, § 189.)

The jury was also instructed that a defendant could be found guilty for directly perpetrating a crime or aiding and abetting a crime. (2CT 541-542; CALJIC Nos. 3.00, 3.01.) The jury was also instructed, in part, that a defendant could be guilty of “murder,” if (1) the defendant aided and abetted robbery, kidnapping for rape, rape in concert, rape, sexual penetration by a foreign object in concert, or sexual penetration by foreign object, and (2) murder was a natural and probable consequence of the crime aided and abetted. (2CT 543-544; CALJIC No. 3.02.)

As relevant here, the jury found appellant guilty of “first degree murder” and made a special finding that appellant was an aider and abettor who had the intent to kill or was a major participant who acted with reckless indifference to human life. In addition, the jury found true four felony-murder special circumstances: robbery, kidnapping for rape, rape, and rape by foreign object. (3CT 597-598.)

As in *Chiu*, the jury here was erroneously instructed that it could find a guilty verdict of “murder” based on the natural and probable

(...continued)

Court reversed the first degree murder conviction, but remanded to allow the People to accept a reduction of the conviction to second degree murder or to retry the first degree murder charge based on a theory of direct aiding and abetting. (*People v. Chiu*, *supra*, 59 Cal.4th at p. 168.)

consequence of aiding and abetting. This improperly allowed the jury to find that appellant guilty of first degree premeditated murder as a natural and probable consequence of a different target crime.

However, the error was harmless beyond a reasonable doubt in light of the verdicts — the jury’s true finding for four felony-murder special circumstances. The instructions on first degree felony murder and the felony-murder special circumstances required almost the exact same elements, except that the special circumstance instruction required *additional* elements. In order to find the felony-murder special circumstance allegations true, the jury had to find that appellant was either the actual killer or an accomplice to the underlying felony that resulted in the victim’s death and who acted with the intent to kill or reckless indifference as a major participant. (2CT 553-554.) Similarly, but less onerously, for the jury to find appellant guilty of first degree murder under a felony murder theory, the jury had to find the victim was killed during the commission of one of the same underlying felonies, even if the murder was unintentional, and appellant was an accomplice to the underlying felony. (2CT 545, 550, 552; CALJIC Nos. 8.10, 8.21, 8.27.) Thus, the felony-murder special circumstances required the jury to find the same facts necessary for first degree felony murder and then some. Therefore, the “killing was necessarily felony murder. [Citation.]” (*People v. Price* (1991) 1 Cal.4th 324, 464 [any error in failing to instruct on voluntary manslaughter was harmless where burglary-murder special circumstance finding shows murder was necessarily felony murder]; accord, *People v. Seaton* (2001) 26 Cal.4th 598, 665 [any error in failing to instruct on voluntary and involuntary manslaughter was harmless in light of robbery and burglary-murder special circumstance findings]; *People v. Lewis* (2001) 25 Cal.4th 610, 646 [any error in failing to instruct on voluntary and involuntary manslaughter was harmless in light of burglary-murder special

circumstance finding]; *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 [any error in failing to instruct on involuntary manslaughter was harmless in light of rape-murder special circumstance finding], overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823.)

Since the jury necessarily found the facts for a theory of murder other than the natural and probable consequences doctrine, i.e., first degree felony murder, the instructional error was harmless beyond a reasonable doubt. Accordingly, appellant's first degree murder conviction should be affirmed.

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: July 30 , 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 2,041 words.

Dated: July 30, 2014

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, appearing to read "Lance Winters", with a stylized flourish at the end.

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DECLARATION OF SERVICE

Case Name: **People v. Warren Justin Hardy**

Case No.: **S113421**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 30, 2014, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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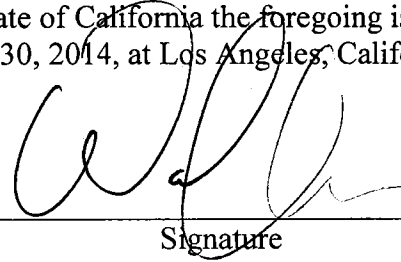
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On July 30, 2014, I caused thirteen (13) copies of the **SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the **California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-4797** by **FedEx**.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 30, 2014, at Los Angeles, California.

M. Walton
Declarant



Signature