

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
JUN 19 2017**

Jorge Navarrete Clerk

Deputy

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

SECOND SUPPLEMENTAL RESPONDENT'S BRIEF

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DEATH PENALTY

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INTRODUCTION

Pursuant to this Court's order filed on May 02, 2017, respondent submits this second supplemental respondent's brief to appellant's second supplemental opening brief ("second supplemental brief"). (Cal. Rules of Court, rules 8.520, subdivision (e), 8.630, subdivision (f).) For the reasons set forth below, appellant's second supplemental brief lacks merit. Appellant has forfeited his argument raised for the first time in his second supplemental brief. Even assuming appellant's claim is not deemed forfeited, it is unavailing. The trial court had no duty to instruct on the independent felonious purpose requirement in the special circumstance instructions. And even assuming such a duty existed, any error in omitting the requirement was harmless beyond a reasonable doubt.

ARGUMENT

I. APPELLANT FORFEITED THE ARGUMENT RAISED FOR THE FIRST TIME IN HIS SECOND SUPPLEMENTAL OPENING BRIEF

In the case at bar, the jury found true the special circumstances under Penal Code section 190.2, subdivisions (a)(17) and (18), that the murder was committed during the commission of a robbery, a kidnapping, a kidnapping for rape, a rape, and a rape by foreign object, and that the murder was intentional and involved the infliction of torture. (12RT 2528; 3CT 597-598.) In his opening brief, appellant argued that there "was no substantial evidence that any of the felonies [were] committed with an independent felonious purpose." (AOB 219.) He further argued that under "the *People v. Green* (1980) 27 Cal.3d 1, line of cases, the controlling law at the time

of the crimes, the true findings to the felony special circumstances can be upheld only if [he] had an independent felonious purpose for committing each special circumstance felony, which was not merely incidental to the murder.”¹ (AOB 219-220; see also AOB 219-244.) In his second supplemental opening brief, however, appellant now argues for the first time that the judgment of death must be reversed because the trial court failed to instruct the jury that he had to commit any special circumstance felony for an independent felonious purpose under Penal Code section 190.2, subdivision (a)(17). (SSOB² 4-11.)

Generally, pursuant to California Rules of Court rules 8.520, subdivision (d)(1), and 8.630, subdivision (d), supplemental briefs must be “limited to new authorities, new legislation, or other matters that were not available in time to be included in the party’s brief on the merits.” This Court recognized precisely that in its May 2, 2017, order. The reason for this rule is manifest. A court’s refusal to consider arguments first presented via a supplemental brief serves both judicial economy and fairness. It prevents counsel from arguing cases in a piecemeal fashion. It protects the opposing party from having to defend against new theories that were not previously put in issue or could have been raised at trial. Thus, supplemental briefing has been so limited by this Court as recognized in its May 2, 2017, order in this case.

¹ *Green* was disapproved on another ground by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.

² “SSOB” refers to appellant’s Second Supplemental Opening Brief.

Here, a second supplemental brief could have been avoided had appellant's counsel raised the current claim in the opening brief. "Counsel's failure has unnecessarily increased this [C]ourt's workload and delayed resolution of this appeal." (*Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 337, fn. 9.) Consequently, appellant has forfeited the claim raised for the first time via supplemental brief because it could have been previously raised in this Court. Therefore, the second supplemental brief should be denied.

Respondent recognizes that this Court, in its May 2, 2017, order, granted appellant permission to file the second supplemental opening brief. However, this Court's allowance for the brief to be filed does not mean that the issue is not forfeited. Although respondent submits no good cause exists for appellant's failure to raise this claim earlier, assuming this Court elects to consider the merits of appellant's current claim, the Court should reject it, as discussed below.

II. THE TRIAL COURT HAD NO DUTY TO INSTRUCT THE JURY THAT THE SPECIAL CIRCUMSTANCE ALLEGATIONS COULD NOT BE FOUND TRUE UNLESS APPELLANT HAD AN INDEPENDENT FELONIOUS PURPOSE FOR THEM; ANY FAILURE TO SO INSTRUCT WAS HARMLESS

In the instant second supplemental brief, appellant contends that the version of CALJIC No. 8.81.17.1 given to the jury erroneously omitted the independent felonious purpose requirement. (SSOB 7.) Respondent disagrees. The trial court had no duty to instruct on the

independent purpose requirement. Even assuming otherwise, any error was harmless beyond a reasonable doubt.³

A. The Trial Court Had No Duty To Instruct On The Independent Purpose Requirement

The felony-murder special circumstance increases the punishment for murders committed while “defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit” certain enumerated felonies. (Pen. Code, § 190.2, subd. (a)(17)(B).) Until 2000, proof of an “independent purpose for the commission of the felony” was required. In 2000, an initiative revised the statute to eliminate the independent purpose requirement. (Prop. 18, Primary Elec. (Mar. 7, 2000); *People v. Brents* (2012) 53 Cal.4th 599, 608, fn. 4; see Pen. Code, § 190.2, subd. (a)(17)(M).)

At the time of appellant’s offense (December 1998), the special circumstance allegations required an independent felonious purpose to commit them. Using kidnapping as an example, “the kidnapping could not be merely incidental to the murder, with the murder being the defendant’s primary purpose.” (*People v. Brents, supra*, 53 Cal.4th at p. 609; see *id.* at p. 608, fn. 4.) Thus, appellant’s case was governed by the pre-2000 version of section 190.2, subdivision (a)(17)(B). (Cf. *People v. Ledesma* (2006) 39 Cal.4th 641, 655, fn. 2

³ Respondent has already addressed the vast majority of the case law raised here anew by appellant in the respondent’s brief filed on October 29, 2013. This includes a specific section on the lack of prejudice. In the interest of brevity, respondent will not repeat those arguments here. (See RB 166-176.)

[because defendant's offenses took place in August and September 1978, his case was governed by the death penalty law that was adopted by the Legislature in 1977, which was subsequently replaced by initiative measure on November 7, 1978].)

In this case, the special circumstance instruction (CALJIC No. 8.81.17.1) did not include the independent purpose requirement. As given to the jury in this case, the special circumstance instruction provided: "To find that the special circumstance, referred to in these instructions as murder in the commission of robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object - a wooden stake, is true, it must be proved: [¶] 1. The murder was committed while [the] defendant was [engaged in] [or] [was an accomplice] in the [commission] of one or more of the following crimes: robbery, kidnap, kidnapping for rape, rape, or rape by a foreign object (a wooden stake)." (2CT 555; see *People v. D'Arcy* (2010) 48 Cal.4th 257, 297 ["a trial court has no duty to instruct on the second paragraph of CALJIC No. 8.81.17 unless the evidence supports an inference that the defendant might have intended to murder the victim without having had an independent intent to commit the specified felony"]; see also *People v. Monterroso* (2004) 34 Cal.4th 743, 767; *People v. Valdez* (2004) 32 Cal.4th 73, 113-114 [holding challenge to instruction was forfeited by defendant's failure to object or request the omitted language].)

However, the trial court had no duty to instruct on the independent purpose requirement. Including the independent purpose requirement in a special circumstance instruction "is appropriate where the evidence suggests the defendant may have intended to

murder his victim without having an independent intent to commit the felony that forms the basis of the special circumstance allegation. In other words, if the felony is merely incidental to achieving the murder—the murder being the defendant's primary purpose—then the special circumstance is not present, but if the defendant has an “independent felonious purpose” (such as [kidnapping]) and commits the murder to advance that independent purpose, the special circumstance is present.” (*D’Arcy, supra*, 48 Cal.4th at p. 296.) “Thus, a trial court has no duty to instruct on the [requirement that the defendant have an independent felonious purpose] unless the evidence supports an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specified felony.” (*Id.* at p. 297.)

Here, as noted in the respondent’s brief at pages 166-176, the evidence showed that appellant had concurrent intents to commit each of the proven special circumstance allegations and to murder the victim. As to appellant’s intent to commit each of the special circumstance allegations, respondent has already laid out the substantial evidence of each allegation in exhausting detail, and will not repeat that briefing here. (See RB 5-38.)

Here, overwhelming evidence demonstrated that appellant committed each of the special circumstance felonies for an independent felonious purpose. Quite simply, there is absolutely no evidence that appellant intended to kill Penny at the moment she allegedly yelled, “Fuck you, niggers,” at appellant and his companions across the street. Rather, as noted by the prosecutor, the more reasonable interpretation of the evidence was that appellant and his

companions crossed the street initially intending to rob Penny, and that the crimes escalated with Penny's resistance. (11RT 2356; see *People v. Horning* (2004) 34 Cal.4th 871, 907 ["the commission of the felony was not merely incidental to an intended murder"].)

The evidence thus showed appellant harbored concurrent intents to commit the special circumstance allegations and to murder Penny. Because the evidence supported the finding that the special circumstance allegations were not merely incidental to the murder, the trial court had no duty to instruct on the independent felonious purpose requirement. (*D'Arcy, supra*, 48 Cal.4th at p. 297.) In the instant petition, appellant essentially asserts that his position is meritorious based on nothing more than Justice Liu's dissenting opinion in *People v. Brooks* (2017) 2 Cal.5th 674 that "the jury here was never instructed that in order to find the special circumstance to be true, it must first determine that Brooks had an independent felonious purpose to commit the kidnapping." (*Id.* at p. 790.) However, Justice Liu's dissent was just that, a dissent. Moreover, it involved a completely different set of factual circumstances and was not joined by any of the other justices. This Court should reject appellant's claim because this Court's majority opinion in *Brooks* was correct. There is absolutely nothing in the majority opinion in *Brooks* which demonstrates instructional error in this case.

B. Even Assuming Instructional Error, It Was Harmless Beyond A Reasonable Doubt

Even if there was sufficient evidence to require the trial court to instruct on the independent felonious purpose requirement, any error

was harmless beyond a reasonable doubt. “An instructional error regarding an element of a special circumstance requires reversal unless the error was harmless beyond a reasonable doubt.” (*Brents, supra*, 53 Cal.4th at p. 612.) Here, appellant has not even claimed that trial defense counsel in his case made an effort to defend against the special circumstance allegations on the theory that they were merely incidental to achieving the murder. (See AOB 6-11; see also *D’Arcy, supra*, 48 Cal.4th at p. 297.) And the jury was properly instructed on the special circumstance allegations and the crimes underlying them as noted in the respondent’s brief. (See RB 166-176.) Under these circumstances, the omission of the independent felonious purpose requirement in the special circumstance instructions given in this case was harmless under any standard. (*D’Arcy, supra*, 48 Cal.4th at p. 297.)

In support of his argument that the alleged instructional error was prejudicial, appellant relies on *Brents* (see SSOB 6-9), in which this Court found a modified version of CALJIC No. 8.81.17 that had the effect of telling the jury “that it could find the kidnapping special circumstance allegation true only if it found the defendant committed the *murder* ‘to carry out or advance the commission of the crime of assault by force . . . or to facilitate the escape therefrom or to avoid detection’” was prejudicial error. (*Brents, supra*, 53 Cal.4th at p. 612 [original italics].)

There is no persuasive analogy between the instructional error in *Brents* and the alleged instructional error in this case. The full instruction given to the jury in *Brents* stated: “To find that the special circumstance, referred to in these instructions as murder in the

commission of kidnapping, is true, it must be proved: [¶] 1. The murder was committed while the defendant was engaged in the commission of a kidnapping; and [¶] 2. [A] The murder was committed in order to carry out or advance the commission of the crime of assault by force likely to produce great bodily injury or to facilitate the escape therefrom or to avoid detection. [B] In other words, the special circumstance referred to in these instructions is not established if the kidnapping was merely incidental to the commission of the murder.” (*Brents, supra*, 53 Cal.4th at p. 612, fn. 5.)

This Court in *Brents* found that “[t]he trial court erred in altering CALJIC No. 8.81.17 to require a finding that the *murder* was committed ‘to carry out or advance the commission’ the *assault* on [the victim] ‘or to facilitate the escape therefrom or to avoid detection’” and that “the jury did not need to find that the *murder* was motivated in some way by defendant’s initial *assault* on [the victim].” (*Brents, supra*, 53 Cal.4th at p. 612 [original italics].) This Court found the error was prejudicial because the instruction was supposed to refer to the same target crime of kidnapping throughout, but “the trial court erroneously inserted one target offense (assault by force) in sentence [A], and a *different* target offense (kidnapping) in sentence [B]. Because each sentence discussed a different target offense, sentence [B] did not elaborate upon or clarify the idea discussed in sentence [A], so the phrase ‘In other words’ at the beginning of sentence [B] was likely to have confused the jury.” (*Id.* at p. 613 [original italics].) This Court found significant the jury’s question during deliberations, which indicated “that sentence [A] was the primary focus of the jury’s attention, and the court’s response to the

jury compounded the court's previous error by wrongly telling the jury that sentence [A] was correct as written." (*Ibid.*) "The jury's question suggest[ed] that it may have found the requirements of the special circumstance satisfied by finding that defendant committed the murder to facilitate his escape from the assault or to avoid detection of that crime." (*Ibid.*) This Court therefore could not be sure the jury found that the kidnapping was not merely incidental to the murder. (*Id.* at p. 614.)

In contrast with *Brents*, here, the jury was not given legally incorrect or confusing special circumstance instructions. (See RB 166-174.) Moreover, evidence that appellant had an independent felonious purpose to commit the special circumstance allegations was not weak, but rather substantial. Therefore, *Brents* does not aid appellant. Because there was no instructional error prejudicial to appellant, the special circumstance findings must be affirmed. (See RB 175-176.)

CONCLUSION

For the foregoing reasons, this Court should reject the instant claim and affirm the judgment.

Dated: June 6, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached SECOND SUPPLEMENTAL RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 2,532 words.

Dated: June 6, 2017

XAVIER BECERRA
Attorney General of California



MICHAEL J. WISE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE

Case Name: *People v. Warren Justin Hardy*

No.: S113421 (CAPITAL CASE)

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 June 16, 2017, I served the attached **SECOND 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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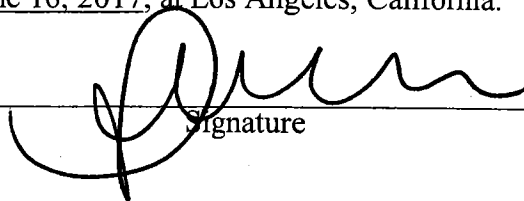
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On June 16, 2017, I caused eight (8) copies of the **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be delivered to the California Supreme Court at 350 McAllister Street, Room 1295, San Francisco, CA 94102 by Golden State Overnight, Tracking # GSOAB108559241.

On June 16, 2017, I caused one electronic copy of the **SECOND SUPPLEMENTAL RESPONDENT'S BRIEF** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

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 June 16, 2017, at Los Angeles, California.

Frances Conroy
Declarant


Signature

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