Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANDRES QUINONEZ REYES, Defendant and Appellant.	Case No. S270723 Court of Appeal Case No. G059251 Orange County Superior Court Case No. 04CF2780

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT REYES

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INTEREST OF AMICUS

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in . . . efforts for the purpose of improving the quality of indigent defense." (Govt. Code, § 15420, subd. (b).) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes – particularly the crime of murder.

This Court has specified the issues on review as:

1. Does substantial evidence support the conclusion that petitioner acted with implied malice?

2. Does substantial evidence support the conclusion that petitioner's actions constituted murder or aided and abetted murder?

OSPD has two levels of concern with the adjudication of these questions. First, the statutory definition of implied malice "is far from clear in its meaning." (*People v. Knoller* (2007) 41 Cal.4th 139, 151.) This Court has thus been compelled to consider its meaning in a series of cases, including *People v. Watson* (1981) 30 Cal.3d 290, where OSPD served as counsel of record, and *People v. Nieto Benitez* (1992) 4 Cal.4th 91, where OSPD appeared as amicus curiae. Second, the Court has similarly grappled with the scope of accomplice liability, including in *People v. Gentile* (2020) 10 Cal.5th 830 (*Gentile*), where OSPD also appeared as amicus curiae. Yet until this case, the Court has not had occasion to directly address the interaction between implied malice and accomplice liability.

It should do so now. Courts and jurors need guidance to understand and apply the difficult concept of implied malice to people who do not strike a fatal blow.

The most recent legislative expression in this area was Senate Bill No. 1437 (Stats. 2018, ch. 1015) (SB 1437), which was predicated on the principle that "[a] person's culpability for murder must be premised upon that person's own actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1, subd. (g).) In furtherance of that goal, SB 1437 eliminated the natural and probable consequences doctrine as a basis for murder liability. As the instant case demonstrates, however, the theory of "aiding and abetting implied malice murder" threatens to effectively resurrect the natural and probable consequences doctrine and impose murder liability on those who are not truly culpable for murder.

Taking the legislative intent behind SB 1437 as a lodestar, and with this Court's longstanding requirement of specific intent for direct aiding and abetting liability in mind, this Court should make clear that (1) aiding and abetting implied malice murder is not a valid theory of liability and (2) the proper analytical framework is instead direct perpetrator liability.[1]

Regardless of how the Court decides those questions, clear tests are needed to help factfinders evaluate liability going forward; aiding and abetting implied malice murder – if it exists – should be carefully circumscribed. This case also presents a chance to provide clarity as to Penal Code section 1170.95, including, at minimum, that when the Legislature said the prosecution needed to prove guilt of "murder" at an evidentiary hearing (Stats. 2021, ch. 551, § 2), it meant just that – proof of all elements of murder.

In sum, embedded within this case are complex and important questions about how, after the Legislature's ameliorative acts, homicide law will look going forward and how seemingly invalid past convictions may be remedied. In reaching these issues, the Court should carefully hew to the Legislature's consistent (and explicit) intent to meaningfully contract accomplice liability.

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[1] As will be shown in section I.C. of this brief, *post*, this approach will still allow those who themselves did not strike the fatal blow to nonetheless be held liable for murder where it is appropriate to do so – including in the situations discussed by this Court in *Gentile*, *supra*, 10 Cal.5th at pp. 849–850.

I.
THE COURT SHOULD CLARIFY, SIMPLIFY, AND MAKE JUST THE CONTOURS OF MURDER LIABILITY FOR SOMEONE WHO DOES NOT INFLICT A FATAL BLOW

A. Summary of argument

A person cannot be liable for aiding and abetting an implied malice murder. Direct aiding and abetting requires a specific intent to help commit the target *crime*, not a particular act. Having a specific intent to commit an identified crime is not satisfied by conscious disregard of the risk that a particular action may end in a given result – the mens rea required for implied malice.

However, in many situations where the defendant did not inflict a fatal blow, the prosecution could still appropriately pursue implied malice murder liability – not for aiding and abetting an implied malice murder, but for *committing* an implied malice murder. To prove murder under that theory, the prosecution would need to prove that the person (1) did an act that posed a high risk of death, (2) acted with conscious disregard for life, and (3) the act was a substantial factor in causing a death.[2]

At a minimum, the Court should make clear that the factual scenarios in which aiding and abetting an implied malice murder applies are narrow in scope. And whatever result this Court reaches as to the validity of aiding and abetting an implied malice murder, it should hold that when murder charges are pursued against

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[2] The basis for (and contours of) this theory of liability will be discussed in Section C, *post*.

someone who did not strike a fatal blow, it is the *Thomas*[3] test of implied malice – which requires committing an act that involves a high probability it will result in death – that must apply.

These important restrictions will make certain that natural and probable consequences liability is not simply repackaged, rendering the Legislature's goal in enacting SB 1437 – limiting the scope of vicarious liability – a hollow promise.

B. Aiding and abetting implied malice murder is not a valid theory of murder because it contravenes the requirement that direct aiders and abettors harbor a specific intent to commit the charged crime

"Criminal liability for aiding and abetting a crime is based on statute." (*People v. Favor* (2012) 54 Cal.4th 868, 881 (dis. opn. of Liu, J.).) Penal Code section 30 classifies the "parties to crimes" as principals and accessories.[4] Section 31, in turn, defines "principals" as including persons who "aid and abet in its commission, or, not being present, have advised or encouraged its commission."

This Court has interpreted those statutes as creating "*two kinds*" of aiding and abetting liability: "First, an aider and abettor with the necessary mental state is guilty of *the intended crime*. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for *any other offense* that was a "natural and probable consequence" of the crime aided and abetted.'" (*People v. McCoy* (2001) 25 Cal.4th

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[3] *People v. Thomas* (1953) 41 Cal.2d 470 (*Thomas*).

[4] Unless otherwise stated, all further statutory references are to the Penal Code.

1111, 1117 (*McCoy*), quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 260 (*Prettyman*), italics added.) Thus, outside the natural and probable consequences doctrine, "a defendant may be held criminally responsible as an accomplice . . . for *the crime he or she intended to aid and abet* . . . ." (*Prettyman*, at p. 261, italics added.)[5]

This Court has interpreted sections 30 and 31 as requiring specific intent for direct aiding and abetting. (See, e.g., *People v. Hardy* (2018) 5 Cal.5th 56, 96; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1132 (*Mendoza*).) This means direct aiding and abetting "requires proof that an aider and abettor rendered aid with an intent or purpose of either committing, or of encouraging or facilitating commission of, *the target offense*." (*People v. Beeman* (1984) 35 Cal.3d 547, 551 (*Beeman*), italics added.) This "mental state component—consisting of intent and knowledge—extends to the entire crime . . . ." (*People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*), superseded on another ground by SB 1437; accord, *Chiu*, at pp. 171–172 (conc. & dis. opn. of Kennard, J.) [contrasting direct aiders and abettors with indirect aiders and abettors, and explaining that for the former, the intent is in relation to "the crime"].)

The reason for this law is plain. There is often more ambiguity in the overt conduct engaged in by the accomplice as compared to the direct perpetrator, and thus a higher risk that

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[5] Because SB 1437 "eliminated natural and probable consequences liability for murder as it applies to aiding and abetting" (*People v. Lewis* (2021) 11 Cal.5th 952, 957 (*Lewis*)), the following discussion concerns only the first form of aiding and abetting – direct aiding and abetting.

accomplice liability will not be commensurate with culpability. So courts – including this one – have demanded clear proof of facilitation and a high mens rea standard to punish aiders and abettors. (Cf. *Mendoza*, *supra*, 18 Cal.4th at p. 1129 ["the act of the aider and abettor is not inherently criminal"; it "may be, and often is, innocuous when divorced from the culpable mental state"]; *United States v. Manatau* (10th Cir. 2011) 647 F.3d 1048, 1052 (Gorsuch, J.) ["proof of intent" rather than "lesser mens rea" often required for accomplice liability because of more "tangential[]" involvement in offense], italics omitted.)

In sum, to be guilty of a crime as a direct aider and abettor, a person must specifically intend the charged crime: "the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,' *the crime in question*." (*People v. Lee* (2003) 31 Cal.4th 613, 624, quoting *Beeman*, *supra*, 35 Cal.3d at p. 560, second italics added.)

Other authorities are in accord. The high court has reiterated that "at common law, a person is liable under [the federal statute defining principals] for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." (*Rosemond v. United States* (2014) 572 U.S. 65, 71 (*Rosemond*), citing 2 LaFave, Substantive Criminal Law (2d ed. 2003) § 13.2, p. 337 and *Hicks v. United States* (1893) 150 U.S. 442. 449; see also *Rosemond*, at p. 76 ["a person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission"].) In

other words, outside the natural and probable consequences doctrine, "the intent must go to the specific and entire crime charged . . . ." (*Rosemond*, at p. 76 & fn. 7; see also *Chiu*, *supra*, 59 Cal.4th at p. 167 [favorably citing that portion of *Rosemond*].)

For murder, the specific intent required of the aider and abettor is intent to kill, i.e., express malice. As this Court has said: "when guilt does not depend on the natural and probable consequences doctrine . . . the aider and abettor must know and share the murderous intent of the actual perpetrator." (*McCoy*, *supra*, 25 Cal.4th at p. 1118.) This Court thus deemed "correct[]" an instruction in a murder case which said that "'[a] person aids and abets the commission or attempted commission of *a crime* when he or she, [¶] (1) with knowledge of the unlawful purpose of the perpetrator and [¶] (2) with the intent or purpose of committing, encouraging, or facilitating the commission of *the crime*, by acts or advice aids, promotes, encourages or instigates the commission of *the crime*.'" (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1227, alterations in original, italics added.) Likewise in *Chiu*, *supra*, 59 Cal.4th 155, this Court stated that to convict an aider and abettor of first degree premeditated murder based on direct aiding and abetting, "the prosecution must show that the defendant aided or encouraged the commission of *the murder* with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating *its commission*." (*Id.* at p. 167, italics added.)

Nonetheless, some statements in *People v. Gentile* (2020) 10 Cal.5th 830 (*Gentile*) have been interpreted as a departure from this

precedent. In *Gentile*, the Court addressed an argument, made by amicus curiae the San Diego County District Attorney, that "Senate Bill 1437 should be interpreted only to modify the natural and probable consequences doctrine for murder rather than to eliminate it. The District Attorney argue[d] that what section 188(a)(3) does is add the element of malice aforethought to natural and probable consequences liability." (*Gentile*, at p. 849.) In support, "[t]he District Attorney point[ed] to two unpublished cases to illustrate the importance of creating a 'hybrid doctrine.'" (*Ibid.*)[6]

In response, the Court stated that:

> As the Attorney General observes, however, second degree murder in both cases might have been pursued under a direct aiding and abetting theory. Such a theory requires that 'the aider and abettor . . . know and share the murderous intent of the actual perpetrator.' (*McCoy*, *supra*, 25 Cal.4th at p. 1118.) For implied malice, the intent requirement is satisfied by proof that the actual perpetrator "'knows that his conduct endangers the life of another and . . . acts with conscious disregard for life.'" (*Soto*, *supra*, 4 Cal.5th at p. 974.) Therefore, notwithstanding Senate Bill 1437's elimination of natural and probable consequences liability for second degree murder, 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.

(*Gentile*, *supra*, 10 Cal.5th at p. 850.)[7]

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[6] The facts of these unpublished cases will be discussed in section C, *post*.

[7] As will be explained in Section C, *post*, if everything in the final sentence quoted above were true – and the defendant's actions posed a high risk of death and actually caused a death – they could

These statements were dicta. (See *People v. Glukhoy* (2022) 77 Cal.App.5th 576, 589 (*Glukhoy*) [agreeing with that characterization], petns. for reviewing pending, petns. filed May 26, 2022 & May 31, 2022.) They were also limited. *Gentile* used the phrase "might have been pursued." (*Gentile*, *supra*, 10 Cal.5th at p. 850.) It did not state there was sufficient evidence of second degree murder. Nor did it state that aiding and abetting an implied malice murder was a valid theory.

After noting that no published case had addressed whether directly aiding and abetting an implied malice murder was a valid theory, in *People v. Powell* (2021) 63 Cal.App.5th 689, 709–710 (*Powell*), the Third District Court of Appeal did just that. *Powell* rejected a contention that aiding and abetting murder requires a specific intent to kill (*id.* at p. 711), and held that "a person can . . . be culpable of implied malice murder on an aiding and abetting theory" (*id.* at p. 712). *Powell* noted that under *McCoy*, *supra*, 25 Cal.4th 1111, "direct aiding and abetting is based on the combined actus reus of the participants and the aider and abettor's own mens rea." (*Powell*, *supra*, at pp. 712–713.) So, the *Powell* court overlaid what it saw as the elements of implied malice murder onto the *McCoy* framework: (1) "In the context of implied malice, the actus reus required of the perpetrator is the commission of a life endangering act," i.e., "the act that proximately causes death"; (2) "For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life endangering act";

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be *directly* guilty of implied malice murder. There would be no need to invoke the notion of "aiding and abetting implied malice murder."

and (3) "The mens rea, which must be personally harbored by the direct aider and abettor, is knowledge that the perpetrator intended to commit *the act*, intent to aid the perpetrator in the commission of *the act*, knowledge that *the act* is dangerous to human life, and acting in conscious disregard for human life". (*Id.* at p. 713 & fn. 27.) In support of its conclusion, *Powell* cited this Court's dicta in *Gentile*. (See *Powell*, at p. 713.)[8]

Whatever its superficial appeal, the *Powell* approach ignores the body of law requiring that direct aiders and abettors intend a specific *crime* – as opposed to a specific *act*. And in the context of aiding and abetting *murder*, *Powell* and its progeny are doubly unsound. "[S]har[ing] the murderous intent of the actual perpetrator" (*McCoy*, *supra*, 25 Cal.4th at p. 1118), requires an intent that *can* be shared. But "[i]mplied malice . . . cannot coexist with a specific intent to kill." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 765.) Indeed, in an implied malice murder, no one – not even the direct perpetrator – knows if murder was "intended" until the victim dies. (See *People v. Swain* (1996) 12 Cal.4th 593, 603 (*Swain*) ["The element of malice aforethought in implied malice murder cases is therefore derived or 'implied,' in part through hindsight so to speak . . ."].) And since not even the direct perpetrator knows whether they "intend" to commit the charged crime, a purported aider and abettor cannot know either. As this Court has put it,

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[8] Two courts have followed *Powell*. (*People v. Superior Court (Valenzuela)* (2021) 73 Cal.App.5th 485, 499; *People v. Langi* (2022) 73 Cal.App.5th 972, 983–984.) The court that decided *Powell* issued a subsequent opinion expanding upon its reasoning. (*Glukhoy*, *supra*, 77 Cal.App.5th at pp. 589–591.)

"[o]ne cannot intend to help someone do something without knowing what that person meant to do." (*Mendoza*, *supra*, 18 Cal.4th at p. 1131.)

Following this logic, in other contexts, this Court has refused to impose liability for crimes that require a specific intent where the defendant has displayed only implied malice. For example, attempted murder cannot be based on implied malice. (See *People v. Lee* (1987) 43 Cal.3d 666, 670.) Rather, "'[a] specific intent to kill is absolutely required.'" (*Ibid.*, quoting *People v. Santascoy* (1984) 153 Cal.App.3d 909, 914.) Similarly, "there is no crime of 'conspiracy to commit second degree murder.'" (*People v. Beck and Cruz* (2019) 8 Cal.5th 548, 641, ellipsis omitted.) Rather, "a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice." (*Swain*, *supra*, 12 Cal.4th at p. 607.) What underlies that rule is that "the specific intent to do some act dangerous to human life together with the circumstance that a killing has resulted from the doing of such act" is *not* equivalent to a specific intent to kill. (*Id.* at p. 603, italics omitted.) The same is true for murder; the specific intent to aid and abet the commission of murder requires a specific intent to commit one thing only: murder.

Amicus anticipates that as in *Gentile*, *supra*, 10 Cal.5th 830, respondent will assert that several cases decided before SB 1437 establish the existence of aiding and abetting implied malice murder. They do not. Respondent may cite *Mendoza*, *supra*, 18 Cal.4th 1114, for the proposition that "a person can be guilty of implied malice murder as a direct aider and abettor if the

perpetrator acted with either express or implied malice, and the aider and abettor assisted the perpetrator with knowledge of the perpetrator's criminal purpose and the intent to encourage or facilitate it." (Respondent's Consolidated Answer to Amicus Curiae Briefs, *People v. Gentile*, S256698, at p. 16.) But what *Mendoza* said was that the aider and abettor could be convicted of "*the intended crime* and any other crime [the direct perpetrator] actually committed that was a natural and probable consequence of the intended crime." (*Mendoza*, at p. 1123, italics added.) In other words, it stands for nothing more than a restatement of the "two kinds" of aiding and abetting liability this Court has long recognized. (See *McCoy*, *supra*, 25 Cal.4th at p. 1117.) And since natural and probable consequences liability for murder no longer exists (*Lewis*, *supra*, 11 Cal.5th at p. 957), that leaves only liability for the *intended crime*.

Respondent may also cite *People v. Woods* (1991) 226 Cal.App.3d 1037, 1047 (*Woods*) as having "affirm[ed] defendant's second degree murder conviction on either an express or implied malice theory, and as either a principal or an aider and abettor, where substantial evidence showed that defendant was part of a group who shot and killed a rival gang member." (Respondent's Consolidated Answer to Amicus Curiae Briefs, *People v. Gentile*, S256698, at p. 16.) But *Woods* did no such thing. The only mention of aiding and abetting in the entire opinion is the unsurprising observation that, in a case where "[t]he jury was instructed on premeditated and deliberate first degree murder and unpremeditated second degree murder with express or implied

malice[,] [t]he jury was also instructed on aider and abettor liability." (*Woods*, at p. 1047.)[9]

In sum, aiding and abetting an implied malice murder has never been, and is not, a valid theory of murder. However, as discussed in the next section, in situations where the prosecution seeks to punish the person who did not strike the final blow, it may still pursue murder liability under a direct perpetrator theory.

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[9] Respondent may further cite *People v. Chun* (2009) 45 Cal.4th 1172, where after holding that a second degree felony murder instruction was given in error, the Court said that "No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice." (*Id.* at p. 1205.) Or respondent may cite *People v. Mejia* (2012) 211 Cal.App.4th 586, for its statement that "When a defendant, with conscious disregard for human life, intentionally acts in a manner inherently dangerous to human life or, with the same state of mind, aids and abets in the underlying crime, he demonstrates implied malice." (*Id.* at p. 604.) While those cases indicate that, in aiding and abetting the underlying crime, a defendant may demonstrate the mental component of implied malice, they do not address what is at issue in this case, i.e., whether the defendant's *actions* were sufficient to render him liable for murder. As will be shown in Section C, *post*, liability for implied malice murder additionally requires an actus reus which contributes to the death.

C. In scenarios where courts have relied on aiding and abetting implied malice murder, the proper analytical framework is direct perpetrator liability, i.e., whether the person *did* commit implied malice murder

The notion of "aiding and abetting implied malice murder" reflects a legitimate concern that defendants whose conduct directly contributed to such murders, but who themselves did not inflict the killing stroke, could escape liability. Under the appropriate analysis, however, such individuals will have to answer for the resulting murders – not as aiders and abettors but because their own conduct rendered them directly liable under the theory of implied malice.[10]

Before tracing some concrete examples, it is vital to understand why this is the only jurisprudentially sound approach. "A conviction for murder requires [1] the commission of an act [2] that causes death, [3] done with the mental state of malice aforethought (malice)." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) When the theory of murder is implied malice, this means – for elements 1 and 3 – that objectively, the person does an act with a high probability of death and the person is subjectively aware that the act poses a risk of death, but nevertheless deliberately performs the act with conscious disregard for life. (See *People v. Knoller* (2007) 41 Cal.4th 139, 156–157 (*Knoller*) [describing two tests for

[10] Regardless of murder liability, such individuals would also remain liable for any non-murder offense they aided and abetted.

implied malice as one and the same and setting forth objective and subjective components of each test].)[11]

As to element 2 – causation – "it is proximate causation, not direct or actual causation, which, together with the requisite culpable mens rea (malice), determines defendant's liability for murder." (*People v. Sanchez* (2001) 26 Cal.4th 834, 845 (*Sanchez*); see also *People v. Cervantes* (2001) 26 Cal.4th 860, 872, fn. 15 ["In all homicide cases in which the conduct of an intermediary is the actual cause of death, the defendant's liability will depend on whether it can be demonstrated that his own conduct *proximately caused* the victim's death . . ."].) "[I]t has long been recognized that there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*Sanchez*, at p. 846.) "To be considered a proximate cause of [the victim's] death, the acts of the defendant[] must have been a 'substantial factor' contributing to the result." (*People v. Caldwell* (1984) 36 Cal.3d 210, 220, italics omitted.) In other words, "'the defendant's act must have been a substantial factor contributing to the result, rather than insignificant or merely theoretical.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 643, quoting *People v. Briscoe* (2001) 92 Cal.App.4th 568, 583–584.)

In sum, a person may be guilty of implied malice murder where they (1) do an act that poses a high risk of death, (2) act with

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[11] A further discussion of this Court's tests for implied malice is in section E, *post*.

a conscious disregard for life, and (3) the act is a substantial factor in causing the death.[12]

In *Gentile*, *supra*, 10 Cal.5th 830, the Court restated the "substantial factor" theory. (*Id.* at p. 850.) The substantial-factor theory of liability could apply to both of the unpublished cases cited by amicus curiae in *Gentile.* The facts of the cases were as follows:

> In one case, the driver in a drive-by shooting was convicted of second degree murder after he observed rival gang members on his gang's turf and drove up to the rivals at a rapid speed to scare them as well as beat them up and harm them, at which point his companion suddenly opened fire and caused the death of one of the rival gang members. In the other case, three gang members were convicted of second degree murder for ambushing and stabbing to death a person walking home, but the evidence was inconclusive as to which of the defendants actually caused the death of the victim.

(*Id.* at pp. 849–850, citations, internal quotation marks, and alterations omitted.) In both cases, the person's liability could be

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[12] Such liability does not apply in the felony murder context. Under section 189, subdivision (e), "[a] participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder *only if* one of the following is proven": "(1) The person was the actual killer"; "(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree"; or (3) "The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Italics added.) So, in cases that would have been felony murder before SB 1437, the statutory text prohibits the prosecution from relying on "aiding and abetting implied malice murder" or even implied malice murder itself.

assessed as a separate actor with a separate mental state, distinct from the actions and mental state of whomever inflicted the fatal blow. In neither case would it be necessary to rely on aiding and abetting an implied malice murder.

This approach would be consistent with reported caselaw. (See, e.g., *People v. Rolon* (2008) 160 Cal.App.4th 1206, 1209 ["a parent . . . may be criminally culpable . . . on an implied malice theory for murder where the parent fails to take reasonably necessary steps for the child's protection, so long as the parent, with ability to do so, fails to take those steps with the intent of facilitating the perpetrator's assaultive offense"]; *People v. Williams* (1977) 75 Cal.App.3d 731, 733 [without recourse to aiding and abetting theory, evidence sufficient for second degree murder on basis that person "with malice, caused the victim's death by using her sister as an innocent agent to accomplish the intended death of the victim"].) It would also harmonize with the overall goal of SB 1437, that "[a] person's culpability for murder must be premised upon that person's *own* actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1, subd. (g), italics added.)

It is also the better analytical approach. Professor LaFave has explained that, even if there is no aiding and abetting liability, that is "not to say . . . that *A* will necessarily escape liability. *A* could well be found guilty of [the same crime] without being declared an accomplice of *B*." (2 LaFave, Substantive Criminal Law (3d ed. 2017) § 13.2(e), p. 485.) For example, in an analogous context, "[i]f *A* gives his car to intoxicated *B* and *B* runs down and kills *C*, it is not necessary to find that *A* is an accomplice to *B*'s crime; if *A*'s own

conduct in turning over the car to one known to be intoxicated is itself criminally negligent and if that conduct is found to be the legal cause of the death, then *A* is guilty of manslaughter on that basis." (*Ibid.*) Professor LaFave concludes "this approach is to be much preferred over the accomplice liability theory, for the latter is not limited by the legal cause requirement and thus could easily be extended to all forms of assistance or encouragement to negligent or reckless conduct." (*Ibid.*, footnote omitted.)

This Court should adopt the substantial factor theory of liability in the implied malice context. The theory is already established and allows for the punishment of people based on their own mental state and actions, without the overlaid complication of applying aiding and abetting principles to a new and ill-fitting context. Nonetheless, as will be explained below, if the Court does recognize the validity of aiding and abetting implied malice murder, it should ensure that the theory has meaningful constraints.

D. If this Court recognizes aiding and abetting implied malice murder as a valid theory, it should make clear that the theory only applies narrowly

As discussed above, *Powell*, *supra*, 63 Cal.App.5th 689, held that "to be liable for an implied malice murder, the direct aider and abettor must, by words or conduct, aid the commission of the life endangering *act*," i.e., "the act that proximately causes death" and "[t]he mens rea . . . is knowledge that the perpetrator intended to commit *the act*, intent to aid the perpetrator in the commission of *the act*, knowledge that *the act* is dangerous to human life, and

acting in conscious disregard for human life." (*Id.* at p. 713 & fn. 27, original italics.)

If this Court endorses the *Powell* test in some fashion, it should clarify that, at minimum, (1) aiding and abetting a crime which in the abstract is dangerous to human life is not enough and (2) all the events leading up to the death are not the "life endangering act." (See *Powell*, *supra*, 63 Cal.App.5th at p. 713 & fn. 27.) Rather, the life endangering act is the "the act that proximately causes death" – for example, a gunshot or a stabbing – and *that* is what must be aided. (See *ibid.*) Moreover, as the court in *Valenzuela*, *supra*, 73 Cal.App.5th 485, explained, it is not enough that the act just be "life endangering"; rather, the act must entail "a significant risk of death." (*Id.* at p. 501.)

A narrow definition of the act that causes death comports with both logic and precedent. As Professor Kadish has written, "[t]he requirement of intention for complicity liability is satisfied by the intention of the secondary party to help or influence the primary party to commit *the act that resulted in the harm*." (Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* (1985) 73 Cal.L.Rev. 323, 347, italics added.) Just what act does this connote? In *People v. Clements* (2022) 75 Cal.App.5th 276, the defendant solicited and coordinated an assault on her brother by a person who (1) she knew had a proclivity for deadly violence and (2) had said multiple times he wanted to kill the victim. (*Id.* at pp. 299–300.) In such instances, the prosecution theory is that defendants aided and abetted, i.e., specifically intended, the act that caused death.

Respondent's departure from that framework shows how *Powell* is susceptible to an overly broad interpretation. Addressing petitioner Reyes' argument that the Court should focus on whether Reyes aided "Lopez's shooting at Rosario's car as the act that was dangerous to human life," respondent urges that the relevant act is "entering contested gang territory armed, with at least five other fellow gang members, and then confronting Rosario." (ABM 44.)[13] This approach should be rejected because it allows the trier of fact to focus on actions other than the fatal blow – i.e., the shooting or the stabbing – that are not properly the act that proximately causes death. (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*); *Knoller*, *supra*, 41 Cal.4th at p. 143.)

Respondent's approach would also thwart the Legislature's intention in passing SB 1437. Allowing focus on actions further attenuated from the life endangering act threatens an end-run around the Legislature's elimination of the natural and probable consequences theory of murder. That doctrine allowed a person to be liable for murder based on their involvement at any point in the underlying criminal activity that set in motion the events leading to the killing, even if they did not personally harbor malice aforethought. Obviously, events prior to a killing cannot be ignored since they are relevant considerations of what the person subjectively knew. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 107 (*Nieto Benitez*) ["The very nature of implied malice . . . invites

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[13] The parties' briefs before this Court will be cited as "OBM" (Reyes's Opening Brief on the Merits), "ABM" (Respondent's Answer Brief on the Merits) and "RBM" (Reyes's Reply Brief on the Merits).

consideration of the circumstances preceding the fatal act"].) But aiding and abetting an act other than the fatal act should not be enough to trigger implied malice liability.

The Legislature highlighted its disapproval of expansive murder liability for those without a clear and personal nexus to the fatal act by choosing to reference the case of *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*) as the example of natural and probable consequences liability in Senate Concurrent Resolution No. 48, the legislative precursor to SB 1437. (Sen. Conc. Res. No. 48, Stats. 2017 (2017–2018 Reg. Sess.) res. ch. 175 (SCR 48).) The Legislature described *Medina* as a natural and probable consequences case wherein all participants in a fistfight were held liable for murder "when only one defendant [Medina] commits a murder, notwithstanding the fact that the other participants did not know the defendant was armed, the killing occurred after the fistfight ended, and the participants did not aid or abet the shooting []resulting in individuals lacking the mens rea and culpability for murder being punished as if they were the ones who committed the fatal act." (SCR 48.)

With that backdrop, SCR 48 recognized the need for statutory changes to sentence people more equitably in relation to their involvement in criminal activity. Accordingly, the Legislature (among other things) abolished the natural and probable consequences doctrine under which Medina's co-defendants were convicted. It would be a sad irony – not to mention an affront to the will of the Legislature – to hold that Medina's co-defendants and others in similar cases, like this one, can still be held liable for

murder under a more porous "aiding and abetting implied malice" theory.

The Legislature's murder liability reforms require a narrow construction of accomplice liability for murder. (See Stats. 2018, ch. 1015, § 1, subd. (e) ["Reform is needed in California to limit convictions . . ."].) If people can still be convicted for murder based on involvement in abstractly dangerous underlying criminal activity preceding the killing, without a clear connection to the fatal act, the legislation will be undercut.

This concern is not exaggerated. There are already examples of murder convictions being sustained based on an overly broad interpretation of *Powell*, resulting in implied malice murder convictions for people who did not "know and share the murderous intent of the actual perpetrator." (*Gentile, supra*, 10 Cal.5th at p. 850, citation and internal quotation marks omitted.) In the unpublished case *People v. Weatherington* (June 27, 2021, B303125) 2021 WL 2309801 (*Weatherington*), two defendants, not affiliated with a gang, participated with gang members in beating somebody up. (*Id.* at *1–3.)[14] During the beating, a different co-defendant produced a knife and fatally stabbed the victim. (*Id.* at *2.) There was no evidence the defendants were aware that the stabber had a knife. One defendant was not present for the fatal stabbing and the other reacted in shock and surprise when he realized there had been

[14] Amicus cites this unpublished opinion as example and not as authority. (Cal. Rules of Court, rule 8.1115(a); cf. *Gentile*, *supra*, 10 Cal.5th at pp. 849–850 [addressing whether results in unpublished cases would have been different under proposed rule].)

a stabbing. (*Id.* at *2–3.) There was medical evidence that none of the victim's injuries other than the stab wounds contributed to his death, none of the other injuries caused any internal damage, and had the victim not been stabbed, none of the other injuries would have required medical attention. (Petitioner Vivid's Petition for Review filed on July 19, 2021, *People v. Weatherington*, S269673, at p. 11.)[15]

The Court of Appeal rejected the argument that, under *Powell,* the stabbing, rather than the beating, was the "life endangering act." (*Weatherington*, *supra*, 2021 WL 2309801, at *5 ["The law does not require appellants to have directly aided and abetted the crime of murder, i.e., Rey's stabbing of [the victim]"].) The Court of Appeal found it was sufficient for implied malice liability that the defendants "aided and abetted the commission of life-endangering acts: a home invasion robbery by seven persons determined to kick the victim's 'ass' and the subsequent group beating of the defenseless victim." (*Id.* at *6.)

This outcome was wrong under both *Gentile* and *Powell*, as the relevant question is not whether the defendants intended to aid and abet a violent/felony assault, i.e., the group beating, upon the victim while acting with implied malice. Rather, the question should have been whether the defendant intended to aid and abet the act that caused the victim's death – the stabbing – with knowledge the perpetrator intended to commit that act, with the intent to facilitate

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[15] Although this medical expert testimony was not mentioned in the Court of Appeal's opinion in *Weatherington*, it was judicially noticed in the appeal of his section 1170.95 denial in B303125.

that act, and while acting with implied malice. (See *Gentile*, *supra*, 10 Cal.5th at p. 850; *Powell*, *supra*, 63 Cal.App.5th at p. 713.)

Distilled to its essence, the Court of Appeal's theory in *Weatherington* is that someone can be held liable for murder if (1) they aid and abet a crime which in the abstract is "dangerous to human life"; (2) in aiding that offense, they know that doing so is potentially dangerous to human life, but act with conscious disregard for that danger; and (3) a death occurs – even if the fatal act occurs outside their presence. This is nothing more than the invalidated natural and probable theory, by another name.

In *Gentile*, *supra*, 10 Cal.5th 830, this Court rejected the existence, under current law, of effectively the same theory. (*Id.* at pp. 850–851.) As noted above, there, the San Diego County District Attorney (as amicus curiae) "argue[d] that Senate Bill 1437 should be interpreted only to modify the natural and probable consequences doctrine for murder rather than to eliminate it." (*Gentile*, at p. 849.) The District Attorney argued for a "hybrid doctrine," in which section 188(a)(3) added the element of malice aforethought to natural-and-probable-consequences liability. "In other words, the District Attorney contend[ed] that to be culpable for murder under the natural and probable consequences theory after Senate Bill 1437, a defendant must aid in and intend the commission of a target offense, the target offense must have foreseeably resulted in murder, and additionally the defendant must possess malice aforethought." (*Gentile*, at p. 849; see also Amicus Curiae Brief of San Diego County District Attorney, *People v. Gentile*, S256698, at p. 7 ["the legislative amendment to Penal Code section 188 created a

hybrid doctrine" – which "did not previously exist as a stand-alone legal theory" – that "can best be described as 'aiding and abetting with implied malice'"].)

Weatherington creates the very type of liability the Supreme Court rejected, i.e., where there is proof of "implied malice" but insufficient evidence of direct aiding and abetting. Its reasoning (as well as respondent's in this case), if followed, would redefine aiding and abetting liability and functionally resurrect natural and probable consequences liability for murder. This Court can and should ensure that does not happen.

Assuming, *arguendo*, that the aiding and abetting implied malice murder theory has any vitality, it must require that the defendant aid the life endangering act rather than merely some prefatory conduct. Otherwise, it will be nothing more than a repackaging of the now-abolished natural and probable consequences theory. So, the rule in *Powell* should be amended to, at minimum, make clear that murder liability may only be obtained if: (1) the direct perpetrator commits an act that entails a significant risk of death; (2) the act is the proximate cause of death; (3) the defendant, by words or conduct, aids the fatal act; (4) the defendant knows that the direct perpetrator intended to commit the fatal act; (5) the defendant intends to aid the direct perpetrator in committing the fatal act; and (6) the defendant acts in conscious disregard for human life. And, as will be discussed in Section E, *post*, whatever theory of liability this Court adopts, it should hold that the act must involve a *high probability* it will result in death – not just a

significant risk of death. If the Court adopts such a rule, the test set forth above should be modified accordingly.

E. Whether or not this Court recognizes aiding and abetting implied malice murder as a valid theory, it should clarify that as to individuals who are not direct perpetrators, the *Thomas* test of implied malice applies

The test used for implied malice can determine the outcome of a case. Consider the case at hand, as framed by respondent: the record demonstrates that petitioner Reyes rode on a bicycle with fellow gang members into rival gang territory and confronted someone. This conduct could be viewed under either of the two varying tests set forth in this Court's caselaw.[16] In *People v. Phillips* (1966) 64 Cal.2d 574 (*Phillips*), overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12, the Court described implied malice murder as a "'killing [which] proximately resulted from *an act, the natural consequences of which are dangerous to life*, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*Phillips*, *supra*, at p. 587, italics added). The other test, set forth in Justice Traynor's concurring opinion in *Thomas*, *supra*, 41 Cal.2d 470, states that implied malice is shown when "the defendant for a base, antisocial motive and with wanton disregard for human life, does *an act that*

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[16] If the relevant act is the shooting itself, as urged in Section D, *ante*, the choice of test used for implied malice in this case may be less outcome-determinative.

involves a high degree of probability that it will result in death." (*Id.* at p. 480 (conc. opn. of Traynor, J.), italics added.)

Applying these two tests to Reyes' conduct could well yield different results. Were the "natural consequences" of Reyes joining other gang members on a bike ride into contested territory and confronting someone "dangerous to life" as the *Phillips* test demands? Perhaps a juror could so find. But was there also a "high degree of probability that [conduct would] result in death," as the *Thomas* test requires? It seems far less likely that a juror would find that standard satisfied.

Precedent explains why. This Court has noted that the word "'likely' may be used flexibly to cover a range of expectability *from possible to probable*," but in at least some contexts, "does not require a precise determination that the chance . . . is *better than even*." (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 916, 922, first italics added.) On the other hand, a high probability is a wholly different thing, as "a preponderance calls for probability, while clear and convincing proof demands a [h]igh probability." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899.) Thus, unlike the objective portion of the *Thomas* test, the corresponding portion of the *Phillips* test makes no attempt to quantify the risk of death, and might suggest that any danger to life, even if relatively slight, would suffice.

The statutory text (and this Court's caselaw) support application of the *Thomas* test. Section 188, subdivision (a)(2) states that "Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." This definition "is far from clear in its

meaning." (*Knoller*, *supra*, 41 Cal.4th at p. 151.) As Justice Mosk, joined by Justice Kennard, wrote thirty years ago, this Court "should encourage the trial courts to give the clearest possible exposition of section 188." (*Nieto Benitez*, *supra*, 4 Cal.4th at p. 115 (conc. opn. of Mosk, J.).)

In the search for clarity, "[t]wo lines of decisions developed" – the *Thomas* test and the *Phillips* test – "reflecting judicial attempts 'to translate this amorphous anatomical characterization of implied malice into a tangible standard a jury can apply.'" (*Nieto Benitez*, 4 Cal.4th at p. 103, quoting *People v. Protopappas* (1988) 201 Cal.App.3d 152, 162–163.) The Court has repeatedly stated that the *Thomas* and *Phillips* tests essentially express the same standard. (See *People v. Watson* (1981) 30 Cal.3d 290, 300 (*Watson*) [tests are "phrased in a different way"]; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1219 (*Dellinger*) [tests "articulated one and the same standard"]; *Nieto Benitez*, *supra*, 4 Cal.4th at p. 104 [same]; *Knoller*, *supra*, 41 Cal.4th at p. 152 [tests "in essence articulated the same standard"].) And as Justice Liu observed, "[a]lthough we have suggested that the *Phillips* formulation of the *subjective* component of implied malice ('conscious disregard for life') is preferable to the *Thomas* formulation ('wanton disregard for human life') for purposes of instructing a jury (see *Dellinger*, *supra*, 49 Cal.3d at p. 1221), we have never disavowed the *Thomas* formulation of implied malice, particularly with respect to the objective component. (See *Knoller*, *supra*, 41 Cal.4th at p. 157 [discussing objective test under *Thomas*].)" (*Cravens*, *supra*, 53 Cal.4th at pp. 512–513 (conc. opn. of Liu, J.); accord, e.g., *Nieto Benitez*, at p. 115 (conc. opn. of Mosk, J.)

["The Legislature has approved this standard (§ 192), and we have never retreated from it"].)[17]

Nonetheless, the majority opinion in *Cravens* "[did] not mention *Thomas*'s formulation of the objective component." (*Cravens*, *supra*, 53 Cal.4th at p. 513 (conc. opn. of Liu, J.).) The Court therefore suggested but did not hold "that the *Phillips* formulation matters in a close case." (*Cravens*, at p. 514 (conc. opn. of Liu, J.); cf. *Nieto Benitez*, *supra*, 4 Cal.4th at p. 114 (conc. opn. of Mosk, J.) [hypothesizing cases where *Thomas* test would make a difference]; *People v. Palomar* (2020) 44 Cal.App.5th 969, 983 (*Palomar*) (dis. opn. of Perren, J.) [where majority used *Phillips* test to affirm, using *Thomas* test and reaching different result]; *Palomar*, at p. 980 (conc. opn. of Tangeman, J.) ["I share my dissenting colleague's view that it is difficult to reconcile the facts of this assault with the conclusion that appellant's conduct carried 'a high probability that it [would] result in death'"], original brackets.)[18] Justice Liu therefore questioned whether these

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[17] In *Nieto Benitez*, *supra*, 4 Cal.4th 91, the Court refused to mandate that the pattern second degree murder instruction require that the defendant commit an act with a high probability that death will result. (*Id.* at p. 111.) But unlike in this case, the defendant in *Nieto Benitez* did inflict the fatal blow, and in subsequent opinions this Court *has* used the *Thomas* formulation for the objective component of implied malice.

[18] Although this Court denied review in *Palomar*, Justices Liu and Groban were of the opinion that the petition should have been granted. (*People v. Palomar*, S261134, petn. for review denied Apr. 22, 2020.)

competing formulations should be reconciled by the Court in a future case. (*Cravens*, at p. 514 (conc. opn. of Liu, J.).)

This should be that case. As Justice Mosk observed, "[t]he clearest language describing the nature of the physical act required to establish implied malice is [the] formulation that the act must have contained a high probability that death would result." (*Nieto Benitez*, *supra*, 4 Cal.4th at p. 115 (conc. opn. of Mosk. J.).) He explained that "the language [then] set forth in CALJIC Nos. 8.11 and 8.31" – which used the "natural consequences of the act are dangerous to human life" language from *Phillips* – "is technical and abstract and hence less readily understood than the 'high probability of death' language." (*Nieto Benitez*, at p. 114 (conc. opn. of Mosk. J.).) Put another way, it "is vague enough to those unschooled in the nuances of the law of homicide that a lay jury might nevertheless vote to [wrongfully] convict [someone] of implied-malice murder." (*Ibid.*)

It is not just the potentially inconsistent results that call for this Court to resolve the uncertainty about which standard applies. The factual nature of this Court's past cases calls for special attention here. None of the Court's modern cases addressing the definition of implied malice – *Watson*, *Dellinger*, *Nieto Benitez*, and *Knoller* – have done so in the unique and complicated context of indirect perpetrators. Nor were any decided after SB 1437, whose explicit purpose was to "more equitably sentence offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, § 1, subd. (b).) Indeed, the Legislature sought to "limit convictions and subsequent sentencing so that the law of California

fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015, § 1, subd. (e).)

By declaring that the *Thomas* test is more appropriate when a defendant is not the person who inflicted the fatal blow, this Court can (1) resolve a tension within its caselaw, (2) provide clearer guidance to juries, and (3) conform to the Legislature's goal of reducing excessive sentences by ensuring that punishment is commensurate with culpability. (Cf. *People v. Patterson* (1989) 49 Cal.3d 615, 626, fn. 8 ["it is appropriate for the courts, in recognition of the Legislature's authority to define criminal offenses, to attempt to minimize the disparity between the legislatively created and the judicially recognized categories of second degree murder"].) And it should do so regardless of whether the theory is aiding and abetting an implied malice murder or implied malice murder itself.

II.
STRAIGHTFORWARD APPLICATION OF THE STATUTORY TEXT REQUIRES THAT AT A HEARING UNDER SECTION 1170.95, SUBDIVISION (D)(3), THE PROSECTION NEEDS TO PROVE *ALL* ELEMENTS OF MURDER UNDER CURRENT LAW

At a section 1170.95, subdivision (d)(3) hearing, the prosecution must prove *each element* of murder under current law. Any doubt on this score was extinguished by Senate Bill No. 775 ("SB 775"), which changed subdivision (d)(3) from requiring proof "that the petitioner is ineligible for resentencing" to proof that "the petitioner is guilty of murder . . . under California law as amended

by the changes to Section 188 or 189 made effective January 1, 2019." (Stats. 2021, ch. 551, § 2.) Had the Legislature only intended for the prosecution to prove *some* elements of murder, it would have said so, and not required proof of "murder." Moreover, as respondent has conceded before, SB 775 is retroactive to non-final cases. (See, e.g., *People v. Porter* (2022) 73 Cal.App.5th 644, 651–652.) It therefore applies to this case. So, respondent's argument in this case – that the prosecution only needed to prove "the mental state of implied malice" (see ABM 26) – fails.

The events that lead to enactment of the current statutory language reinforce this conclusion. As originally enacted by SB 1437, section 1170.95, subdivision (d)(3) stated that "[a]t the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (Stats. 2018, ch. 1015, § 4.) Every court that directly addressed that language held that the prosecution needed to prove *each element of murder* under current law. (*People v. Rodriguez* (2020) 272 Cal.Rptr.3d 342, 344 (*Rodriguez*), review granted Mar. 10, 2021, S266652, cause transferred Dec. 22, 2021; *People v. Lopez* (2020) 271 Cal.Rptr.3d 170, 175 (*Lopez*), review granted Feb. 10, 2021, S265974, cause transferred Dec. 22, 2021.)[19] "[C]ourts generally presume 'the

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[19] Although *Rodriguez* and *Lopez* have been rendered "'depublished' or 'not citable,'" they are mentioned here only as factual background for the Legislature's enactment of SB 775. (See, e.g., *Pacific Gas & Electric Co. v. City and County of San Francisco* (2012) 206 Cal.App.4th 897, 907, fn. 10 [unpublished opinion

Legislature is aware of court opinions existing at the time it amends legislation.'" (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1254, citation omitted.) And when enacting SB 775, the Legislature was *definitely* aware of *Lopez* and *Rodriguez*, whose holdings it described. (See Assem. Com. on Public Safety, Analysis of Sen. Bill No. 775 (2021–2022 Reg. Sess.) July 12, 2021, p. 9 ["On the other hand, in *People v. Lopez* (2020) 56 Cal.App.5th 936, 949, review granted February 10, 2021, S265974, the court stated, '[W]e construe the statute as requiring the prosecutor to prove beyond a reasonable doubt *each element of first or second degree murder* under current law . . .'"], original brackets and ellipsis, italics added.) That the Legislature changed the language to conform to *Lopez* and *Rodriguez* further demonstrates that respondent's interpretation is mistaken.[20]

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appropriately cited "to explain the factual background . . . and not as legal authority"].)

[20] One lower court has asserted, in dicta, that "[o]f course, in a section 1170.95 petition, the trial judge isn't charged with holding a whole new trial on all the elements of murder." (*People v. Clements* (2022) 75 Cal.App.5th 276, 298.) The assured "of course" cannot mask the fact that the statement was made without reference to any supporting authority – it exists as pure *ipse dixit*. But more concerning is the lower court's failure even to acknowledge the amended statutory language or the legislative history that gave rise to that language, both of which, as discussed in the text, render that court's dictum utterly untenable.

III.
WHEN, BASED ON A COLD RECORD, A TRIAL COURT DENIES RELIEF AT A SECTION 1170.95, SUBDIVISION (D)(3) HEARING, THE APPELLATE COURT SHOULD CONDUCT INDEPENDENT REVIEW

Although not formally mentioned in the issues to be briefed and argued, the parties have briefed the issue of the standard of review on an appeal after a section 1170.95 evidentiary hearing. The parties dispute whether, functionally, this is a cold record case and whether independent review should apply. (Compare OBM 27–28 and RBM 6–7 with ABM 21–24.) Regardless of how that dispute is resolved, the question of what appellate deference, if any, is due to trial court section 1170.95 determinations made on a cold record is one this Court will almost surely have to address.

"The fact that [a ruling] is reviewed by way of appeal does not necessarily dictate a particular standard of review." (*People v. Vivar* (2021) 11 Cal.5th 510, 527 (*Vivar*).) So, where a trial court at a section 1170.95, subdivision (d)(3) hearing denies relief but does so based on a cold record, there is no reason for a reviewing court to defer to the lower court's finding. (See *Smiley v. Citibank* (1995) 11 Cal.4th 138, 146 ["We have no need to defer, because we can ourselves conduct the same analysis"].) Instead, in accordance with this Court's emerging precedent, the appellate court – which is identically situated to the trial court – should independently review the record.

For example, in *In re Cudjo* (1999) 20 Cal.4th 673, a habeas corpus case, this Court held that, in reviewing a trial court's decision on a postconviction issue, it would independently review the evidence to determine whether it supported the trial court's findings

and conclusions. (*Id.* at pp. 687–688.) In doing so, the Court stressed that deference need not be given to factual findings based entirely on documentary evidence. (*Id.* at p. 688.)[21] In other cases similarly decided on a cold record, the Court has held that deference to factual findings is unnecessary when the underlying determination does not involve live witnesses and associated credibility determinations. (See, e.g., *People v. Avila* (2006) 38 Cal.4th 491, 529 [although removal of potential jurors is normally afforded deference, de novo review used when decision based solely on written questionnaires]; *People v. Lewis* (2004) 33 Cal.4th 214, 226 [independent review of determination – made by judge who did not preside at trial – that penalty verdict was not contrary to the law or the evidence presented]; see also *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 79–80 (*Ogunmowo*) [no deference given to trial court's conclusion about facts in written documents, because trial and appellate courts were in same position to interpret evidence]; *People v. Booth* (2016) 3 Cal.App.5th 1284, 1305–1306 [no deference given to finding that witness lacked credibility, because "all of this information is in the record before us, [so] we are in the same position as the trial court"].)

Vivar, *supra*, 11 Cal.5th 510, is the latest instance of the Court taking that approach. In *Vivar*, the Court held, in deciding appeals from the grant or denial of a motion to vacate a conviction

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[21] Amicus anticipates that respondent will point out differences between section 1170.95, subdivision (d)(3) hearings and habeas corpus proceedings. But as will be shown, this Court has not limited independent review of cold records to habeas cases.

under Penal Code section 1473.7, that appellate courts should independently review factual findings that rest on a cold record. (See *Vivar*, at pp. 524, 527–528.)[22] As Justice Corrigan put it: under *Vivar*, "no deference is owed to the trial court's factual findings except when credibility determinations are based upon live testimony." (*Id.* at p. 535 (conc. & dis. opn. of Corrigan, J.).) The Court explained that its holding was a product of (1) the history of section 1473.7; (2) the critical interests at stake in a section 1473.7 motion; (3) the type of evidence on which a section 1473.7 ruling is likely to be based; and (4) the relative competence of trial courts and appellate courts to assess that evidence. (*Vivar*, at p. 527.)

Every factor relied on in *Vivar*, *supra*, 11 Cal.5th 510, applies to section 1170.95 proceedings.[23] *First,* just like section 1473.7, in which the Legislature "intended . . . to make relief . . . broadly available to deserving defendants" (*Vivar*, at p. 525), SB 1437 was an ameliorative act which "redefine[d] the crime of murder as part of a broader penal reform" (*People v. Marquez* (2020) 56 Cal.App.5th 40, 51). With SB 1437, the Legislature expressly desired to "limit

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[22] Section 1473.7 provides a means to vacate a prior conviction on the ground that there was a prejudicial error that affected the person's ability to meaningfully understand the actual or potential immigration consequences of a plea. (*Vivar*, *supra*, 11 Cal.5th at p. 517.)

[23] In *Vivar*, the Court stated that "Our decision addresses only the independent standard of review under section 1473.7." (11 Cal.5th at p. 528, fn. 7.) However, as discussed in the accompanying text, application of the *Vivar* factors to section 1170.95, subdivision (d)(3) determinations – along with the use of independent review in other contexts – establishes why such review is appropriate here, too.

convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding" (Stats. 2018, ch. 1015, § 1, subd. (e).) Moreover, just like section 1473.7, which was amended to expand the pool of individuals eligible for relief (see *Vivar*, at p. 525), the Legislature amended SB 1437 to broaden its application – both procedurally and substantively (see Stats. 2021, ch. 551, § 2).

Second, Vivar reiterated that "'the proper review standard is influenced in part by *the importance of the legal rights or interests at stake*,'" as well as by "'the *consequences of an erroneous determination* in the particular case.'" (*Vivar*, *supra*, 11 Cal.5th at pp. 524–525, quoting *People v. Ault* (2004) 33 Cal.4th 1250, 1265, 1266 (*Ault*).) The "most elemental" interest, of course, is "the interest in being free from physical detention by one's own government." (*Hamdi v. Rumsfeld* (2004) 542 U.S. 507, 529.) And when a petitioner has never had the chance for a jury trial under current homicide law, the consequences of an erroneous denial of a section 1170.95 petition – potential lifelong wrongful incarceration – are at their apex. (See *People v. Flores* (2020) 54 Cal.App.5th 266, 274 [noting "paramount liberty interests of the petitioner" in section 1170.95 proceedings].)

This brings us to the *third* and *fourth Vivar* factors – the type of evidence on which a ruling is likely to be based and the relative competence of trial courts and appellate courts to assess that evidence. Just as with section 1473.7 petitions, section 1170.95 petitions are likely to be based on a cold record developed many years beforehand and decided by a judge with "no firsthand

familiarity with the circumstances." (*Vivar*, *supra*, 11 Cal.5th at p. 527.) As the Court explained, "[w]here . . . the facts derive entirely from written declarations and other documents . . . there is no reason to conclude the trial court has the same special purchase on the question at issue; as a practical matter, '[t]he trial court and this court are in the same position . . . ' when reviewing a cold record . . . ." (*Id.* at p. 528, quoting *Ogunmowo*, *supra*, 23 Cal.App.5th at p. 79, ellipses and first alteration added; accord, *Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1514 ["where the trial court's nether position does not make it the better decision maker, appellate deference is not appropriate"].) Thus, a straightforward application of *Vivar* should lead to independent review of a trial court's ruling at a section 1170.95, subdivision (d)(3) hearing.

Nonetheless, in *People v. Clements* (2022) 75 Cal.App.5th 276 (*Clements*), Division Two of the Fourth District Court of Appeal held otherwise.[24] In doing so, the lower court noted that this Court "held in the context of a Proposition 36 petition for recall of sentence that 'even if the trial court is bound by and relies solely on the record of conviction to determine eligibility, [where] the question . . . remains a question of fact . . . we see no reason to withhold the deference

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[24] Amicus is aware that other courts have also chosen to apply the substantial evidence standard on appellate review from the denial of a section 1170.95 petition. (See, e.g., *People v. Ramirez* (2021) 71 Cal.App.5th 970, 985.) But none were cold record cases where the appellate court addressed the argument made here; they just stated the standard of review without apparent dispute. Because "it is axiomatic that cases are not authority for propositions not considered" (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176), those cases do not provide support for a contrary rule.

generally afforded to such factual findings.'" (*Clements*, at p. 301, quoting *People v. Perez* (2018) 4 Cal.5th 1055, 1066 (*Perez*), alteration and ellipses added by *Clements*.)

Clements, *supra*, 75 Cal.App.5th 276, acknowledged this Court's holding in *Vivar*, *supra*, 11 Cal.5th 510, but asserted that in *Vivar*, "the Court emphasized that the questions raised by a 1473.7 motion, 'while mixed questions, are predominantly questions of law.'" (*Clements*, at p. 301, quoting *Vivar*, at p. 524.) Thus, because the question in *Clements* was "predominantly a factual determination," the lower court "conclude[d] that *Perez*, not *Vivar*, governs in the circumstances of [the defendant's] appeal." (*Clements*, at p. 301.) Finally, *Clements* noted the *Vivar* factors but stated, in full, that "[t]he same factors don't support applying independent review in the context of reviewing a trial judge's ruling after a full hearing under section 1170.95 subdivision (d)(3)." (*Clements*, at p. 301.)

Clements was wrongly decided. Preliminarily, although it noted the four *Vivar* factors, *Clements* made no effort to actually apply them to section 1170.95 proceedings. This vitiates its persuasive force. (See *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 358 ["When . . . a decision treats an issue in a 'summary and conclusory' manner, and is 'virtually devoid of reasoning,' its authoritative status is undermined"], quoting *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 533.)

The even deeper flaw in *Clements* is that the purported distinction on which the opinion turned – that (like *Perez*) it was reviewing a "predominantly . . . factual determination" while *Vivar*

involved a mixed question of law and fact – is simply inaccurate. While the underlying question in *Vivar* was a mixed question – "[w]hether counsel's advice regarding immigration was inadequate and whether such inadequacy prejudiced the defense" – the specific issue in *Vivar* pertinent to this discussion was whether "appellate courts must review deferentially factual findings made by the trial court concerning prejudice under section 1473.7, even if those findings are based on a cold record consisting solely of documentary evidence." (*Vivar*, *supra*, 11 Cal.5th at pp. 521, 524.) And *that* issue – which this Court held required independent review – *was* a pure question of fact.

In short, the *Clements* court's effort to distinguish *Perez* from *Vivar*, so that it could rely on the former case and ignore the latter, was unavailing. And when the factors set forth in *Vivar* are applied, appeals arising under section 1170.95 present a different and more compelling case than the situation did in *Perez* for independent review of cold record determinations.

At issue in *Perez* was the trial court's determination that the defendant was ineligible for Proposition 36 relief because he was armed with a deadly weapon during his current offense. (*Perez*, *supra*, 4 Cal.5th at p. 1066.)[25] The defendant's guilt of the underlying offense was not at issue, nor did the elements of the

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[25] Amicus notes that, while the Court held that substantial evidence review was appropriate for determining that issue, Justice Corrigan expressed a different view. (*Perez*, *supra*, 4 Cal.5th at p. 1068 (conc. opn. of Corrigan, J.) ["on the record before us, the trial court's finding of eligibility is a question of law subject to de novo review"].)

offense change; the only question was whether he was armed with a deadly weapon. (*Id.* at p. 1059.) If the defendant had prevailed, he would have received a new sentence, but would remain convicted of the same offense because there would be no question he was still guilty of it under current law.

A proceeding under section 1170.95, subdivision (d)(3) is quite different, both in terms of the law's history (the first *Vivar* factor) and the weight of the interests at stake (the second *Vivar* factor). Unlike "prior ameliorative provisions [that] merely authorized reductions in the sentences imposed for convictions of the unchanged underlying offenses . . . Senate Bill No. 1437 has changed the nature of the offense itself." (*People v. James* (2021) 63 Cal.App.5th 604, 609.) This distinction has several pertinent implications. Most obviously (and unlike in *Perez*), petitioner's guilt of the underlying offense *is* at issue in a section 1170.95 proceeding because the definition of murder – the most serious offense the law knows – has changed. Thus, the critical interests at stake could not be weightier.

Recognizing this, the Legislature took extraordinary steps to ensure that petitioners have every protection and opportunity to have their cases determined on their merits. This included creating a procedure, governed by the established rules of evidence, in which the State has again the burden of proving beyond a reasonable doubt that the petitioner is guilty of murder under current law. (§ 1170.95, subd. (d)(3).)

Given the concern shown by Legislature that petitioners receive a full and fair determination of the merits of their cases, the

short-circuited mode of appellate review adopted by *Clements* is anomalous. A person could, under *Clements*, have their liability under current law both determined in the first instance *and* affirmed where (1) no jury ever decided their guilt under current law, (2) the trial court that found them "guilty" was in no superior position to make such a guilt determination, but (3) the reviewing court nonetheless accords deference to that determination.

This Court has eschewed such unfair procedures before. (See *Ault*, *supra*, 33 Cal.4th at p. 1266 ["if a trial court's determination that juror misconduct was harmless were not reviewed de novo, the risk would arise, in a close case, that the complaining party's rights had been finally resolved by an unfair trial in which the party was denied the fundamental constitutional guarantee of an impartial jury"], italics omitted.) It should do the same here, and – in accordance with *Vivar* – conduct independent review when a trial court, based solely on a cold record, denies relief at a section 1170.95, subdivision (d)(3) hearing.

IV.
CONCLUSION

OSPD, as amicus curiae, respectfully urges the Court to reach the following holdings as to homicide liability: (1) aiding and abetting implied malice murder is not a valid theory, and the proper analytical framework for someone who does not strike the fatal blow is direct perpetrator liability; (2) alternatively, if it exists, a theory of aiding and abetting implied malice murder has only narrow application; and (3) in either event, for individuals who did not strike a fatal blow, the *Thomas* test of implied malice applies.

OSPD further urges that, to the extent this Court reaches issues relating to section 1170.95 proceedings, it hold that (1) the prosecution needs to prove each element of murder at a subdivision (d)(3) hearing and (2) appellate review of a cold-record denial at a subdivision (d)(3) hearing should be independent.

DATED: June 22, 2022

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Samuel Weiscovitz, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 10,462 words in length, excluding the tables and this certificate.

DATED: June 22, 2022

Respectfully submitted,

/S/ Samuel Weiscovitz

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DECLARATION OF SERVICE

Case Name: *People v. Reyes*
Case Number: **Supreme Court Case No. S270723**
Orange County Superior Court
No. 04CF2780
4DCA Case No. G059251

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AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT REYES

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The Honorable Richard King Judge of the Superior Court Orange County Central Justice Center 700 Civic Center Drive West Santa Ana, CA 92701

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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. Signed on **June 22, 2022**, at Sacramento, CA.

Esmeralda Manzo Digitally signed by Esmeralda Manzo
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ESMERALDA MANZO

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Supreme Court of California

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Case Number: **S270723**
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Date

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