IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S270723
Plaintiff and Respondent,	(Fourth Dist., Div. 3, No. G059251)
v.	(Orange County Superior Court No. 04CF2780)
ANDRES QUINONEZ REYES,	
Defendant and Appellant.	

Appeal from the Superior Court of Orange County
Hon. Richard M. King, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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A. Standard of decision and standard of review.

The People state that the superior court "necessarily made credibility determinations" in light of the fact that both Reyes and a defense psychologist testified. (RB 23.) The superior court's findings, however, were based on the inculpatory evidence from the original trial, and thus did not rely at all on the defense evidence. (See also AOB 28.) Those findings in support of implied-malice murder were therefore based entirely on the cold record. Further, this Court has recognized that independent review may be appropriate even in particular cases where there is some live testimony. (See People v. Vivar (2021) 11 Cal.5th 510, 527-528.)

Appellant recognizes that the Court of Appeal recently rejected independent review in an evidentiary hearing under Penal Code section 1170.95, subdivision (d)(3). (People v. Clements (2022) 75 Cal.App.5th 276, 301.) Clements, however, did not take into account the rationale of this Court's opinion, People v. Vivar, supra, such as "the relative competence of trial courts and appellate courts to assess th[e] evidence" and "the interests at stake" (id. at p. 527) (in Vivar, relief from deportation after a sentence has been served, and in this case relief from a life sentence that defendant is still having to serve).

The People rely on the Court's specification of issues. (RB

22.) But so fundamental a threshold question as the standard of review would seem to be "fairly included" in the specified issues. (See Cal. Rules of Court, rule 8.516(a)(1).)

B. Insufficient evidence of implied malice.

1. Insufficient evidence of objective conduct that involved a high probability of death.

There was no jury finding of a qualifying act. The People argue that the jury "necessarily found" the objective component of implied-malice murder. (RB 25 (boldfaced heading), 27.) The People, however, rely on the underlying act for a murder under the now-invalid doctrine of natural and probable consequence: "Reyes committed an intentional act (specifically, a criminal act known as the 'target offense'), the natural and probable consequences of which included murder." (RB 27; see also RB 29.)

The evident flaw in the People's analysis is their conflation of "natural consequences" for purposes of implied-malice murder and "natural and probable consequence" for purposes of the doctrine of liability under the doctrine of natural and probable consequence. The two concepts are not equivalent or even comparable. (People v. Martinez (2007) 154 Cal.App.4th 314, 334 ("Contrary to defendant's suggestion, the use of the term 'natural consequences' in the CALCRIM No. 520 definition of implied malice does not import into the crime of murder the caselaw

relating to the distinct 'natural and probable consequences' doctrine developed in the context of aiding and abetting liability"); Witkin and Epstein, California Criminal Law (4th ed. 2021) *Crimes Against the Person*, § 211.)

One such difference is that the objective "probability" or likelihood of death that the People must demonstrate is far higher for implied malice. The People must prove beyond a reasonable doubt that defendant committed "an act that involves a high degree of probability that it will result in death." (People v. Knoller (2007) 41 Cal.4th 139, 156-157, quotation marks and citation omitted.) Under the doctrine of natural and probable consequence, on the other hand, it suffices that the unintended crime be a "reasonably foreseeable" result of the act (commission of or aiding and abetting in the target crime). (People v. Medina (2009) 46 Cal.4th 913, 920, italics omitted.) "To be reasonably foreseeable the consequence *need not have been a strong probability*; a possible consequence which might reasonably have been contemplated is enough." (Ibid., emphasis added, quotation marks, emendations, and citation omitted; see also People v. Manibusan (2013) 58 Cal.4th 40, 91.)

A "high degree of probability" (or high probability) and a "strong probability" or "strong likelihood" seem equivalent, and the courts have indeed treated them as such in this and other contexts. (See People v. Matta (1976) 57 Cal.App.3d 472, 488; People v. Ross (1979) 92 Cal.App.3d 391, 407; cf. Gamer, Developments in California Homicide Law (2003) 36 Loy. L.A. L.Rev. 1425, 1425-1426 (using "high probability" and "strong

probability" interchangeably with respect to the objective act for implied-malice murder).) Thus, in holding that foreseeability under the doctrine of natural and probable consequence does not objectively require a "strong probability" of the result (here, death), People v. Medina, supra, in effect held that it did not require a *high* probability (or high degree of probability) of death, which is the standard for implied-malice murder. (See also People v. Superior Court (Valenzuela) (2021) 73 Cal.App.5th 485, 503 ("But while it is fair to say that the "act" [defendant] fostered and instigated [under the doctrine of natural and probable consequence] was an assault with a deadly weapon, his culpability for implied malice murder on a direct aiding and abetting theory requires more than just showing an intended aggravated assault. Rather, a determination that the intended assault involved a significant risk of death is necessary").)

Here, the record shows only that the jury convicted Reyes of second-degree murder. (CT (1) 44, 69.) It does not show that the jury found a high probability of death; the jury might well have found mere foreseeability under the doctrine of natural and probable consequence, as the prosecutor frequently urged the jury to do. (Exh. (3) 539:8-10; (3) 555:23-540:1-11; (3) 576:10-577:7.) Accordingly, contrary to the People's analysis (RB 27), there is no "binding" factual finding with respect to the act.

The new law does not prohibit consideration of all the elements of implied-malice murder in the evidentiary hearing, but rather contemplates full litigation of the contested issues. Next, the People argue that the new law (Stats. 2018, ch. 1015 (S.B. 1437), amending Pen. Code, § 188 and adding Pen. Code, § 1170.95) "did not amend the objective element (i.e., the actus reus requirements) of the crime of malice murder under section 188." (RB 26.) From this, the People conclude that it is not permissible to "relitigate[]" the objective act for implied-malice murder. (RB 27.) There is no "relitigation," however, because there was no express or implied jury finding that the act satisfied the higher standard for implied-malice murder.

Further, the People's argument proves too much. Not only did the new law "not amend the objective element" (RB 26) of implied-malice murder, but it also left unchanged the subjective elements. The entirety of the definition of implied-malice murder is the same now as it was prior to enactment of S.B. 1437. (See Pen. Code, § 188, subd. (a)(2); People v. Clements, supra, 75 Cal.App.5th at p. 298.) Yet, the People do not argue that it is impermissible to "relitigate" the unchanged subjective elements.

The People also err in their assumption that the objective and subjective elements can be separated at all when implied malice is contested in an evidentiary hearing. For implied-malice murder there is an essential link between the specific highly dangerous act (the objective component) and defendant's knowledge and conscious disregard of the risk of that specific act (the subjective components). (See, e.g., People v. Bryant (2013) 56

Cal.4th 959, 965 (recognizing that the term "implied malice" has both a physical and a mental component).) Defendant must directly commit or aid and abet in the direct commission of an act, all the while knowing and consciously disregarding the high probability of death from his specific conduct. (See People v. Knoller, supra, 41 Cal.4th at p. 143; People v. Powell (2021) 63 Cal.App.5th 689, 713.) It is not feasible to evaluate whether defendant knew the risk of his conduct and proceeded with that conduct in conscious disregard of that risk without first determining the qualifying conduct (act) at issue, that is, the conduct for which he had knowledge and conscious disregard. A free-floating general disregard for the lives of others or an intent to commit a related but distinct crime, such as a target crime, is not sufficient. (Cf. In re Taylor (2019) 34 Cal.App.5th 543, 560 (in analogous context of reckless indifference, this element "is not satisfied with evidence of a general indifference to human life"); In re K.M. (2022) 75 Cal.App.5th 323, 330 ("Evidence that a person aided one crime cannot substitute for evidence that the person aided a different crime").)

This principle is illustrated by a recent analogous case. In People v. Pacheco (2022) 76 Cal.App.5th 118 [290 Cal.Rptr.3d 891, 894], defendant gang member "jumped" two people, causing the death of one of them. He was convicted of first-degree murder as an aider and abettor, with a true finding on the gang special circumstance. (Ibid.) In a section 1170.95 petition he sought an evidentiary hearing on the ground that the jury may have convicted him under the doctrine of natural and probable

consequence, but the trial court denied the petition at the prima facie stage on the ground that the gang special circumstance showed his intent to kill. (290 Cal.Rptr.3d at pp. 894, 897.) The Court of Appeal reversed, holding that at the prima facie stage it was possible that defendant intended to kill the victim but did not take any action to further *that* intent. (Id. at p. 898.) That is, the mens rea was not necessarily linked to the actus reus at issue.

Although Pacheco was not an implied-malice case, its application of general principles of aiding and abetting where the jury may have relied on the doctrine of natural and probable consequence is equally applicable: defendant's intent must be tied to the specific act that he committed or aided and abetted. Aiding and abetting a target offense within the scope of the doctrine of natural and probable consequence cannot substitute for proof of malice, whether express or implied, because defendant's malice may not have been directed to that target offense. It follows that in a contested hearing the People must establish the sufficiency of the element of a highly dangerous act for which they contend that defendant harbored the subjective elements of implied malice.

The sole authority on which the People rely in fact supports appellant's position. In People v. Clements, supra, 75 Cal.App.5th 276 (RB 26), defendant (petitioner) "argu[ed] she was convicted of second degree murder under a natural and probable consequences theory and could not be convicted under the current law." (Id. at p. 282.) The trial court accordingly held

an evidentiary hearing and found that she had acted with implied malice. (Id. at pp. 282-283.) The Court of Appeal first specified the act at issue, for which it found substantial evidence. (See id. at p. 299 ("First, it was basically uncontested that she solicited Earl to assault Jim").) Only after thus establishing the highly dangerous act did the court proceed to consider the subjective elements. (E.g., ibid. ("Second, there was substantial evidence she understood the risk of her solicitation").)

Reyes has proceeded in precisely the same as in Clements, the People's authority. First, he explained why the potential highly dangerous acts were in fact insufficient (AOB 30-53), and then why there was insufficient evidence of the subjective components even assuming arguendo that there was highly dangerous conduct on Reyes's part under all the circumstances. (AOB 53-77).[1]

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[1] Appellant does not concede the People's premise that the jury's adverse findings may ever be binding once the case has proceeded from the prima-facie stage to an evidentiary hearing with new evidence. The Court of Appeal recently held that an acquittal or a not-true finding on an enhancement allegation was binding in favor of defendant in the evidentiary hearing, but the court limited its holding to evidentiary hearings in which neither side introduced new evidence. (People v. Cooper (April 12, 2022, A161632) __ Cal.App.5th __ [2022 WL 1090571, *1].) Here, there was new defense evidence. Further, in Cooper the binding effect of a finding in favor of defendant was based on considerations that are not applicable to a finding *against* defendant. (See id. at pp. *11-*14.) This Court has granted review of a recent case that stated in dictum that such preclusion applies in the evidentiary phase. (People v. Price (2021) 71 Cal.App.5th 1128, 1151-1152,

(. . . continued)

There was insufficient evidence of the objective element.

The People have elected to rely exclusively on their view that the objective element of a highly dangerous act has already been established and is binding. The People do not otherwise attempt to defend the sufficiency of the evidence of this element. Appellant therefore respectfully relies on the discussion in the opening brief, supplemented with the following new authorities.

The Court of Appeal has recently emphasized that "liability for aiding and abetting requires some affirmative action that assists or encourages the commission of the crime." (In re K.M., supra, 75 Cal.App.5th at p. 329, quoting People v. Partee (2020) 8 Cal.5th 860, 868, quotation marks, emendations, and italics omitted.) In that case, the minor and four others approached the victim. (Id. at p. 326.) One of them ("Angel") grabbed the victim's cell phone. (Ibid.) The victim chased him and tackled him to the ground. (Ibid.) Three of the perpetrators, including the minor, surrounded and threatened him, but they fled when the victim's employer arrived. (Ibid.)

The Court of Appeal found insufficient evidence that the minor committed an act that assisted or encouraged the theft of the cell phone. (Id. at pp. 329-330.) There was evidence that the

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review granted February 9, 2022, S272572 (grant and hold behind People v. Strong (December 18, 2020, C091162) [nonpub. opn.], review granted March 10, 2021, S266606; see also People v. Coley (March 23, 2022, A159927) __ Cal.App.5th __ [2022 WL 1127328, *6] (dictum in support of Price's dictum).)

minor "stood behind the victim and yelled 'you hurt my friend, we're going to hurt you.'" (Id. at p. 329.) That, however, occurred after Angel had taken the cell phone, so that "there was no nexus between this action and the crime – the theft of the phone." (Ibid.) This left only a suspicion based on the minor's association with the others, which amounted only to a suspicious circumstance. (Id. at p. 328; see also id. at p. 329 ("A person present at the scene of a crime – even one who is the criminal's companion, knows a crime is being committed, fails to prevent it, and later expresses approval of it – is not guilty of aiding and abetting the crime if he takes no action to aid or encourage the crime").)

Here, Reyes was riding his bicycle back home with his fellow gang friends when one of them, Lopez, confronted the victim and shot him. (Exh. (1) 136-141, 150-151.) There was no evidence of any affirmative act on Reyes's part prior to or during the confrontation and the shooting. In fact, there was no evidence that he was even close to Lopez during the confrontation. This is therefore an easier case than In re K.M., in which the minor and his companions were together when they accosted the victim. (See id. at p. 326.) Further, just as in that case, any act or omission on Reyes's part after the shooting was irrelevant, for there could not have been a "nexus between this action and the crime" because it occurred subsequent to the crime. (In re K.M. at p. 329.) (See also AOB 50-51.)

The opening brief relied in part on a federal appellate case, United States v. Garcia (9th Cir. 1998) 151 F.3d 1243. (AOB 42, 46-47.) This Court recently cited with approval Garcia's holding in a conspiracy case that gang members' general agreement to back each other up does not support such conduct on a particular occasion. (People v. Holmes, McClain and Newborn (2022) 12 Cal.5th 719, 781 ("Standing alone, a gang's general agreement to fight rivals may not suffice to support a particular conspiracy charge").)

2. Insufficient evidence of the subjective components.

Reyes's comment after his arrest. (See AOB 54.) The People correctly do not rely on Reyes's comment to detectives en route to juvenile hall to support any of the elements of implied-malice murder. The People thus appear to recognize that the superior court and the Court of Appeal erred in surmising that the comment showed that Reyes "knew that what he was doing was dangerous to human life." (RT 298:13-19, quoted in the opinion below, People v. Reyes (August 4, 2021, No. G059251) [nonpub. opn.] 2021 WL 3394935, *5, review granted October 17, 2021, S270723; id. at p. *6 (approving superior court's findings).) Reyes's comment not only did not support that inference but in fact tended to exculpate him. (See AOB 56.)

Reyes's knowledge that Lopez had a gun. (See AOB 57.) The People reason that "Reyes knew Lopez intended to commit

an armed gang confrontation in the contested area" because he knew Lopez was carrying a gun. (RB 45; see also RB 29, 32.) The assumption that any time a gang member carries a gun he is likely to use it, and thereby endanger the life of another, is not supported by the evidence. As the prosecutor's own gang expert explained, gang members carry guns for self-defense (exh. (2) 390) and as a way of showing off to fellow members of their gang (exh. (2) 405). The sole evidence as to Lopez himself was Reyes's statement that Lopez "did carry a firearm from time to time as a known gang member with his rank would do." (CT (1) 132 (declaration in support of petition for resentencing).) Reyes therefore had no reason to know that on this particular occasion Lopez intended to fire the gun or even to brandish it. Lopez, after all, had no history of firing or brandishing a gun, much less a history of which Reyes himself was aware. Even if the gang expert had opined that gang members generally carry guns in order to use them offensively, this would have been an impermissible inference from gang culture, as explained below.

Circumstances prior to the confrontation. (See AOB 59.) The People make a series of surmises based solely on Reyes's gang membership. For example, the People cite the gang expert's discussion of how a gang member may enhance his status within the gang by committing a violent crime. (RB 31, citing Exh. (2) 391-392, 395.) From this, the People conclude that "Reyes was personally motivated to participate in the gang's crimes because of the benefit he would receive in the form of increased status and

respect in his gang." (RB 31.) There was, however, no evidence whatsoever that Reyes was thus motivated at all, or that any such motivation influenced his behavior on this occasion. The People's surmise amounts to an improper inference of specific conduct of a gang member in a particular case based on gang culture. (See People v. Samaniego (2009) 172 Cal.App.4th 1148, 1179 ("While that opinion [of the gang expert] may generally be true regarding gang culture, it is still speculative in its application to the specific conduct of gang members in a particular case").) As noted in subsection (B)(1), this Court has recognized the same principle as applied to conspiracy, which is closely analogous to aiding and abetting. (See People v. Holmes, McClain and Newborn, supra, 12 Cal.5th at p. 781; see also People v. Nguyen (2015) 61 Cal.4th 1015, 1055 ("gang evidence standing alone cannot prove a defendant is an aider and abettor to a crime") (quotation marks and citation omitted).)

Similarly, the People err in surmising that Reyes "necessarily knew that his fellow gang members were similarly motivated, and thus more likely to initiate or perpetuate violence." (RB 31.) There is no evidence in the record about the motivation of Lopez or any of the other bicyclists on the afternoon of the shooting, much less that Reyes was aware of such motivation. The fact that a crime may benefit the gang or a gang member does not constitute substantial evidence that this was a particular person's motivation for the specific charged crime at issue. (See People v. Gonzalez (2021) 59 Cal.App.5th 643, 649; People v. Ramirez (2021) 71 Cal.App.5th 970, 990 (insufficient

evidence of reckless indifference where, although the gang expert testified that gang members were willing to commit volent crimes in order to intimidate outsiders and the community, there was "no evidence [defendant] sought to enhance his reputation in the gang by escalating the attempted carjacking through the use of lethal force").) Further, the motivation of the other bicyclists is irrelevant to Reye's subjective knowledge without a showing that Reyes himself knew their motivation, and there was no evidence of such knowledge.

The People rely on the gang expert's discussion of general gang culture to infer that Reyes and the other bicyclists traveled "into contested gang territory to pursue and confront potential rival gang members." (RB 29.) This is erroneous in two respects. *First*, as explained above, there was no actual evidence that on this occasion Reyes traveled into contested territory for the purpose of pursuing and confronting potential rivals. The gang expert in fact conceded that he did not know what Lopez was thinking and that the shooting may not have been gang related. (Exh. (2) 450.)

Second, the record actually shows the contrary: Reyes traveled into contested territory because that was the way to get to his friends' home and then the way to get back to his own area after visiting his friends. (Exh. (2) 453 (gang expert concedes that the bicyclists would "have to go through a fringe area to get there [the friends' home]"); RT 193:10-20 (Reyes's testimony).) It is not necessary to indulge in conjectures about motive when the obvious motive appears on the face of the record. (See People v.

Soriano (2021) 65 Cal.App.5th 278, 289 (where defendant's location was explained by the fact that he lived close by, the fact that he was also in gang territory had no probative value); People v. Lara (2017) 9 Cal.App.5th 296, 319-320.)

In summary, stripped of improper surmises based on general gang culture, the record shows only that Lopez broke away from the group of bicyclists to accost a motorist, while Reyes continued pedaling north on Sullivan until he paused to see what was going on.

The People also rely on the conviction for participation in a criminal street gang (count 2) and the gang enhancement (count 1). (See CT (1) 71-72.) First, the People reason that in light of the gang enhancement "the jury necessarily concluded that Reyes committed the murder for the benefit of, at the direction of, or in association with F-Troop, and that Reyes intended to assist, further, or promote criminal conduct by F-Troop members." (RB 30, referring to Pen. Code, § 186.22, subd. (b).) The People's phrasing obscures the fact that insofar as the jury relied on the doctrine of natural and probable consequence, it did not find that his act that was the underlying basis of the murder conviction and thus of the gang enhancement was murder, but rather that it was one of the target offenses, namely, "disturbing the peace, or conspiracy to commit either disturbing the peace or assault." (CT (2) 425 (instruction).) It was one of these target crimes that Reyes sought to assist, further, or promote. A willingness to disturb the peace does not "strongly suggest that Reyes was

subjectively aware of the danger to human life" (RB 30) or even weakly hint at such a subjective awareness.

The People rely on the substantive gang crime (Pen. Code, § 186.22, subd. (a)) to show that Reyes knew the gang was violent because he was aware that its "pattern of criminal activities included murder and attempted voluntary manslaughter." (RB 30.) At the time of trial, however, the element of "pattern" required the commission of only two qualifying crimes over a period of many years, one of which could include the currently charged crime, and neither of which had to be related to the gang at all. (CT (2) 433-434 (instruction); see former Pen. Code, § 186.22, subd. (e), as amended by Proposition 21, as approved by voters, Primary Elec. (March 7, 2000).) In this case, the sole prior crime on which the People relied was an attempted voluntary manslaughter committed by one Melgoza in 2002; the other crime was the charged murder itself. (See Exh. (2) 412:15-413:6; CT (2) 433-434.) A single incident by a single member of this large gang of at least 200 members (according to the gang expert's "extremely conservative" estimate (exh. (2) 407)) contributes nothing to a showing of Reyes's purported knowledge that there was a risk of death by riding his bicycle back home with a few other members of the gang, one of whom happened to be armed.[2]

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[2] Melgoza was also known as "Frank Lopez." (Trial exhibit 19, first page.) The dates of birth demonstrate that this was not the Frank Lopez who was bicycling with Reyes. (See trial exhibit 19, first page; RT 214:21-23.)

Finally, apart from the fact that these findings do not factually support the People's proffered inference, the findings cannot be considered in any event for two reasons. *First*, as explained above with respect to the jury's finding of target crimes, once the case has reached the stage of an evidentiary hearing, prior findings are no longer binding. The superior court sits as the trier of fact in a plenary proceeding.

Second, the conviction on the substantive gang crime and the true finding on the gang enhancement are themselves not binding because the gang statute has been amended to exclude reputational benefit. Stats. 2021, ch. 699 (A.B. 333), approved by the Governor on October 8, 2021.) (Here, the prosecutor's gang expert squarely relied on the reputation benefit in responding to a hypothetical. (Exh. (2) 441:7-19.)) This case is thus analogous to the cases holding that in a prima-facie hearing under section 1170.95, jury findings based on the pre-*Banks/Clark* definition of reckless indifference and major participant are not valid and cannot defeat a prima facie case. (See, e.g., People v. Mejorado (2022) 73 Cal.App.5th 562, 570-571, review granted March 23, 2022, S273159; see People v. Banks (2015) 61 Cal.4th 788; People v. Clark (2016) 63 Cal.4th 522.) (This issue is currently before the Court. (People v. Strong, supra, S266606; cf. People v. Curiel (November 4, 2021, G058604) [nonpub. opn.], review granted January 26, 2022, S272238 (considering whether true finding on gang special circumstance (Pen. Code, § 190.2, subd. (a)(22) bars relief at the prima facie stage).)

No intentional act showing knowledge and conscious disregard. (See AOB 60.) The People rely on the expert's testimony about "backup." (RB 32, citing exh. (2) 400.) The People proffer that "[i]t is reasonable to infer that Reyes knew his gang had identified and selected a target, and consistent with his role as 'back up,' and the expectation that he would provide support and assistance, Reyes and the others in his group worked as a unit to chase the car and track down [the victim]." (RB 33.) This picture is mere surmise of lockstep conduct based on improper inferences from evidence of general gang culture. (See People v. Nguyen, supra, 61 Cal.4th at p. 1055; Menifee v. Superior Court (2020) 57 Cal.App.5th 343, 364.) Further, as explained in the opening brief (AOB 48-49), in his response to the hypothetical the gang expert never testified that when one gang member commits a crime, all of the other gang members who are present in the area are acting as backup. He testified only that if it is assumed that gang members are going out in a group to commit a crime together, then seemingly passive members have a role as backup. (See exh. (2) 394-395, 399-400.) Thus, for purposes of the hypothetical, the expert simply assumed that Reyes was in fact bicycling with Lopez to commit a crime with him. His testimony cannot be bootstrapped to support the theory that he was indeed bicycling with Lopez in order to commit a crime with him.

No other part of the record supports the People's portrayal. The People state that when the victim drove by, "Reyes and his

fellow gang members looked at each other and then started chasing after [the victim's] car, yelling at him to slow down and to stop so they could 'talk to him.'" (RB 33.) Although the eyewitness (Steven G.) sometimes used the vague "they" in describing what one or more of the bicyclists did or said (e.g., exh. (1) 141), he made clear that it was a single bicyclist who yelled out to the driver. (Exh. (1) 163 ("One of them had screamed to the car to slow down"); see also (1) 148 ("One of them that was going was screaming at the car").) There was no evidence that Reyes was that person, even disregarding his testimony that he was not the one. (See RT 212:24-213:1.) Similarly, there was no evidence that Lopez initially intended a confrontation, violent or otherwise. For example, there was no evidence that when he spoke to the driver he was holding, much less brandishing, his gun. The only evidence on this point was Reyes's testimony that Lopez was *not* holding a gun. (RT 211:2-8.) Although the superior court was not obligated to credit this testimony, disbelief could not constitute affirmative evidence of the contrary. (E.g., People v. Lara, supra, 9 Cal.App.5th at p. 319.) The assertion that Reyes and the others all "worked as a unit" (RB 33) is hard to square with the testimony of the very eyewitnesses on whom the People rely. According to Steven G., before the bicyclists reached the intersection they had already separated or drifted into two groups. (Exh. (1) 143, 147-148, 163.) The undercover detective who happened to be approaching the intersection at the time of the shooting confirmed that there were only two bicyclists near Lopez. (Exh. (1) 178-179.) Thus, Steven G.'s occasional

indiscriminate use of "they," in the face of his subsequent specific clarification, cannot constitute *substantial* evidence. (See In re I.C. (2018) 4 Cal.5th 869, 892 ("It is well settled that the standard [of substantial evidence] is not satisfied simply by pointing to isolated evidence torn from the context of the whole record") (quotation marks and citation omitted); People v. Sanford (2017) 11 Cal.App.5th 84, 94 (isolated evidence was not substantial where "other, uncontroverted evidence undermines the reasonableness" of the proposed inference); Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 654 ("Not every bald assertion rises to the dignity of substantial evidence").)

Even if there had been substantial evidence that all seven bicyclists did indeed look at each other, that all seven chased the victim's car, and that all seven yelled at the victim, this leaves open the question what Reyes knew and intended. His conduct would have been entirely consistent with disturbing the peace (which was in fact one of the target crimes the People specified under the doctrine of natural and probable consequence (CT (2) 425)) or a similar misdemeanor or other youthful exhibition that he did not expect would endanger anyone's life.

The People's theory that Reyes was deliberately acting as backup by virtue of being present in the vicinity when another gang member committed a crime is a resurrection of the now-invalid theory of imputed malice: because Reyes was in the same gang, and there was an expectation that gang members would back each other up, such backup conduct is imputed to Reyes on this specific occasion. Such imputed malice is precisely what S.B.

1437 abolished. (See Stats. 2018, ch. 1015 (S.B. 1437), §§ 1(f), 1(g) (statement of legislative intent); id., § 2 (adding Pen. Code, § 188, subd. (a)(3).)

An illustration of what "backup" actually involves is found in People v. Medina (2016) 245 Cal.App.4th 778. There, codefendant Whitehead "eagerly joined [his accomplices] as armed backup in their ill-fated attempt to remedy an illegal drug deal gone bad." (Id. at p. 793.) For example, when he learned about the plot "he *asked* to go along." (Id. at p. 792, italics in original.) "[H]e was the first out of the car and immediately pulled out his gun." (Ibid.) He followed orders to watch one member of the opposing group because it was suspected that he was armed. (Ibid.) He was not present when the shooting occurred only because he had followed another order to escort someone away. (Ibid.) Here, there was no evidence that Reyes asked to participate in a gang confrontation, or that he eagerly scrambled out of the car to confront the opponents, or that he followed any orders; and of course he was not armed with any type of weapon.

Reyes's subsequent possession of the murder weapon. (See AOB 61.) The People do not explain how Reyes's subsequent brandishing of Lopez's gun showed that he had acted with knowledge and conscious disregard with respect to the prior shooting at the intersection. The People only draw the inference that Reyes had a character for not caring about potential deadly consequences to others. (See RB 34 ("This conduct demonstrates

Reyes's conscious disregard for the danger such actions posed to human life").) This propensity argument is impermissible. (See, e.g., People v. Knoller, supra, 41 Cal.4th 139, 151-152; People v. Clark (2021) 62 Cal.App.5th 939, 961.)

Reyes's subsequent fight with Nieves. (See AOB 63.) Here again, the People's inference of conscious disregard in an entirely different incident (RB 34-35) is based on an impermissible inference from his supposed character. The unspoken premise of the People's argument is that Reyes was the kind of person who would initiate a gang confrontation; and based on this character or propensity he was not a passive observer to Lopez's unexpected actions but rather an aider and abettor whose seemingly manifest inaction really constituted the affirmative act of backup.

The People's authorities (RB 35) do not involve reliance on an entirely distinct subsequent crime but rather on defendant's admissions or conduct *with respect to the charged crime* that tend to show his state of mind when he committed that crime, not merely a general character for indifference to the consequences of his action. (See, e.g., People v. Ogg (1958) 159 Cal.App.2d 38 (AOB 64; RB 35) (defendant failed to seek medical aid or other assistance after he struck his wife); People v. McCartney (1963) 222 Cal.App.2d 461, 469 (RB 35) (defendant admitted "she was glad she shot the deceased"); People v. Burden (1977) 72 Cal.App.3d 603, 606-607, 620 (RB 35) (defendant father, whose infant son died of malnutrition and dehydration, admitted "that he did nothing about the child's deplorable state, though he could

have if he 'had really wanted to,' because he 'just didn't care'").) (See AOB 63-65.)

The People state that Reyes "mirrored Lopez's conduct when he assaulted F.N. with the very same gun." (RB 40.) The incidents are not comparable except at the most general level. Reyes was not accosting and confronting a potential rival in the middle of a crowded intersection in disputed territory, as Lopez had done. Rather, in a secluded part of his gang's own territory, he approached someone to determine whether he was an intruder. (See exh. (1) 211, 216-217; (2) 225-226.) As the gang expert admitted, such encounters sometimes end peaceably rather than violently, and in fact the expert could not say that "one happens more often than not [*sic*] than the others." (Exh. (2) 404.) The difference is evident between offensive actions looking for a fight and defensive encounters that may end peaceably as often as, or more often than, violently. There was no "mirroring."

Reyes's flight, demeanor, and failure to seek aid. (See AOB 68.) The People state that Reyes "did not react with shock or surprise, nor did he render any aid to [the victim] or disassociate from Lopez and the others." (RB 34.) Reyes in fact disassociated himself from Lopez by immediately fleeing. (See exh. (1) 158.) There was no evidence that he fled *with* Lopez because there was no evidence he was one of the two bicyclists who were with the gunman. (See also exh. (1) 158 (Steven G. testifies that the bicyclists fled in two different general directions).) (See Juan H. v. Allen (9th Cir. 2005) 408 F.3d 1262, 1277 ("the trial record does

not support a conclusion that [the minor] left the murder scene in common 'flight' with [the killer]").)

The People's assertion that Reyes "did not react with shock or surprise" (RB 34) is memorably speculative. No one testified to seeing Reyes's facial expression.

The fact that this 15-year-old boy fled immediately after witnessing a shooting cannot support guilt, contrary to the People's contention (RB 34). "No reasonable trier of fact could find evidence of criminal culpability in the decision of a teenager to run home from the scene of a shooting." (Juan H., supra, 408 F.3d at p. 1277.)

As for failure to render aid, the crime occurred in a busy intersection with many pedestrians in the area. (See, e.g., exh. (1) 175.) Reyes would have known that help was going to arrive quickly. (Cf. In re Moore (2021) 68 Cal.App.5th 434, 452 (fleeing without rendering aid did not support reckless indifference "because there were other people in the parking lot at the time of the shooting," so that defendant "could have reasonably assumed that help would arrive quickly"); People v. Clark, supra, 63 Cal.4th at p. 620 ("defendant would have known that help in the form of police intervention was arriving"); In re Taylor, supra, 34 Cal.App.5th 543, 559 ("And it appears [defendant] knew help was arriving").) Certainly the record does not show that 15-year-old Reyes had any medical training that could have made any difference if he had intervened. (See Taylor at p. 559.)

Reyes's youth. (See AOB 69.) In addition to the authorities

cited in the opening brief, the Court of Appeal has reaffirmed the importance of taking into account the fact that a "teenager is less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotions or peer pressure than is an adult." (In re H.N. (March 29, 2022, as modified April 20, 2022, B313698) __ Cal.App.5th __ [2022 WL 906099, *4], quotation marks and citation.)

H.N. and the authorities cited in the opening brief merely corroborate the sentencing court's penetrating yet common-sense observation: "And you're here for any number of reasons, some of which boil down to the fact that when we're 15 years old we make stupid decisions and dumb mistakes." (Exh. (3) 613.)

The People concur that Reyes's youth "is a relevant factor." (RB 37.) The People reason, however, that "Reyes's gang background and knowledge of F-Troop's pattern of criminal activities put him on notice that violence was likely." (RB 39.) Being "on notice," however, is based on an objective (reasonable-person) standard. (See, e.g., Prudential-LMI Com. Ins. v. Superior Court (1990) 51 Cal.3d 674, 681.) The issue in this case is whether this 15-year-old boy subjectively grasped the consequences of his conduct in light of now-well-understood physiological and psychological facts of adolescent development, among other factors.

Separately, the People's analysis relies on their assumption that knowledge or intent imputed from defendant's gang membership is substantial evidence that he acted with a

particular mens rea in the case at hand. This is erroneous for the reasons discussed above.

The People join appellant in noting that People v. Ramirez, supra, 71 Cal.App.5th 970 involved reckless indifference, not implied malice. (RB 38-39; see AOB 69.) Nothing in the People's discussion of Ramirez casts doubt on its holding that "[a] juvenile's immaturity and failure to appreciate the risks and consequences of his or her actions bear directly on the question" of his subjective knowledge and conscious disregard of the risks. (Id. at p. 991.) The factual distinctions (see RB 38-39) favor Reyes, making it an even easier case of insufficiency of subjective knowledge and intent. In particular, defendant in Ramirez, who, like Reyes, was only 15 years old, admitted to the police that "he knew [that his fellow gang member] was planning a carjacking." (Id. at pp. 978-979.) Notwithstanding this knowledge, he accompanied him for that purpose (a carjacking), possibly because he "was influenced by peer pressure." (Id. at pp. 979, 991.) He knew that his gang companion had a gun, and he admitted that he himself was prepared to use physical violence, though he said he would not use a gun himself. (Id. at p. 979 ("I ain't gonna shoot. It's just me and my two fists").) In Reyes's case, there was no substantial evidence that he knew there was going to be a violent crime or indeed any crime, nor that he accompanied Lopez for the purpose of participating in a crime, nor that he was willing to use physical violence while participating in the crime.

Other matters. This Court has ordered depublished a case finding sufficient evidence of implied malice (discussed at AOB 75). (People v. Garcia (2020) 57 Cal.App.5th 100, review granted February 10, 2021, S265692, remanded to Court of Appeal and ordered depublished December 29, 2021.)

The People state that "[t]he law does not require proof the defendant knew definitively that someone would be killed." (RB 37.) Appellant has never made this contention. He specifically observed that defendant need only be aware "of engaging in conduct that endangers the life of another – no more, and no less." (AOB 53, quoting People v. Knoller, supra, 41 Cal.4th at p. 143.) Similarly, Reyes has never argued that the People must prove "the precise consequences that unfolded." (RB 37, quotation marks and citation omitted.)

II.

Insufficient evidence that Reyes's actions constituted murder or aided and abetted murder

The People appear to concur that there was no substantial evidence that Reyes was guilty of murder on the theory that he was the killer, that he directly aided and abetted the killer, that he conspired to commit murder, or that he directly committed an implied-malice murder. The People argue only that he aided and abetted Lopez's commission of an implied-malice murder. (See RB 41-47.)

Three new Court of Appeal opinions have reaffirmed that aiding and abetting an implied-malice murder requires that the aider and abettor himself "act[] with the mental state of implied malice." (People v. Langi (2022) 73 Cal.App.5th 972, 983; see also People v. Superior Court (Valenzuela), supra, 73 Cal.App.5th 485, 503 ("to commit implied malice murder as an aider and abettor one must personally harbor implied malice. This means the defendant knows that his conduct endangers the life of another and acts with conscious disregard for life") (quotation marks, emendations, and citations omitted); People v. Glukhoy (April 18, 2022, C084169) __ Cal.App.5th __ [2022 WL 1134484, *21].) Thus, it is not enough that he intentionally aid the perpetrator in conduct that the *perpetrator* knows endangers the life of another, and which the *perpetrator* proceeds with in conscious disregard of that danger. (See Valenzuela at p. 984 (jury may have erroneously found defendant "guilty of second degree murder by

imputing to him the implied malice of the actual killer, without finding that he personally acted with knowledge of the danger to, and with conscious disregard for, human life") (quotation marks and citation omitted).) As Valenzuela recognized, that principle follows from this Court's opinion, People v. Gentile (2020) 10 Cal.5th 830. (See Valenzuela at p. 503.)

The theory that Reyes aided and abetted an implied-malice murder does not lessen any part of the People's burden compared to the theory that he directly committed an implied-malice murder. As noted above, he must still personally harbor the mental component of knowledge and conscious disregard. As for the physical component, it is defendant's own conduct that is the relevant act. (See People v. Superior Court (Valenzuela), supra, 73 Cal.App.5th at p. 503 (it is the aider and abettor himself who must "act[] in conscious disregard for human life") (quotation marks and citation omitted); People v. Gentile, supra, 10 Cal.5th at p. 850 ("an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that *his or her conduct* endangers the life of another and acts with conscious disregard for life") (emphasis added); People v. Powell, supra, 63 Cal.App.5th 689, 713 ("For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life endangering act"); People v. Glukhoy, supra, 2022 WL 1134484 at p. *27 (aider and abettor's act of advising the reckless driver where to go facilitated continued reckless driving).) (Of course, the aider and abettor's act must be viewed in light of all the circumstances (People v.

Nieto Benitez (1992) 4 Cal.4th 91, 107), which would include the conduct of the actual killer that he intends to further by his own actions, such as the driver's reckless driving in Glukhov.)[3]

Here, the People's analysis of Reyes's act (conduct) repeats their surmise that Reyes was affirmatively acting as "backup" to an act by Lopez that objectively carried a high probability of death. (RB 44.) As explained in issue 1 in this brief and the opening brief, this surmise does not constitute substantial evidence.

Even assuming arguendo that Reyes was "backing up" Lopez, there was no evidence that he shared Lopez's intent to commit the dangerous act of firing his gun as the car drove off, or Lopez's intent to create the circumstances that would cause the victim to drive off. In fact, the circumstances that caused the victim to drive off are a matter of speculation. Reyes also had no reason to believe that Lopez intended a gang confrontation. For example, none of the bicyclists displayed gang signs, shouted out the name of a gang, or made any references whatsoever to a gang. (Exh. (1) 164-165, 196-197.) As far as Reyes would have known,

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[3] Appellant does not concede that the passenger's advice in Glukhoy to exit the freeway at a particular point "because they knew the area" (id.at p. *27) involved a high probability of death even in the context of the driver's reckless driving on the freeway up to that point. Objectively, the passenger's advice in fact tended to reduce the risk, for if the driver knew the area where the passenger directed him to go, he was less likely to crash or strike a pedestrian while trying to navigate in an unfamiliar neighborhood.

Lopez intended at most to cause a ruckus and disturb the peace (one of the target crimes specified for guilt under the doctrine of natural and probable consequence (CT (2) 425)). Certainly one can suspect that Lopez had a gang motivation. As this Court has admonished, however, a plausible possibility does not constitute substantial evidence. (See People v. Nelson (2016) 1 Cal.5th 513, 551 (insufficient evidence of lying in wait where "[t]he jury was presented with no evidence from which it could have chosen, beyond a reasonable doubt," one scenario rather than another); People v. Pearson (2012) 53 Cal.4th 306, 319.)[4]

The People also rely on several factual errors. The People state that "Reyes stood by Lopez as Lopez pulled out his gun, aimed it at [the victim's] car, and fired it." (RB 44.) There was no evidence that Reyes "stood by" Lopez at that time. The undercover detective testified that he saw two other bicyclists near Lopez at the time of the shooting (exh. (1) 177-179) but he did not identify Reyes as one of those two, and was not even paying attention to them (exh. (1) 203-204). Further, the detective did not even see any other bicyclists (see exh. (1) 177-179), so that Reyes and the two or three other bicyclists must have been a considerable distance from Lopez. (Reyes was about

[4] The gang expert could not say that the victim was an active gang member. (See exh. (2) 442-443.) The only evidence suggesting possible gang involvement was some photos (found in his home) in which he made West Myrtle gang signs. (Exh. (2) 265-267.)

30 feet away according to his own testimony. (RT 210:18-23.)) Steven G., the other trial eyewitness, did not see the shooting but he corroborated the detective's observation by testifying that there were two distinct groups of bicyclists. (Exh. (1) 143, 147-148, 151, 156-157, 163.) Thus, it could not have been the case that Reyes "stood by" Lopez when Lopez pulled out his gun and fired. (See RB 44.)[5]

The People also assert that Reyes "fled with his gang." (RB 44, 45.) As explained earlier, there was no evidence that Reyes was one of the bicyclists who went with Lopez. Nor was there any evidence that he and any of the remaining members of the group deliberately fled together, not merely in the same general direction as dictated by where they were at the time. (See exh. (1) 158.)

The People assert that "Reyes aided Lopez" "by going with him to gather several other gang members as 'back up' and then riding with Lopez and the other gang members into contested territory." (RB 44.) There was no evidence that Reyes or, for that matter, Lopez "gather[ed]" other members of the gang for the ride back to their home territory through the contested territory. Reyes, who was the only person to testify on this point, indicated that the same people who went with him to visit their friends also returned with him. (RT 193:10-14; 196:13-197:26 (Reyes describes "[e]veryone that I was riding bikes with that day").)

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[5] Steven G. testified that there were "[l]ike seven about" bicyclists in total. (Exh. (1) 136.) Reyes testified that there were six, including himself. (RT 196:13-197:26; 199:8-15.)

Nor was there any evidence that Reyes or Lopez gathered the group of bicyclists for purposes of backup when they left the park. The only purpose apparent from the record for pedaling from the park to the home of their friends south of the "contested" intersection was to visit those friends.

The People's analysis of Reyes's knowledge and intent summarizes their arguments in issue 1 (see RB 45), which are addressed above and in the opening brief. The People's discussion of proximate causation is based on their claim that Reyes committed an act that aided Lopez. (See RB 45-47.) There was no such act for the reasons discussed above. (See also AOB 84-85.)

CONCLUSION

For the foregoing reasons, and the reasons specified in the opening brief, defendant and appellant respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: April 22, 2022.

Respectfully submitted,

/s/ Richard A. Levy

Richard A. Levy
Attorney for Andres Reyes

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Richard A. Levy

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