S272238

No.

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA ,
Plaintiff and Respondent,

v.

FREDDY ALFREDO CURIEL,
Defendant and Appellant.

Fourth Appellate District, Division Three, Case No. G058604
Orange County Superior Court, Case No. 02CF2160
The Honorable Julian Bailey, Judge

PETITION FOR REVIEW

ROB BONTA (SBN 202668)
Attorney General of California
LANCE E. WINTERS (SBN 162357)
Chief Assistant Attorney General
A. NATASHA CORTINA (SBN 156368)
Acting Senior Assistant Attorney General
CHARLES C. RAGLAND (SBN 204928)
Supervising Deputy Attorney General
*SETH M. FRIEDMAN (SBN 186239)
Deputy Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 738-9157
Fax: (619) 645-2191
Seth.Friedman@doj.ca.gov
Attorneys for Plaintiff and Respondent

December 14, 2021

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The People of the State of California respectfully petition for review of the unpublished decision of the Fourth District Court of Appeal, Division Three, ruling that a jury's special circumstance finding under Penal Code section 190.2, subdivision (a)(22) that "the defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang" does not legally bar the defendant from relief under Penal Code section 1170.95.[1] A petition for rehearing was not filed in the Court of Appeal. A copy of the Court of Appeal's opinion is attached and is available at 2021 WL 5119900.

ISSUE PRESENTED

Whether a jury's special-circumstance finding under section 190.2, subdivision (a)(22) that "the defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang" precludes the defendant from making a prima facie showing of eligibility for relief under section 1170.95.[2]

REASONS FOR GRANTING REVIEW

This Court should grant review to resolve confusion in the lower courts regarding the effect of a jury's special circumstance finding under section 190.2, subdivision (a)(22) (hereafter section

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[1] All further statutory references are to the Penal Code

[2] The court is already considering a similar issue regarding whether such a finding renders error under *People v Chiu* (2014) 59 Cal.4th 155 harmless. (See *In re Lopez*, S258912.)

190.2(a)(22)) on a defendant's subsequent petition for resentencing under section 1170.95. While no published case has addressed this issue, many unpublished cases have.[3]

The majority of the unpublished decisions conclude that a jury's special circumstance finding under section 190.2(a)(22) necessarily bars relief under section 1170.95.[4] But a few unpublished cases, including this one, have reached the opposite conclusion.[5]

Because of these conflicting decisions, petitioners who are similarly situated under section 1170.95 are receiving different

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[3] One published case stated, in dicta, that "a court would be correct to summarily deny a petition [under section 1170.95] in such a case [where there is a special circumstance finding under section 190.2(a)(22)] because the defendant could not make a prima facie claim that he was entitled to relief." (*People v. Allison* (2020) 55 Cal.App.5th 449, 460.)

[4] For example, there are the following unpublished opinions: *People v. Arellano* (Nov. 29, 2021, C092861); *People v. Condiff* (Nov. 4, 2021, B296181); *People v. Fernandez* (Nov. 3, 2021, F080069); *People v. Saesee* (Oct. 29, 2021, F080018); *People v. Reaza* (Oct. 8, 2021, E074012); *People v. Martinez* (Aug. 10, 2021, E076841); *People v. Lopez* (Aug. 4, 2021, G059828); *People v. Carachure* (July 21, 2021, G059817); *People v. Barragan* (June 22, 2021, B304388); *People v. Saesee* (June 16, 2021, F080018); *People v. Cervantes* (Apr. 8, 2021, G058554); *People v. Davis* (Oct. 5, 2020, B297734); *People v. Mejia* (Aug. 8, 2020, B302951); *People v. Lee* (July 27, 2020, B297565); *People v. Robinson* (July 14, 2020, B298823); *People v. Thlang* (May 15, 2020, C089529); and *People v. Condiff* (May 14, 2020, B296181).

[5] Besides this case, there are: *People v. Huynh* (May 4, 2021, G058444); *People v. Young* (Jan. 11, 2021, G057741), later vacated and superseded; and *People v. Benson* (Oct. 9, 2020, C089862).

outcomes at the prima facie stage, with some having their petitions summarily denied and some being allowed to proceed to an evidentiary hearing. In the absence of this Court's guidance, these disparate outcomes are likely to continue. To the extent the section 190.2(a)(22) finding does automatically bar relief under section 1170.95, time and resources will be unnecessarily expended in conducting evidentiary hearings to which some petitioners are not entitled. To the extent the section 190.2(a)(22) finding does not automatically bar relief under section 1170.95, some petitioners will be deprived of an evidentiary hearing to which they are entitled. This Court should, therefore, settle the issue.

LEGAL BACKGROUND

Effective January 1, 2019, Senate Bill No. 1437 (2017-2018 Reg. Sess.) made ameliorative reforms to California law governing felony murder and the natural and probable consequences doctrine. The bill did so by narrowing first and second degree murder liability through amendments to sections 188 and 189. The amendments provide that malice is required to support a murder conviction and may not be imputed to a person based solely on participation in a crime, except under the amended law of felony murder in section 189, subdivision (e). (§ 188.)

To account for cases that were already final, Senate Bill No. 1437 also enacted section 1170.95, setting forth a procedure for those convicted prior to the new law to petition to vacate their murder convictions and be resentenced. A person may file such a

petition if he or she was "convicted of felony murder or murder under a natural and probable consequences theory" and, among other things, "could not be convicted of first or second degree murder because of changes to Section 188 or 189" made by Senate Bill No. 1437. (§ 1170.95, subd. (a)(3).)

Upon receipt of a properly pleaded petition for resentencing under this provision, a court must appoint counsel and permit briefing by the parties. (*People v. Lewis* (2021) 11 Cal.5th 952, 960-970.) It must then make a prima facie determination regarding the petitioner's entitlement to relief under section 1170.95. (§ 1170.95, subd. (c).)

The court may not engage in factfinding about the petitioner's culpability as part of the prima facie assessment, and should deny a petition at this stage only if the petitioner is ineligible for relief as a matter of law. (*Lewis*, *supra*, 11 Cal.5th at pp. 970-972.) As part of this prima facie review, the court should consider the petitioner's record of conviction. (*Ibid.*) "[I]f the record, including the court's own documents, 'contain[s] facts refuting the allegations made in the petition,' then 'the court is justified in making a credibility determination adverse to the petitioner,' " thereby deeming him or her ineligible. (*Id.* at p. 971, quoting *People v. Drayton* (2020) 47 Cal.App.5th 965, 979.)

If the prima facie showing is satisfied—that is, if the court determines that resentencing is not precluded as a matter of law in light of the record of conviction—then the court must issue an order to show cause why relief should not be granted, and the parties may at that point either stipulate to resentencing or

proceed to an evidentiary hearing. (§ 1170.95, subd. (d).) The hearing may be based on the evidence already in the record of conviction as well as any new evidence presented by the parties to demonstrate whether the petitioner is eligible for resentencing. At the hearing, the prosecution bears the burden to prove, "beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (§ 1170.95, subd. (d)(3).)

STATEMENT OF THE CASE

In 2002, Curiel and Abraham Hernandez, both gang members, got into a verbal altercation with Cesar Tejada and others in front of an apartment building. (Opn. 2-3.) Hernandez produced a gun and shot Tejada dead. (Opn. 3.)

Curiel was tried for Tejada's murder, with an attached section 190.2(a)(22) allegation. (Opn. 2, 4.) The trial court instructed the jury on both aiding and abetting and the natural and probable consequences theory of murder. (Opn. 4.) The jury convicted Curiel of murder, and found true the section 190.2(a)(22) special circumstance. (Opn. 2, 4.) Curiel was sentenced to life without parole, plus 25 years to life for a firearm enhancement finding. (Opn. 4.)

In April 2019, Curiel filed a petition under section 1170.95. (Opn. 4.) After appointing counsel and receiving briefing, but without issuing an order to show cause and holding an evidentiary hearing, the trial court denied the petition. (Opn. 2, 4.) The trial court determined that Curiel was ineligible for relief based on the jury's special circumstance finding under section 190.2(a)(22), reasoning that " 'it is apparent [Curiel's] conviction

and sentence rest[ed] upon the jury's finding that although he was not the actual shooter, he acted with the *intent to kill*.' " (Opn. 2.)

On appeal, Curiel argued the trial court improperly denied his petition at the prima facie stage. (Opn. 6.) The Court of Appeal agreed, expressly rejecting the People's argument that "the special circumstance finding established Curiel acted with the intent to kill, rendering him ineligible for resentencing under section 1170.95 as a matter of law." (Opn. 6.)

In its analysis, the court acknowledged that the jury's special-circumstance finding established Curiel's murderous intent. (Opn. 7.) But the court concluded that this did not preclude relief under section 1170.95 because it did not establish that the jury actually convicted Curiel as a direct aider and abettor. (Opn. 7.) The court explained that, to be liable as a direct aider and abettor, a person must both harbor murderous intent and commit an act aiding or encouraging the murder as opposed to a different target offense. (Opn. 7.) According to the court, the special-circumstance finding did not prove the requisite act. (Opn. 7.) Therefore, "[t]he jury's findings did not prove as a matter of law Curiel was convicted under the theory of direct aiding and abetting." (Opn. 7.)

ARGUMENT

The Court of Appeal did not properly apply section 1170.95. Because Senate Bill No. 1437 did not make any changes to the actus reus requirements for murder liability, the court's focus on the actus reus for direct aiding and abetting was misplaced.

Specifically, Senate Bill No. 1437 amended section 188 by adding a requirement that, except in the case of felony murder, all principals to murder must have acted with malice aforethought, express or implied, to be convicted of that crime. (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 1, subds. (b), (d), § 2.) With respect to felony murder, Senate Bill No. 1437 added subdivision (e) to section 189, requiring that the defendant have been the actual killer, an aider and abettor to the murder who acted with intent to kill, or a major participant in the underlying felony who acted with reckless indifference to human life. (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

Importantly, outside the context of felony murder—a doctrine not implicated here—Senate Bill No. 1437 did not change the law of murder as it relates to the actus reus of the crime. Its sole effect, instead, was to require a specific mens rea—malice aforethought—for one to be guilty of murder, either as a direct perpetrator or as an aider and abettor.

Because of this specific intent requirement, this Court held in *People v. Gentile* (2020) 10 Cal.5th 830, 846-848, that Senate Bill No. 1437 abrogated the natural and probable consequences doctrine as a basis for murder liability. As the court explained, section 188, subdivision (a)(3)'s newly enacted requirement of malice aforethought was functionally incompatible with the continued vitality of the natural and probable consequences doctrine as it relates to murder because that doctrine provided a basis for certain aiders and abettors to be convicted of murder despite their personal lack of malice aforethought—namely,

where the murder occurred as a reasonably foreseeable consequence of a nonhomicide "target" offense aided and abetted. (*Id.* at pp. 847-848; see *id*. at pp. 850-851 [stating that the "core feature" of the natural and probable consequences doctrine with respect to murder was that "it eliminate[d] the mental state requirement" of malice aforethought]; see also *People v. Chiu* (2014) 59 Cal.4th 155, 164-166 [explaining theoretical underpinnings of natural and probable consequences doctrine].)

Indeed, under the natural and probable consequences doctrine, and prior to the enactment of Senate Bill No. 1437, the aider and abettor's mens rea was "irrelevant" on the question of his or her culpability for murder. (*Chiu*, *supra*, 59 Cal.4th at p. 164.) But now Senate Bill No. 1437 forbids precisely what the natural and probable consequences doctrine formerly allowed—the imputation of malice to a person based solely on his or her participation in a crime. (*Gentile*, *supra*, 10 Cal.5th at p. 847.)

Section 1170.95 explicitly requires, as a precondition to relief, that the petitioner "could not be convicted of first or second degree murder *because of* changes to Section 188 or 189" effected by Senate Bill No. 1437. (§ 1170.95, subd. (a)(2), italics added.) Reflecting this provision, the courts are not "charged with holding a whole new trial on all the elements of murder" in determining the merits of a section 1170.95 petition. (*People v. Clements* (2021) 60 Cal.App.5th 597, 618, review granted Apr. 28, 2021, S267624.) Instead, the courts and the parties are to "focus on evidence made relevant by the amendments to the substantive definition of murder." (*Ibid.*)

In this case, the Court of Appeal's opinion correctly acknowledges that, in finding true the section 190.2(a)(22) special circumstance, the jury necessarily found that Curiel acted with an intent to kill—that is, with express malice. (Opn. 7.) That finding is the only finding "made relevant by" Senate Bill No. 1437's amendments to the substantive law of murder. (*Clements*, *supra*, 60 Cal.App.5th at p. 618; see *Lewis*, *supra*, 11 Cal.5th at p. 959 [observing that Senate Bill No. 1437 was intended " 'to ensure that murder liability is not imposed on a person who . . . did not act with the intent to kill' "].)

Whether Curiel's record of conviction establishes as a matter of law the actus reus component of murder, on the other hand, is not an area of law "made relevant" by Senate Bill No. 1437. Senate Bill No. 1437 does not address any aspect of murder liability under the natural and probable consequences doctrine other than that of malice aforethought—i.e., mens rea. And that particular issue—whether Curiel possessed malice aforethought in aiding and abetting the conduct causing the victim's death—has been conclusively resolved against him, disqualifying him from relief under Senate Bill No. 1437 as a matter of law.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

ROB BONTA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
A. NATASHA CORTINA
Acting Senior Assistant Attorney General
CHARLES RAGLAND
Supervising Deputy Attorney General

S/ SETH M. FRIEDMAN
SETH M. FRIEDMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

December 14, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review uses a 13-point Century Schoolbook font and contains 2,037 words.

ROB BONTA
Attorney General of California

S/ SETH M. FRIEDMAN
SETH M. FRIEDMAN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

December 14, 2021

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ATTACHMENT
Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FREDDY ALFREDO CURIEL, Defendant and Appellant.	G058604 (Super. Ct. No. 02CF2160) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Julian W. Bailey, Judge. Reversed and remanded.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Michael Pulos and Seth M. Freidman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Freddy Alfredo Curiel of first degree murder, with a true finding on the special circumstance that the murder was to further the activities of a criminal street gang within the meaning of Penal Code section 190.2, subdivision (a)(22).[1] Curiel sought resentencing pursuant to Senate Bill No. 1437 (S.B. 1437). The trial court denied his petition for resentencing in light of the jury's true finding on the special circumstance. It determined Curiel was ineligible for resentencing under S.B. 1437 as a matter of law because "it is apparent that [Curiel's] conviction and sentence rest[ed] upon the jury's finding that although he was not the actual shooter, he acted with the *intent to kill*. This finding was part of the 'True' finding of the special circumstance pursuant to [section] 190.2[, subdivision](a)(22); intentional killing for the benefit of a criminal street gang). The Court of Appeal specifically found that the evidence was sufficient to support that finding."

Curiel asserts this was error, and we agree. The jury's findings did not establish he was ineligible for resentencing as a matter of law. We therefore reverse the trial court's postjudgment order and remand the matter for further proceedings consistent with this opinion.

FACTS

I. *Underlying Crime*

A detailed recitation of the facts is set forth in the prior opinion in this case. (*People v. Curiel* (Feb. 21, 2008, G037359) [nonpub. opn.] (*Curiel I*).) In sum, one summer morning in 2002, Cesar Tejada, Raul Ramirez, Lupe Olivares, Griselda Alfaro, Jeffrey [last name unknown], and another man were in front of Tejeda's apartment drinking and socializing. Two men walked by, later identified as Curiel and Abraham Hernandez, and stared at the group angrily before going into a convenience store.

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[1] All further statutory references are to the Penal Code.

Ramirez went into the apartment to use the restroom, and when he came back, Curiel and Hernandez had returned, and Curiel was arguing with Tejada. One of the men asked Tejeda, "'Where are you from?'" Tejeda replied, "'I am from nowhere[.]'" Ramirez asked Curiel and Hernandez to leave and one of them replied, "'Shut the fuck up,'" and it was not his business. Lupe Olivares argued with Curiel, and Curiel got into a shoving match with Tejeda and Ramirez. Curiel said it was his neighborhood, and yelled, "'OTH.'"

Hernandez pulled out a gun, pointed it at Jeffery, and chased him away. Hernandez returned, argued with Tejeda, and shot him in the chest at close range. Hernandez and Curiel fled the scene.

Police interviewed Olivares and showed her a security video from the convenience store. She identified Curiel as the non-shooter. Police arrested Curiel at his home later that day. In a recorded interview, Curiel said he had been at a party until midnight, went to his ex-girlfriend's house, and then went home. Confronted with the security video, he denied any knowledge of the shooting.

At trial, Olivares testified she was drunk and high at the time of the shooting, and did not remember the incident. She denied seeing Hernandez shoot Tejeda or identifying Curiel to the police. An officer who interviewed Olivares after the shooting testified she did not appear to be drunk or high. On cross-examination, Olivares said she did not see who shot Tejada, but that it was Hernandez who started the confrontation, and Curiel told Hernandez to "'chill out.'"

The parties stipulated Curiel was an active member of the "On the Habit" or "OTH" gang. A gang expert testified the gang's territory included the area where the shooting occurred. The expert testified over objection that, "'if there is a gun within a group, that it is expected that everybody knows if there is a gun and who has it.'" He

opined the shooting was done for the benefit of and to further promote the criminal conduct of the street gang.

Curiel testified and admitted being with Hernandez when the shooting happened but denied knowing Hernandez had a gun. He recalled harsh words were exchanged between Hernandez and Ramirez, Olivares, and Tejeda. Curiel testified he told Hernandez to "'chill out.'" He admitted being a gang member, and said he lied to the police on the day of the shooting because he did not want to jeopardize himself or his family.

II. *Verdict, Sentencing, and Petition for Resentencing*

As pertinent here, the trial court instructed the jury on both aiding and abetting and the natural and probable consequences theories of murder. It also issued an instruction as to whether the murder was to further the activities of a criminal street gang within the meaning of section 190.2, subdivision (a)(22).

The jury found Curiel guilty of Tejeda's murder (§ 187, subd. (a)), with a true finding on the gang special circumstance (§ 190.2, subd. (a)(22)). It further found Curiel vicariously discharged a firearm within the meaning of section 12022.53, subdivisions (d) and (e). The jury also convicted Curiel of street terrorism in violation of section 186.22, subdivision (a). The court declared a mistrial on a second murder count and dismissed the charge. It sentenced Curiel to a term of life without the possibility of parole plus 25 years to life.

In April 2019, Curiel filed a petition for resentencing pursuant to section 1170.95. The court appointed counsel. After briefing, but without issuing an order to show cause and holding an evidentiary hearing, the court denied Curiel's petition.

DISCUSSION

I. *S.B. 1437 and Section 1170.95*

"Effective January 1, 2019, the Legislature passed Senate Bill 1437 'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' [Citation.] In addition to substantively amending sections 188 and 189 . . . Senate Bill 1437 added section 1170.95, which provides a procedure for convicted murderers who could not be convicted under the law as amended to retroactively seek relief. [Citation.]" (*People v. Lewis* (2021) 11 Cal.5th 952, 959 (*Lewis*).)

Section 1170.95, subdivision (a), provides, in relevant part, "A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts. . . ." Under section 1170.95, if the petitioner makes a prima facie showing, the court must issue an order to show cause (OSC) and, absent a waiver and stipulation by the parties, hold a hearing to determine whether to vacate the murder conviction, recall the sentence, and resentence the petitioner. (§ 1170.95, subds. (c), (d)(1).) A prima facie showing under section 1170.95 requires the following: (1) an accusatory pleading was filed against the petitioner allowing the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine; (2) he or she was convicted of first or second degree murder following a trial, or accepted a plea offer to first or second degree murder in lieu of trial, at which he or she could have been so convicted; and (3) that he or she could not be convicted of murder due to the amendments to sections 188 and 189. (§ 1170.95, subd. (a)(1)-(3).)

The "authority to make determinations without conducting an evidentiary hearing pursuant to section 1170.95, [subdivision] (d) is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime)." (*People v. Drayton* (2020) 47 Cal.App.5th 965, 980.) "If, accepting the facts asserted in the petition as true, the petitioner would be entitled to relief because he or she has met the requirements of section 1170.95[, subdivision] (a), then the trial court should issue an order to show cause. [Citation.]" (*Id*. at pp. 980-981.) An order summarily denying a section 1170.95 petition without issuing an OSC is a question of law subject to de novo review. (*Id*. at p. 981.)

II. *Analysis*

Curiel argues the trial court improperly denied his petition after he made a prima facie showing under section 1170.95. We agree.

Curiel alleged in his petition, and our record reflects, one of the theories the prosecution relied on to convict him of first degree murder was the natural and probable consequences theory. Notwithstanding this showing, however, the trial court determined Curiel to be ineligible based upon the jury's true finding on the special circumstance that the murder was to further the activities of a criminal street gang within the meaning of section 190.2, subdivision (a)(22). The Attorney General argues the special circumstance finding established Curiel acted with intent to kill, rendering him ineligible for resentencing under section 1170.95 as a matter of law. We disagree with the Attorney General.

We note a defendant convicted of murder for directly aiding and abetting that offense is ineligible for resentencing under section 1170.95. Relief is precluded in that situation because liability stems from the defendant's own mental state; it is not

dependent on imputed malice under the felony murder rule or the natural and probable consequences doctrine. (See *People v. Chiu* (2014) 59 Cal.4th 155, 167 [a direct aider and abettor "acts with the mens rea required for first degree murder"]; *People v. McCoy* (2001) 25 Cal.4th 1111, 1118 [a direct aider and abettor must necessarily "know and share the murderous intent of the actual perpetrator"].)

However, to convict a defendant for first degree murder under the theory of direct aiding and abetting, the prosecution must prove more than just murderous intent. In addition to proving the defendant harbored the intent to kill, the prosecution must also show the defendant actually "aided or encouraged the commission of the murder[.]" (*Chiu, supra*, 59 Cal.4th at p. 167; see generally CALCRIM No. 401.)

In this case, the jury's true finding on the special circumstance allegation did not prove this crucial additional requirement. Rather, it only satisfied the intent requirement for aiding and abetting a murder. The jury's finding shed no light on whether Curiel actually encouraged or assisted the perpetrator in carrying out the murder. Thus, the jury's finding on the special circumstance does not prove, without more, he was convicted under the theory of direct aiding and abetting. While the jury established Curiel had the mindset of a murderer, they did not prove he committed the necessary acts to subject him to murder liability under that theory of culpability. (See *People v. Duchine* (2021) 60 Cal.App.5th 798, 815 [in order to deny resentencing petition at prima facie stage of proceedings, record of conviction must conclusively establish defendant both "engaged in the requisite acts" *and* "had the requisite intent" to be guilty of murder under S.B. No. 1437] (*Duchine*).) The jury's findings did not prove as a matter of law Curiel was convicted under the theory of direct aiding and abetting. Because the jury could have convicted under the now-defunct natural and probable consequences theory of first degree murder, it was error for the trial court to deny his petition for resentencing at this preliminary stage.

Indeed, the Attorney General concedes this very issue by stating: "Since [Curiel] was not the shooter, and since he was not charged with felony murder . . . , there were two avenues of murder liability. Either [Curiel] directly aided and abetted Hernandez's murder of Tejada or [Curiel] aided and abetted Hernandez in the commission of another crime, the natural and probable consequences of which were the murder of Tejada. After being instructed on both these theories, the jury convicted Curiel of murder." The Attorney General also admits, "True, as [Curiel] notes, we cannot know for sure if the jury convicted him based on the natural-and-probable-consequences doctrine or as a direct aider and abettor."

This is not to say Curiel is necessarily entitled to relief under section 1170.95. We agree with our colleagues in the First District, Division 2, that "the time for weighing and balancing and making findings on the ultimate issues arises at the evidentiary hearing stage rather than the prima facie stage, at least where the record is not dispositive on the factual issues." (*Duchine*, *supra*, 60 Cal.App.5th at p. 815.) The trial court should have issued an order to show cause and, absent a waiver and stipulation by the parties, ordered a hearing to allow the prosecution to prove beyond a reasonable doubt that, notwithstanding its reliance on the now-defunct theory of natural and probable consequences, Curiel is ineligible for resentencing because he directly aided and abetted the murder. (§ 1170.95, subds. (a)(3), (d)(3); see, e.g., *People v. Duke* (2020) 55 Cal.App.5th at 113, 122-124 [defendant's petition for resentencing properly denied where evidence established he directly aided and abetted the murder].) Absent such proof, the trial court must grant Curiel's petition and resentence him in accordance with section 1170.95.

DISPOSITION

The postjudgment order denying Curiel's section 1170.95 petition is reversed, and the matter remanded with directions to issue an order to show cause and to proceed consistently with section 1170.95, subdivision (d).

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

MARKS, J.*

*Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Curiel**
Case No.:

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On December 14, 2021, I electronically served the attached **PETITION FOR REVIEW** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on December 14, 2021, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Orange County Superior Court
Clerk of the Court
For: The Honorable Julian Bailey
341 The City Drive South
Orange, CA 92868-3205

Court of Appeal of the State of CA
Fourth Appellate District-Div. Three
601 West Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 14, 2021, at San Diego, California.

B. Romero
Declarant


Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **The People of the State of California v. Freddy Alfredo Curiel**
Case Number: **TEMP-1VN4DKDO**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Seth.Friedman@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/14/2021
Date

/s/BLANCA ROMERO
Signature

Friedman, Seth (186239)
Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego
Law Firm