# IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**STATE OF NEW MEXICO,**

**Plaintiff-Appellee,**

**vs.** **Case No. S-1-SC-40100**

**STEPHEN J. GOLDMAN,**

**Petitioner-Appellant.**

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DEFENDANT-APPELLANT'S REPLY BRIEF

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FROM THE SECOND JUDICIAL COURT
BERNALILLO COUNTY, NEW MEXICO
THE HONORABLE STANLEY WHITAKER PRESIDING

*ORAL ARGUMENT REQUESTED*

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## STATEMENT OF COMPLIANCE

This brief contains 3,978 words in compliance with the limitations set forth in Rule 12-318(F)(3) NMRA. Counsel used Times New Roman, a proportionally-spaced type style / type face. This brief was prepared using Microsoft Word, version 14.6.7 for Mac 2011.

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### I. The Jury Instructions Denied the Jury a Proper Choice Between Verdicts and Substantially Prejudiced Mr. Goldman

#### A. The District Court Erred in Failing to Instruct the Jury as to the Second-Degree Murder Lesser Included of Felony Murder and In Omitting Felony Murder from the Stepdown Instruction

New Mexico's felony murder doctrine elevates second degree murder to first degree when it is committed in the course of a dangerous felony. *State v. Lopez*, 1996-NMSC-036, ¶8. As detailed in the brief in chief, New Mexico law limits the felony murder rule in five main ways, with one of the limitations being requirement that "causation must be physical; [] consist[ing] of those acts of defendant or his accomplice initiating and leading to the homicide without an independent force intervening . . . ." *State v. Harrison*, 1997-NMSC-038, ¶ 11. *See also State v. Groves*, 2021-NMSC-003, ¶10 ("just because a death occurred when and where a defendant committed a felony does not mean that commission of the felony caused the death.") This requirement is carried forward in the second element of the uniform instruction for felony murder which provides that the defendant must have caused the death of the decedent during the commission of the predicate crime, *see* UJI 14-202, or in other words, that "the actus reus of the felony must have an actual connection to the cause of the death," *Groves*, 2021-NMSC-003 at ¶10. Likewise, the instruction for second degree murder as a lesser included crime for felony murder, which the jury

was not given, has as an element that the defendant did not cause the death of the victim during the commission of the felony. *See* UJI 14-212.

The State posits first that the Court should reject Mr. Goldman's argument that the jury instructions were fundamentally flawed insofar as they did not include UJI 14-212, the lesser included second-degree instruction for felony murder, because the causation requirement was in fact included in the felony murder instruction and the accessory liability instructions. *See* Answer Brief ("AB") at 17-19. It is true that the jury was instructed that they had to find that Mr. Goldman had "caused the death" of each of the victims during the commission of one of the predicates in order to find him guilty of felony murder, RP 362, 367, and that he had to "help[], encourage[] or cause[] the killings" to be guilty under an aiding or abetting theory, RP 369.

However, the failure to give UJI 14-212 clearly constitutes fundamental error despite the inclusion of the causation element in the felony murder and accessory liability instructions. This is because the lesser included second-degree instruction 1) would have emphasized for the jury the causation element, requiring as an element that Mr. Goldman "did *not* cause the death[s]" of the victims "during the commission of" any predicate crime and 2) would have demonstrated for the jury the precise legal differences between felony murder and the lesser included second-degree charge and differentiated the lesser included from that of first degree murder by deliberate killing. *See, e.g., State v. Jimenez*, 2007-NMCA-0005, ¶18, *cert granted*

*by State v. Jimenez*, 141 N.M 164 (2007), *cert quashed by State v. Jimenez*, 143 N.M. 667 (2008)(holding that, acquittal on second-degree deliberate intent murder did not act as acquittal on entire second-degree murder charge, as would prohibit any retrial on remaining theory of second-degree felony murder under double jeopardy)

In the absence of this instruction, the jury was only instructed as to the second-degree murder lesser included of first-degree murder by deliberate killing, which of course has no causation element. *See* RP 359, 364. "There was no other instruction given which would have informed the jury in any way that lack of [causation] was [] an element of second-degree murder as an included offense of felony murder" and the district court's "[f]ailure to include this important distinction between [felony murder and its lesser included] second-degree murder [] under the facts of this case was fundamental error." *See State v. Montoya*, 2013-NMSC-020, ¶¶20-21 (finding fundamental error and reversing defendant's felony murder conviction where "jury instructions properly contained the essential element of lack of provocation in the second-degree instruction that was given as a lesser included offense of deliberate first-degree murder [but] the provocation element was omitted from the essential elements of second-degree murder in the separate felony murder instruction.")

The error is particularly apparent given that the district court's stepdown instruction only referenced the deliberate killing alternative and did not include felony murder, s*ee* RP 361, 366, and in light of the jury's question as to whether the

defendants could "be found guilty of second degree murder and felony murder[.]" **[Court's Ex. 1]**. Given the facts of Mr. Goldman's case, the error is fundamental: there is a reasonable probability that the failure to give UJI 14-212 was a significant factor in the jury's deliberations in relation to the rest of the evidence before them. *See State v. DeGraff*, 2006-NMSC-011, ¶ 21; *State v. Barber*, 2004-NMSC-019, ¶19.

The State also bookends its argument that the lesser included was not warranted given the facts of the case with the notion that if the jury believed that Anthony Aragon actually killed the victims and that Goldman did not act as an accessory, it would have simply acquitted Goldman of felony murder. AB at 24. This argument ignores the fact that a defendant is entitled to have the jury instructed as to each crime charged and each lesser included crime supported by the evidence prior to deliberations. *See State v. Reynolds*, 1982-NMSC-091, ¶11 (finding reversible error where district court failed to give a manslaughter instruction that was supported by the evidence and rejecting the State's argument that "since the jury was instructed to consider first degree murder first, of which the defendant was found guilty, the jury would not have reached a voluntary manslaughter instruction"); *but see State v. Madrid,* No. S-1-SC-37567, 2021 WL 5882099 (N.M. Dec. 13, 2021) (nonprecedential opinion)(rejecting defendant's assertion and reliance on *Reynolds* for the proposition that trial counsel was ineffective in failing to request a jury instruction on second-degree murder as a lesser-included offense

for depraved-mind first-degree murder where the stepdown instruction directed the jury to consider the first degree alternatives, encompassing the willful and deliberate *and* depraved mind alternatives, and only to move to the second degree instruction if they were not unanimous as to guilt)[1] The jury's guilty verdicts as to felony murder simply can't rule out the possibility that it would have found guilt as to the lesser included second-degree murder instead if it had been properly instructed.

The State further asserts that Mr. Goldman was actually not entitled to a jury instruction as to the second degree lesser included of felony murder because no reasonable view of the evidence could have led the jury to conclude that second degree murder is the highest degree of crime Mr. Goldman committed. AB at 19-20 (citing *State v. McGruder*, 1997-NMSC-023, *overruled on other grounds by State v. Chavez*, 2009-NMSC-035, ¶16). This argument ignores the not insubstantial evidence in the record supporting an inference that Mr. Goldman committed the second degree murders of both Romero and Lateef while still harboring a reasonable doubt that he is guilty of felony murder."

Specifically, on its face, the evidence supports a reasonable inference that Mr. Goldman, in participating in the kidnappings and the robbery and some level of

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[1] Unlike the instruction in *Madrid*, the stepdown instruction in the instant case was not generic and all-encompassing in its references to the first-degree instructions but instead explicitly omitted felony murder and instructed the jury not to return a verdict as to second degree murder unless they unanimously found Goldman not guilty of first degree murder by deliberate killing. *See* RP 361, 366.

violence against Lateef and Romero, "knew that his acts created a strong probability of death or great bodily harm" to them but that he also did not cause their deaths during the course of those predicate crimes because Anthony Aragon's conduct in killing Lateef and Romero was actually the intervening act that led to their deaths. *See* UJI 14-212 NMRA (elements 2 and 3)

There are certainly factual scenarios which allow courts the discretion not to give the lesser included to felony murder, often because the State has actually proven a nexus between a predicate felony and the murder that excludes the possibility that the murder was not committed in the commission of a felony. *See, e.g. McGruder*, 1997-NMSC-023 at ¶19 (noting that, the nexus was established in part because "the State [had] identified two felonies that occurred at approximately the same time as [the victim's] death: the burglary that occurred almost, if not simultaneously, and the armed robbery that occurred shortly thereafter.") The evidence of guilt in *McGruder* did essentially preclude any inference that would support a second degree instruction, mainly because only seconds elapsed from the time the defendant knocked on the victim's door to the time he shot him and then immediately pursued another resident at gunpoint in order to obtain the keys to the victim's truck. *Id.* at ¶¶3-5. There simply wasn't any evidence to support the defense theory in that case that the victim's death was not caused by an attempt to take his truck, but rather that his death had precipitated the events that led to the theft of the truck, *i.e.* that the

discharge had been accidental and that the defendant had then used the victim's truck to escape.

In Mr. Goldman's case in contrast, the evidence certainly supports a reasonable inference that the victims' deaths did not "occur[] in the course of an appropriate predicate felony" meaning that "an instruction on both felony murder and second degree murder would be appropriate." *Id.* at ¶17. Simply put, the jury heard evidence in support of the notion that Anthony Aragon actually killed the victims and that Mr. Goldman had no role in a homicide in the commission of one or more felonies and with the requisite *mens rea*. *Id.* at 21. The defense theory was that if any predicate crimes occurred, namely the two kidnappings and the armed robbery of Lateef, those crimes had concluded by the time Anthony Aragon arrived and Goldman and Atkins left and were independent of the homicides. *See, e.g. McGruder*, 1997-NMSC-023 at ¶19 (noting that the requisite nexus was established where the predicate felonies were almost simultaneous to the victim's death). Contrasting with the facts in *McGruder*, the kidnappings and armed robbery for which Mr. Goldman was convicted occurred well in advance both of the victims' deaths and of the intervening event of Anthony Aragon's arrival.

There was some evidence adduced in support of the notion that it was Aragon who ultimately decided to and who did kill the victims, who were not dead at the time that Goldman and Atkins left the Buick. Unlike the scenario in *McGruder*,

where there was eyewitness testimony regarding the shooting, there is no eyewitness account of what occurred when the defendants were out on the west mesa or, other than Aragon's self-serving testimony, when Aragon and Atkins later drove off in the Buick with Lateef and Romero inside it. The State's theory at trial was that the boys had shot Lateef and Romero on the west mesa, had placed their bodies in the trunk and then had driven around for a while before calling Aragon; however, the defense presented evidence and elicited testimony, including from Aragon and Detective Jesse Carter, in support of the theory that Aragon killed Lateef and Romero sometime after Mr. Goldman left.

In particular, the testimony at trial was that a phone call was placed on Mr. Atkins' phone from a location near the Double Eagle airport to Anthony Aragon. **[2/20/23 CD 9:20:40-21:30; St. Ex. 229, S.40; 4:15:20-35]**. Aragon testified that, in December, 2018 when the victims were killed, he was 36 years old, nearly twice Goldman's age, that he used methamphetamine and alcohol every day and that this caused him to be violent and do things that were out of character. He further testified that he always carried a Ruger P90 .45 caliber weapon. **[2/16/23 CD at 4:06:10-7:10; 2/16/2023 CD 9:15:50-9:16:01]**. Aragon admitted that, in December, 2018, he was spiraling out of control and making bad decisions, including related to his drug and alcohol abuse and that, when he received a call from the boys asking him to meet them, he had been using drugs. **[2/16/23 CD 9:02:30-9:02:55; 9:16:30-**

**18:40; 2/15/23 4:10:21-17:05; 4:33:00-45; 2/16/2023 CD 9:05:05-07; 2/16/2023 CD 9:14:00-08]** During his direct exam, Aragon testified that the defendants appeared nervous and all had blood on them, both on their clothes and hands, but when defense counsel impeached him with his previous statement that "[he actually] did not see blood on any of them[,]" he agreed that the prior statement was the truthful one. **[2/16/23 CD 9:32:00-33:41; 4:18:40-19:10]**. Aragon further testified that the boys never told him about what had happened before he arrived, meaning that there was no testimony or evidence directly implicating Goldman in the shootings. **[2/15/23 CD 4:19:20-40]**

Aragon further testified that he found no blood in the trunk but that there was blood in the backseat and throughout the vehicle, **[2/15/23 CD 4:48:05-55]**, and later on cross-examination, Detective Carter agreed with the defense that had Romero and Lateef been shot and placed in the trunk of the Buick for two hours, as posited by the State and explained by Aragon, there should be some of Lateef's blood on Romero and vice versa. That was not the case. He also agreed that in this scenario, there could be a lot of blood in the trunk of the vehicle. Carter also acknowledged that, although Aragon claimed he had left a trunk liner that may have been bloody at the scene of the burial, no such item was found. **[2/21/23 CD 4:13:00-4:18:00]**

In sum, the testimony of Aragon and Carter strongly buttresses the defense theory that Lateef and Romero were not dead in the trunk of the vehicle when Aragon

arrived, because Aragon denied seeing the quantity of blood law enforcement would have expected and because the physical evidence recovered on the west mesa also did not reflect that the trunk had been significantly bloodied. Additionally, Aragon was repeatedly impeached, calling into question his testimony about having been "asked for help" by the boys and supporting a reasonable inference that he had committed the murders on his own.

For its part, the district court seemed to agree with the defense that the second degree lesser included of felony murder would have been warranted, or at least it did not disagree, noting in discussions with counsel that "in legal theory that second-degree murder is a lesser-included offense" of felony murder but concluding wrongly that the instructions were not in error because the jury had been instructed on second-degree murder as a lesser-included offense of deliberate intent murder. **[2/24/23 CD 4:11:00-55]**

Despite this factual overlay, the State argues that there was no evidence whatsoever that Lateef and Romero were killed "at a point independent of the [] kidnappings," AB at 21, an argument that altogether ignores large portions of the testimony of Aragon and Detective Jesse Carter. In support, the State cites to *State v. Smith*, 2001-NMSC-004, for the proposition that the evidence in Goldman's case definitively establishes the nexus between the kidnappings and/or the armed robbery and the murders of Lateef and Romero, but *Smith* is easily distinguished. In *Smith*,

the defendant was convicted of false imprisonment and felony murder, and this Court rejected her argument that there was insufficient evidence to establish a causal connection between those crimes. There, the jury heard eyewitness testimony and admissions from the defendant that the defendant and two others had picked up a stranger in their car and forced him into the back of their car while defendant put her foot on the gas pedal allowing the driver to beat the victim with the butt of his weapon. The group ultimately took the victim out of the car, and the group fired multiple rounds at him – the defendant shot him twice with her 9 mm handgun before retrieving a spent casing as a souvenir. *Smith*, 2001-NMSC-004 at ¶¶5, 9. This Court held that the testimony was sufficient to establish the requisite causal connection between false imprisonment and felony murder and noted that the jury could have found the defendant guilty of felony murder on an aiding and abetting theory as well. *Id.* at ¶15 (noting that causation in the context of felony murder means "those acts of defendant or his accomplice initiating and leading to the homicide without an independent force intervening.") (quoting *Harrison*, 1997-NMSC-038, ¶11). As in *McGruder*, the predicate crime in *Smith* occurred nearly simultaneously with the murder, making the causal connection difficult to dispute in that case.

Finally, the State argues that even if the jury believed that Aragon killed Lateef and Romero after Mr. Goldman left, the jury *could* still have found that Goldman committed felony murder as an accessory, facilitating, helping or causing

the deaths in some way. AB at 24. Given the evidence, there is also a fair inference that Goldman did not act as an accessory and left Lateef and Romero alive in Aragon's control with no instructions to harm them whatsoever. RP 369 (elements 5 and 6). Regardless, Mr. Goldman was entitled to the second-degree lesser included instruction for all of the above-described reasons.

**B. The District Court Committed Fundamental Error**

The miscarriage of justice in this case is plain when one considers the extent to which the felony murder jury instructions, "through omission or misstatement, fail[ed] to provide the juror[s] with an accurate rendition of the relevant law" with respect to the elements of felony murder and its lesser included. *State v. Benally*, 2001-NMSC-033, ¶12.

The State notes that our appellate courts generally decline to apply the doctrine of fundamental error to a defendant's tactical or strategic choices whether or not to request lesser-included offenses, *see* AB at 25. It is worth noting that this is not a case wherein the defendant may be said to have voluntarily waived his right to a revised stepdown or the lesser included instruction, but instead a case where his counsel was deficient in failing to do so. *See State v. Boeglin*, 1987-NMSC-002, ¶¶15-16 (holding that the defendant's right to a jury instruction on second degree murder as a lesser included offense of first degree murder, warranted by the evidence, may be knowingly, intelligently, and voluntarily waived.) The failure

to properly instruct the jury as to the lesser included second-degree offense is absolution fundamental in that it "go[es] to the foundation of the case [and] take[s] from [Mr. Goldman] a right which was essential to his defense and which no court could or ought to permit him to waive." *Barber*, 2004-NMSC-019, ¶8.

The State also argues that because the jury was instructed as to the second-degree lesser included to deliberate intent first degree murder, "the jury would not have been pressured to convict [Mr. Goldman] or risk acquittal . . .," AB at 26, but this argument entirely ignores the differences between the two lesser included crimes as well as the fact that the stepdown instruction gave the jury no guidance as to felony murder, as described above. *See supra* section I.A.

This Court's fundamental error review serves to safeguard Mr. Goldman's substantive rights where the district court's "mistake[s] in process make[ his] conviction fundamentally unfair notwithstanding [his] apparent guilt." *State v. Nevarez*, 2010-NMCA-049, ¶24. Here, the Court has a strong basis to support a finding that there was a miscarriage of justice and consequently that the district court's instructional error was fundamental.

## II. The Jury's Question and Statements Illustrated That There Was Confusion Among Jurors and the District Court's Response Only Compounded Its Instructional Error

As articulated in the brief in chief, the jury's question regarding whether "the defendants [could] be found guilty of second-degree murder and felony murder,"

**[Court's Ex. 1]**, demonstrated their blatant confusion in the midst of deliberations, a confusion that was born out of the court's failure to instruct on the lesser included second-degree to felony murder and the flawed stepdown instruction which excluded felony murder.[2] In short, the jury seems to have identified the exact problem that, under the instructions as given, it had no second degree option for felony murder despite the fact that a view of the evidence supported second degree murder convictions.

To further illustrate the extent of the confusion the foreman added that "more than anything, we're just trying to find a clarification on how alternative sentencing works." The court stated: "I don't think we can really give you any detailed explanation on it except to say yes and that you have to follow the jury instructions as presented to you." **[*Id.* at 4:16:30-17:24]**. The foreman's comments indicate that

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[2] The brief in chief included an argument that the district court should have instructed the jury with a separate stepdown instruction for felony murder and the lesser included second-degree; however, this Court has previously implied in dicta and in dissent that a single stepdown instruction covering both alternatives is likely preferable. *Jimenez*, 2007-NMCA-0005, ¶38, (Pickard, L. and Vigil, M., dissenting)(stating that, in a prior unpublished opinion, this Court had "acknowledged there was possible error in the instructions in giving the jury the two step-down instructions, [for alternate theories of first degree murder] because of the theoretical possibility of inconsistent verdicts.")(internal quotations omitted). Upon further reflection, counsel recognizes that a single stepdown instruction, encompassing both alternate theories of first-degree murder and both lesser included instructions would be preferable due to the possibility that two stepdown instructions could lead to inconsistent verdicts.

at least some fraction of the jurors did not understand the relationship between the two first-degree murder alternatives nor did they understand the relationship and/or the differences in the elements between felony murder and second-degree murder as it was instructed. This was a direct result of the court's flawed stepdown instruction, which directed in part: "you should only return a verdict on second degree murder if you unanimously find the defendant not guilty of first degree murder by a deliberate killing." RP 366. The stepdown did not tell the jury what to do if they unanimously found Mr. Goldman not guilty of felony murder, but it should have provided in turn that an acquittal as to felony murder would permit a verdict on the second degree lesser included of felony murder. Had the court done so, there is a very real possibility that the jury would have acquitted Mr. Goldman of felony murder and entered different verdicts.

The court's response, which it arrived at not after reviewing the law, but instead in presuming that the instructions as given accurately reflected the law, only served to worsen the problem. **[2/24/23 CD 4:01:55-4:03:06]**. Having realized that the stepdown instruction omitted felony murder and that it had not instructed the jury as to the lesser included to felony murder, the court chose not to correct the errors thus depriving the jury of a proper choice between verdicts.

By the time the district court took the jury's verdicts, the confusion had absolutely not been resolved. The foreman indicated that the jurors were still

deliberating on second degree murder despite having convicted on the felony murder alternative, a posture which is contrary to the message of the stepdown if not the plain language of the stepdown instruction they received. Despite the foreperson's plain language that the jury had "deliberated [on second degree] but had not reached a final decision" and that "we were not unanimous at the time we stopped talking about it," **[2/27 /23 CD 12:26:50-30:40]**, peculiarly, the State insists in accord with the district court that the jury "more accurately was hung," AB at 46 n. 5. And faced with this record, the State asserts that reversal is not required even in the event that this Court finds that the jury's confusion persisted because the confusion centered on the manner of returning verdicts. This is an extremely strained and narrow reading of the record on which the State relies in its conclusion that "[t]he jury did not express any confusion on the elements required to convict [Mr. Goldman] of felony murder or the legal standards applicable to those elements." AB at 47. In fact, the jury's question and subsequent comments went to the heart of the court's instructional error: the jurors' question and subsequent statements evinced that they simply could not reconcile the stepdown instruction's failure to address felony murder and the lack of the lesser included for felony murder.

## CONCLUSION

For all of the above reasons, Mr. Goldman respectfully requests that this Court reverse his convictions for felony murder and remand for a new trial only on those counts not barred by double jeopardy.

Respectfully submitted,

JUSTINE FOX-YOUNG, P.C.

*/s/ Justine Fox-Young*
Justine Fox-Young

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was emailed to Charles Gutierrez in the New Mexico Department of Justice this 18th day of September, 2024.

*/s/ Justine Fox-Young*
Justine Fox-Young