United States Court of Appeals, Ninth Circuit.
Willie Curtis WILSON, Petitioner-Appellant,
v.
K.W. PRUNTY, Warden; Attorney General of the State of California, Respondents-Appellees.
No. 99-55587.
D.C. No. CV-97-04541-WDK-01.

Argued and Submitted April 13, 2000.
Decided May 11, 2000.

Appeal from the United States District Court for the Central District of California, William D. Keller, District Judge, Presiding.

Before FERNANDEZ and WARDLAW, Circuit Judges, and WEINER,[FN2] District Judge.

FN2. The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM [FN1]

FN1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Willie Curtis Wilson appeals from the district court's denial of his 28 U.S.C. § 2254 petition in which he claimed that he was twice put in jeopardy for the offense of first degree murder. We affirm.

Wilson makes a number of interesting and complex arguments in an attempt to convince us that his trial and conviction for first degree murder (premeditated murder) after his conviction for first degree murder (felony murder) was set aside on appeal subjected him to double jeopardy. But in California premeditated and felony murder form parts of a single crime. *See* Cal.Penal Code §§ 187, 189; *People v. Johnson,* 233 Cal.App.3d 425, 454, 284 Cal.Rptr. 579, 595-96 (1991). That is true to the point that a jury need not even agree on which one leads to an ultimate conviction when both are presented to it. *See People v. Guerra,* 40 Cal.3d 377, 386, 708 P.2d 1252, 1257, 220 Cal.Rptr. 374, 379 (1985); *People v.. Scott,* 229 Cal.App.3d 707, 718, 280 Cal.Rptr. 274, 280-81 (1991). Clearly, that California rule is constitutionally permissible. *See Schad v. Arizona,* 501 U.S. 624, 627, 111 S.Ct. 2491, 2494-95, 115 L.Ed.2d 555 (1991); *Sullivan v. Borg,* 1 F.3d 926, 927-29 (9th Cir.1993).

The very complexity of Wilson's argument demonstrates, as little else could, that Wilson cannot point to a violation of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). What is clearly established is the general rule that

where a reversal is obtained on a ground other than sufficiency of the evidence, it is ordinarily proper to retry the defendant for the same offense. *See, e.g., Montana v.. Hall,* 481 U.S. 400, 402, 107 S.Ct. 1825, 1826, 95 L.Ed.2d 354 (1987) (per curiam); *Ball v. United States,* 163 U.S. 662, 672, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896). It is far from apparent (clearly established) that where different theories are wrapped up in the same offense, the double jeopardy alchemy is different. *See Sanabria v. United States,* 437 U.S. 54, 69-73, 98 S.Ct. 2170, 2181-83, 57 L.Ed.2d 43 (1978) (treating alternative theories of the same offense as a single offense for double jeopardy purposes). In fact, circuit courts have not been uniform in their treatment of retrials in unified murder cases similar to the one at hand. *Compare Wilson v. Meyer,* 665 F.2d 118, 123-24 (7th Cir.1981), *with United States, ex rel. Jackson v. Follette,* 462 F.2d 1041, 1049-50 (2d Cir.1972).

In fine, we cannot say that the state court's determination [FN3] was contrary to or an unreasonable application of double jeopardy law as declared by the United States Supreme Court.[FN4]

FN3. *See People v. Wilson,* 43 Cal.App. 4th 839, 848-49, 50 Cal.Rptr.2d 883, 889 (1996).

FN4. In light of this determination, we need not decide whether Wilson's claim is barred by *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

AFFIRMED.