No. S270723

In the Supreme Court of the State of California

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

v.

ANDRES QUINONEZ REYES,
Defendant and Appellant.

Fourth Appellate District, Division Three, Case No. G059251
Orange County Superior Court, Case No. 04CF2780
The Honorable Richard M. King, Judge

RESPONDENT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE

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TABLE OF CONTENTS

Page

Introduction 7

Argument 9

I. The Court need not announce any categorical rule governing the relevance of expert evidence about adolescent brain development 9

II. Direct aiding and abetting an implied malice murder remains a viable theory of liability for second degree murder 12

III. A section 1172.6 petition does not require the superior court to conduct a new murder trial entirely and resolve factual disputes unaffected by the changes to sections 188 and 189 24

IV. A superior court's ruling on a section 1172.6 petition should be reviewed under the substantial evidence standard, not independently reviewed 26

Conclusion 30

Certificate of compliance 31

TABLE OF AUTHORITIES

Page

CASES

In re Hardy
(2007) 41 Cal.4th 977 27

In re Moore
(2021) 68 Cal.App.5th 434 10

People v. Allison
(2020) 55 Cal.App.5th 942 24

People v. Bascomb
(2020) 55 Cal.App.5th 1077 29

People v. Brown
(2014) 59 Cal.4th 86 ..... 11, 12

People v. Burden
(1977) 72 Cal.App.3d 603 18

People v. Clements
(2022) 75 Cal.App.5th 276 ..... 25, 27, 28, 29

People v. Cravens
(2012) 53 Cal.4th 500 22

People v. Dellinger
(1989) 49 Cal.3d 1212 21

People v. Farfan
(2021) 71 Cal.App.5th 942 24

People v. Gentile
(2020) 10 Cal 5th. 830 ..... *passim*

People v. Glukhoy
(2022) 77 Cal.App.5th 576 17

People v. Grana
(1934) 1 Cal.2d 565 11

TABLE OF AUTHORITIES
(continued)

Page

People v. Knoller
(2007) 41 Cal.4th 139 ..... 20, 21

People v. Latham
(2012) 203 Cal.App.4th 319 18

People v. Medina
(2009) 46 Cal.4th 913 ..... 11, 12

People v. Nieto Benitez
(1992) 41 Cal.4th 91 ..... 21, 22

People v. Phillips
(1966) 64 Cal.2d 574 21

People v. Powell
(2021) 63 Cal.App.5th 689 ..... 15, 17

People v. Ramirez
(2021) 71 Cal.App.5th 970 ..... 10, 29

People v. Reyes
(Aug. 4, 2021, No. G059251) 2021 WL 3394935 14

People v. Sanchez
(2016) 63 Cal.4th 665 19

People v. Sedeno
(1974) 10 Cal.3d 703 21

People v. Simmons
(1971) 19 Cal.App.3d 960 11

People v. Strong
(Aug. 8, 2022, S266606) ___ Cal.5th ___, 2022 WL 3148797 ..... 24, 26

People v. Superior Court (*Valenzuela*)
(2022) 73 Cal.App.5th 485 ..... 15, 16, 17

TABLE OF AUTHORITIES
(continued)

Page

People v. Tessman
(2014) 223 Cal.App.4th 1293 11

People v. Thomas
(1953) 41 Cal.2d 470 ..... 13, 20, 22, 23

People v. Vivar
(2021) 11 Cal.5th 510 ..... 28, 29

People v. Watson
(1981) 30 Cal.3d 290 22

People v. Webb
(1986) 186 Cal.App.3d 401 20

People v. Williams
(2020) 57 Cal.App.5th 652 29

Shamsian v. Atlantic Richfield Co.
(2003) 107 Cal.App.4th 967 19

Western States Petroleum Assn. v. Superior Court
(1995) 9 Cal.4th 559 19

Whiteman v. American Trucking Assns., Inc.
(2001) 531 U.S. 457 26

STATUTES

Evidence Code
§ 664 11

TABLE OF AUTHORITIES
(continued)

Page

Penal Code
§ 188 ..... 14, 24, 25
§ 189 ..... 24, 25
§ 189, subd. (e) 10
§ 1170.95 7
§ 1170.95, subd. (d)(3) 27
§ 1172.6 ..... *passim*
§ 1172.6, subd. (a)(3) 24
§ 1172.6, subd. (b)(2) 12
§ 1172.6, subd. (d) 12
§ 1172.6, subd. (d)(3) 24, 26, 27
§ 1473.7 ..... 28, 29
§ 1473.7, subd. (a)(1) 28

COURT RULES

California Rules of Court
Rule 8.516(a)(1) 19

OTHER AUTHORITIES

CALCRIM
No. 220 27
No. 403 19
No. 520 ..... 19, 21

CALJIC
No. 8.31 21

Senate Bill
No. 775 24
No. 1437 8

INTRODUCTION

This case concerns whether substantial evidence supports the trial court's finding that Reyes is guilty of second degree murder and thus ineligible for resentencing relief under Penal Code section 1172.6.[1] The parties addressed this issue extensively in the briefing already before this Court. Neither amicus brief undermines the conclusion that the Court of Appeal's judgment was correct and should be affirmed.

In its amicus brief, the Juvenile Innocence & Fair Sentencing Clinic[2] urges this Court to hold that the science of juvenile brain development is relevant to whether a youthful offender exhibited conscious disregard for human life, and it contends the trial court erred in failing to properly consider such evidence. Respondent agrees that such evidence is relevant, but does not agree that the trial court committed any error. At Reyes's resentencing hearing, the trial court did, in fact, admit and consider a psychologist's testimony about adolescent brain

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[1] Effective June 30, 2022, section 1170.95 was renumbered section 1172.6, with no change in the text. (Stats. 2022, ch. 58, § 10.) This brief will either refer to the statute as section 1172.6 or "former section 1170.95." All subsequent statutory references are to the Penal Code unless otherwise noted.

[2] Citations to the amicus brief filed by the Juvenile Innocence & Fair Sentencing Clinic are indicated using "JIFSC" and the page number. Similarly, citations to the amicus brief from the Office of the State Public Defender are indicated using "OSPD" and the page number, and citations to respondent's Answer Brief on the Merits are indicated using "ABM" and the page number.

development but nevertheless concluded that petitioner was not entitled to relief in light of other counterbalancing factors. To the extent that JIFSC suggests that this Court should hold that all 15-year-olds lack the necessary capacity to appreciate a potential risk to human life, JIFSC offers no arguments or authorities to support such a categorical rule, and none is necessary.

In a separate amicus curiae brief, the Office of the State Public Defender raises three arguments, all of which are unavailing. First, OSPD urges this Court to conclude that aiding and abetting implied malice murder is not a valid theory of liability for murder, or alternatively that it should be redefined to narrow its applicability. But this overlooks this Court's recent confirmation that "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." (*People v. Gentile* (2020) 10 Cal 5th. 830, 850.) OSPD next argues that the prosecution needed to prove *all* elements of murder under current law at the hearing. But the statutory language does not allow for reconsideration or relitigation of findings unrelated to changes stemming from Senate Bill No. 1437. Finally, OSPD urges this Court to conduct independent review here instead of applying the substantial evidence standard. This argument goes beyond the issues upon which this Court granted review, and in any event, it disregards the fact that Reyes testified at the hearing below and the superior court necessarily made credibility

determinations, thus requiring that such factual findings be reviewed for substantial evidence.

ARGUMENT

I. THE COURT NEED NOT ANNOUNCE ANY CATEGORICAL RULE GOVERNING THE RELEVANCE OF EXPERT EVIDENCE ABOUT ADOLESCENT BRAIN DEVELOPMENT

JIFSC argues that this Court "should explicitly hold that the science of juvenile brain development is relevant to whether petitioner exhibited 'conscious disregard for human life' in the case against him for implied malice murder." (JIFSC 16.) But a categorical rule that this type of evidence is relevant in every case is unnecessary, particularly because evidence of adolescent brain development was indeed admitted and considered by the trial court in this case. JIFSC acknowledges that the trial court allowed for such expert testimony about this scientific theory, and that it "was the focus of Dr. Elizabeth Cauffman's testimony at petitioner's evidentiary hearing," but then faults the trial court because such science "did not find its way into the court's reasoning." (JIFSC 8.) The court did not err in that regard, however.

Respondent does not dispute that the science regarding juvenile brain development has advanced our understanding of that topic and can be very helpful to understanding a youthful offender's behavior and mental state. Such evidence is often relevant and thus properly considered by a trial court in determining whether a youthful offender exhibited conscious

disregard for human life.[3] But this Court need not address whether such evidence is relevant and necessarily admissible in *every* case because the trial court here allowed and considered the testimony of Dr. Cauffman, a developmental psychologist and expert in adolescent brain development. The trial court expressly noted that it had "considered the expert's testimony," but it nonetheless concluded the prosecution had proven the elements of implied malice murder. (See RT 297–298.)

Accordingly, the record makes clear that the superior court weighed Dr. Cauffman's testimony against the other ample evidence that Reyes acted with conscious disregard for human life, and resolved the conflict against Reyes. As the fact finder, it had sole province to make these determinations, and JIFSC's insistence that the trial court should have afforded more weight

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[3] JIFSC incorrectly asserts that, "[d]espite [] widespread agreement by the courts that juvenile brain development is relevant to a minor defendant's mens rea, the People argue that this Court should confine its consideration of juvenile brain development to the mens rea element of felony murder only . . . [,]" (JIFSC 9–10), referring to the "reckless indifference" standard in section 189, subdivision (e). Respondent made no such argument. On the contrary, in the answer brief on the merits, the People explicitly acknowledged that "a defendant's youth is a relevant factor in determining whether he or she acted with conscious disregard to human life." (ABM 37 [citing *People v. Ramirez* (2021) 71 Cal.App.5th 970, 984, and *In re Moore* (2021) 68 Cal.App.5th 434, 454].) Respondent further noted that evidence regarding adolescent brain development "may be relevant to both" the "conscious disregard" element of implied malice murder and the "reckless indifference" element of felony murder, but only the former was at issue in this case. (ABM 38–39, fn. 5.)

to this evidence ignores the well-settled rules regarding the substantial evidence standard of review. (*People v. Brown* (2014) 59 Cal.4th 86, 106 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact"]; *People v. Medina* (2009) 46 Cal.4th 913, 919 [appellate court does not reweigh evidence].)

JIFSC also complains that the superior court misunderstood or misused the scientific evidence introduced to demonstrate adolescent brain function. (JIFSC 48–53.) However, "[a]s a broad proposition, cases have stated that a trial court's remarks in a bench trial cannot be used to show that the trial court misapplied the law or erred in its reasoning." (*People v. Tessman* (2014) 223 Cal.App.4th 1293, 1302; see *People v. Grana* (1934) 1 Cal.2d 565, 570–571; cf. Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"].) This proposition stems from the well-settled principle that, in a criminal bench trial, the trial court is not required to provide a statement of decision, and any explanation the trial court provides as to its decision is not part of the record on appeal. (*Tessman*, at p. 1302; *Grana*, at p. 571.)

Remarks made by the superior court before rendering a verdict may therefore not be used by a defendant to attack that verdict by showing the judge applied erroneous reasoning. (*People v. Simmons* (1971) 19 Cal.App.3d 960, 964; but see *Tessman*, at p. 1303 [appellate court may consider a judge's statements when those statements, taken as a whole, disclose an incorrect conception of the relevant law, "embodied not merely in

secondary remarks but in [the judge's] basic ruling"].) That rule of law must apply here because the superior court was not required to provide a reasoned decision following the section 1172.6 evidentiary hearing. (Compare § 1172.6, subd. (d) [no requirement that trial court issue reasoned denial at evidentiary hearing stage] with § 1172.6, subd. (b)(2) [requirement that trial court denying petition without prejudice due to missing information advise petitioner of inadequacies in petition].)

Moreover, JIFSC's argument about the superior court's comments boils down to the contention that it should have weighed the evidence differently. But the record makes clear that the court weighed Dr. Cauffman's testimony against the other ample evidence that Reyes acted with conscious disregard for human life, and resolved the conflict against Reyes. As the fact finder, it had sole province to make these determinations, and JIFSC's insistence that the trial court should have afforded more weight to this evidence ignores the well-settled rules regarding the substantial evidence standard of review, which applies in this case (see Arg. IV, *post*). (*People v. Brown* (2014) 59 Cal.4th 86, 106 ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact"]; *People v. Medina* (2009) 46 Cal.4th 913, 919 [appellate court does not reweigh evidence].)

II. DIRECT AIDING AND ABETTING AN IMPLIED MALICE MURDER REMAINS A VIABLE THEORY OF LIABILITY FOR SECOND DEGREE MURDER

Amicus OSPD argues that "[a] person cannot be liable for aiding and abetting an implied malice murder" because such a

theory of liability "contravenes the requirement that direct aiders and abettors harbor a specific intent to commit the charged crime." (OSPD 14–15.) OSPD further contends that, even if such a theory of liability remains valid, this Court should "make clear that the factual scenarios in which aiding and abetting an implied malice murder applies are narrow in scope." (OSPD 14.) OSPD urges this Court to make one additional holding—it asks this Court to endorse and adopt the *Thomas* test for assessing the actus reus necessary to establish an implied malice murder, *i.e.*, the evidence must prove the commission of an act that involves a "*high probability* it will result in death . . . ." (OSPD 14–15, italics added.)[4] But this Court has already held that direct aiding and abetting an implied malice murder remains a valid theory of liability. As to the theory's reach, this Court need not and should not accept OSPD's invitation to artificially cabin the theory to any precise set of factual scenarios. Finally, OSPD's request regarding the *Thomas* test is untimely, forfeited, and without merit.

Preliminarily, if this Court finds substantial evidence to support Reyes's guilt under a direct perpetrator theory, it need not reach or decide this issue. As OSPD acknowledges, where (as here) a defendant is not the actual killer and 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

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

murder." (OSPD 14, italics original; see also OSPD 24–29.) This is precisely the basis of respondent's primary argument that substantial evidence supports the trial court's finding of guilt. (ABM 20, 29–40.) As detailed in respondent's answer brief, the jury necessarily found Reyes's own actions were intentional and objectively dangerous to human life. (ABM 25–28.) The superior court determined Reyes was subjectively aware of the danger his actions posed, and that he consciously disregarded that known risk. (ABM 28–35.) Taken together, those findings satisfy the elements of implied malice murder and establish Reyes's guilt as a direct perpetrator. Notably, neither the trial court nor the Court of Appeal made any mention of aiding and abetting, while both found Reyes's own conduct satisfied the elements of implied malice. (*People v. Reyes* (Aug. 4, 2021, No. G059251) 2021 WL 3394935 [unpubd. opn.] at *5–6.)

In any event, as indicated in respondent's second argument in the answer brief (ABM 41–47), aiding and abetting an implied malice murder remains a viable theory of liability for second degree murder. As this Court noted recently, where "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.) Consistent with the amendments to section 188 that were enacted by SB 1437, this theory requires a defendant to personally harbor malice—either express or implied. (See *id.* at p. 847.)

In *People v. Powell* (2021) 63 Cal.App.5th 689, the Court of Appeal, relying on *Gentile*, correctly rejected the defendant's contention that direct aiding and abetting implied malice murder is an invalid legal theory. (*Powell*, at p. 714.) The *Powell* court reasoned:

> In the context of implied malice, the actus reus required of the perpetrator is the commission of a life-endangering act. For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life-endangering act. Thus, 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, not the result of that act. 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; see also *People v. Superior Court* (*Valenzuela*) (2022) 73 Cal.App.5th 485, 499.) The analysis in *Powell* is correct. Contrary to OSPD's assertion, a person may aid and abet implied malice murder by specifically intending that crime in the sense that the person intends the commission of an act (not necessarily entirely undertaken by the person him- or herself) that is dangerous to human life while consciously disregarding that danger.[5]

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[5] OSPD posits that "the proper analytical framework is direct perpetrator liability" in this context (OSPD 25–29) and it asks this Court to restate the governing legal requirements based on "the substantial factor theory of liability in the implied malice (continued…)

OSPD next argues that "[a]ssuming, 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," or otherwise, "it will be nothing more than a repackaging of the now-abolished natural and probable consequences theory." (OSPD 36.) But as this Court explained in *Gentile*, a key distinction between the natural and probable consequences doctrine and implied malice is that the latter requires the subjective mental state of conscious disregard for life on the part of the defendant—*i.e.*, 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.) This means that an aider and abettor who acts with implied malice "can be guilty of murder *entirely apart* from the natural and probable consequences doctrine." (*Valenzuela*, *supra*, 73 Cal.App.5th at p. 499, italics added.) In contrast, for liability under the natural and probable consequences doctrine, the aider and abettor only need have the intent to participate in a target offense, and guilt

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context." (OSPD 29.) While there may be some overlap between accomplices and direct perpetrators in the context of implied malice murder, the theories are distinct, and prosecutors frequently rely on one to the exclusion of the other. OSPD does not demonstrate, however, how its direct-liability formulation of the test would result in any appreciable practical difference here that would justify departing from well-settled precedent.

for the charged crime is thereby imputed to him. (*Gentile*, at p. 846; *People v. Glukhoy* (2022) 77 Cal.App.5th 576, 590.)

Put another way, as both the *Powell* and *Valenzuela* courts have emphasized, direct aiding and abetting of an implied malice murder is based on "the aider and abettor's *own* mens rea." (*Valenzuela*, *supra*, 73 Cal.App.5th at p. 499, citing *Powell*, *supra*, 63 Cal.App.5th at pp. 712–713.) "In this key respect, *Powell* is entirely consistent with *Gentile* in basing murder liability on the aider and abettor's own state of mind—conscious disregard for life." (*Valenzuela*, at p. 499; see also *Glukhoy*, *supra*, 77 Cal.App.5th at pp. 590–591.) As such, appellant's assertion that implied malice aiding and abetting liability "functionally resurrect[s] natural and probable consequences liability for murder" is unfounded. (OSPD 36.) This theory does not impute malice based solely on a defendant's participation in a crime, and respondent does not suggest otherwise.

Next, assuming the validity of the aiding and abetting implied malice murder theory, OSPD asks this Court to narrow the reach of this theory of liability by "requir[ing] that the defendant aid the life endangering act rather than merely some prefatory conduct." (OSPD 36.) But the elements of implied malice have long been defined, and nothing about the recent legislative changes was intended to alter these long-standing definitions. Rather, the Legislature's recent changes to the law of murder were "intended to restrict culpability for murder outside the felony murder rule to persons who personally possess malice aforethought." (*Gentile*, *supra*, 10 Cal.5th at p. 847.) Nothing

about these changes indicates an intent to redefine or restrict the conduct necessary for liability.

In addition, artificially restricting this theory in the manner OSPD suggests would exempt conduct that the law properly seeks to punish. As an example, consider implied malice murder charges against parents because a child in their care died from malnutrition, starvation, or neglect. (See e.g., *People v. Latham* (2012) 203 Cal.App.4th 319, 332 [both parents properly charged with implied malice murder based on failure to obtain medical treatment for child]; *People v. Burden* (1977) 72 Cal.App.3d 603, 606 [parent properly charged with implied malice murder based on five-month-old son's death from malnutrition and dehydration].) In such situations, there may not be a singular identifiable "life-endangering act" attributable to one defendant and not the other. Imposing OSPD's proposed restriction on the act necessary to prove implied malice murder would exempt such defendants from liability. The restriction is not necessary and would frustrate the proper goal of implied malice as a theory of murder.

Finally, OSPD urges this Court to announce a new test for the objective component of implied malice murder. (OSPD 37–41.) Specifically, OSPD contends this Court should "hold that the act must involve a *high probability* it will result in death—not just a significant risk of death." (OSPD 36, italics original.) But as explained in respondent's answer brief (and discussed further in Argument III, *post*), under either an implied malice or a natural and probable consequence theory (the two theories provided at

Reyes's original trial), the jury necessarily determined that his conduct satisfied the objective component for implied malice murder. (ABM 25–29; 2 CT 401, 411; CALCRIM Nos. 403, 520.) Because the verdicts reflect an affirmative jury finding on this element, it cannot be relitigated in the context of a resentencing hearing under former section 1172.6. (See ABM 25–29.) Nor was the definition of this element an issue on which this Court granted review. (See Cal. R. Crt., rule 8.516(a)(1) ["On or after ordering review, the Supreme Court may specify the issues to be briefed and argued" and "[u]nless the court orders otherwise, the parties must limit their briefs and arguments to those issues and any issues fairly included in them"].)[6] In addition, properly

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[6] In a similar vein, in footnote 56 of its amicus brief (discussed in Argument I, *ante*), JIFSC raises two contentions that also fall outside the scope of this Court's grant of review. (Cal. R. Crt., rule 8.516(a)(1).) First, JIFSC implies the trial court's consideration of the gang evidence violated *People v. Sanchez* (2016) 63 Cal.4th 665, 682–686. (JIFSC 47–48, fn. 56.) Second, citing and relying on material entirely outside the appellate record and regarding an unrelated case, JIFSC attacks the credibility of Detective Rondou, the gang expert who testified at Reyes's trial in 2005. (JIFSC 47–48, fn. 56.) This Court should decline to consider both contentions raised in footnote 56 because they ignore the well-settled rules applicable to any substantial evidence analysis. More specifically, such review must be confined to the evidence presented to the fact finder, and an appellate court may not consider matters outside the record and never presented to the lower courts. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 565 ["appellate courts generally may not consider evidence not contained in the trial record when reviewing [] findings" for substantial evidence]; *Shamsian v. Atlantic Richfield Co.* (2003)

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framed, OSPD's argument regarding the *Thomas* test is actually a claim of instructional error—the true contention is that the instructions provided to the jury did not accurately define an element of the offense. But that claim has been forfeited because Reyes could have raised it in his initial direct appeal and did not. (See e.g., *People v. Webb* (1986) 186 Cal.App.3d 401, 410 ["In the first place, we specifically affirmed the judgment of conviction in the prior appeal and remanded only for resentencing[; thus, d]efendant cannot now be permitted to make a direct attack upon his convictions"].)

Even if this claim could be properly raised here, this Court should reject it because the "*Thomas* test" definition of the actus reus element—as opposed to its characterization of the mens rea element (see *People v. Knoller* (2007) 41 Cal.4th 139, 152–157)—is not an accurate statement of the law. Adoption of the "*Thomas* test" for this purpose would directly contradict this Court's settled precedent, which has repeatedly defined the actus reus for

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107 Cal.App.4th 967, 975, fn. 5 [appellate courts will not typically take judicial notice of matters outside the appellate record].)

In any event, even if this Court were to take notice of the unproven accusations against the gang expert, Detective Rondou's credibility played a marginal role, if any, at the hearing below. JIFSC fails to identify any material factual dispute that may only be resolved by recourse to Detective Rondou's testimony. Indeed, when explaining why it was denying the petition at the hearing, the superior court never mentioned any testimony by Detective Rondou that had not been corroborated by Reyes at the hearing.

implied malice murder as "'an act, the natural consequences of which are dangerous to life . . . .'" (*Knoller*, at p. 143, quoting *People v. Phillips* (1966) 64 Cal.2d 574, 587; *People v. Nieto Benitez* (1992) 41 Cal.4th 91, 111 [same]; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1218–1219 [same]; *People v. Sedeno* (1974) 10 Cal.3d 703, 719 [same].) The applicable jury instruction—and the one given in this case—reflects this same definition. (See CALCRIM No. 520; 2 CT 401.)

Indeed, in *Nieto Benitez*, *supra*, 41 Cal.4th at page 111, this Court squarely addressed this issue and reaffirmed its approval of instructions for second degree murder with implied malice that excluded the requirement that a "high probability that death would result." In rejecting an identical request by OSPD to reinsert[7] the requirement that a "high probability that death would result" into CALJIC No. 8.31, this Court stated:

> The State Public Defender, as amicus curiae, urges us to instruct the lower courts that, in a retrial of the present case and in future cases, the high-probability requirement should be reinstated in the instructions defining second degree murder. ¶ We conclude, however, that the present CALJIC No. 8.31 correctly distills the applicable case law.

(*Id.* at p. 111.)[8]

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[7] An earlier version of CALJIC No. 8.31 included the requirement of a "high probability" of death. (See *Dellinger*, *supra*, 49 Cal.3d at p. 1217, citing CALJIC No. 8.31 (1983 rev.) (4th ed. pocket pt.).)

[8] In *Nieto Benitez*, this Court noted that the "high probability" formulation was not intended to be an elevated standard, as both definitions of implied malice were once considered to be "one and

(continued…)

In addition, OSPD's argument that this Court should adopt the "*Thomas* test" is unpersuasive because the *Thomas* case did not actually involve an implied malice murder at all. The "test" often cited from *Thomas* in this context was actually a single sentence from a concurring opinion addressing a different issue entirely and was never intended to define the necessary elements of implied malice murder. (*Thomas*, *supra*, 41 Cal.2d at p. 480 (conc. opn. of Traynor, J.).) The issue before the Court in *Thomas* was whether the trial court "misdirected the jury by giving an improper instruction on 'lying in wait[.]'" (*Id.* at pp. 471, 475–

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the same standard." (*Nieto Benitez*, *supra*, 4 Cal.4th at p. 104, quoting *People v. Watson* (1981) 30 Cal.3d 290, 300 [noting that the "high probability" formulation is the same as the "acts with conscious disregard for life" standard, just simply "[p]hrased in a different way"].) But this Court ultimately rejected the former definition because it "caused confusion in the decisions of the Courts of Appeal." (*Nieto Benitez*, at p. 104.) In arguing for its revival, both Reyes and OSPD sow a similar kind of confusion. OSPD apparently assumes that the latter definition also incorporates an elevated standard; after all, if both definitions were truly synonymous, the definition used should not have affected the superior court's decision below. But by implying that the "high probability of death" standard requires the prosecution to prove that Reyes's act created "better than even" odds of resulting in death (OSPD 38), OSPD asks this court to apply the *Thomas* formulation in a manner that the *Thomas* Court never intended. (*People v. Cravens* (2012) 53 Cal.4th 500, 513 ["This test recognizes that the ultimate inquiry involves a determination of probability: Although an act that will certainly lead to death is not required, the probability of death from the act must be more than remote or merely possible"] (conc. opn. of Liu, J.).) The circumstances of this case meet the "high probability" standard when properly applied.

476.) The majority concluded the instruction "[wa]s not as exact as it might be," but "no prejudice to the defendant resulted therefrom." (*Id.* at p. 475.)

In his concurring opinion, Justice Traynor agreed with the majority that the instruction was erroneous "because the court failed to explain that murder must first be established before the question of lying in wait can arise." (*Thomas*, *supra*, 41 Cal.2d at p. 480 (conc. opn. of Traynor, J.)) After explaining the error, Justice Traynor turned to the question of prejudice and concluded the erroneous instruction was harmless because no "reasonable jury could conclude that the killing was not murder." (*Ibid.*) As he explained, the "[d]efendant confessed that he shot at [the victim] for sexual pleasure[,]" and "[u]nder these circumstances there can be no doubt that malice must be implied and that the killing was murder." (*Ibid.*) Justice Traynor added, "[implied malice murder] is shown when, as here, the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death." (*Ibid.*)

Justice Traynor's concurrence thus did not define the actus reus element of implied malice murder. Rather, it explained that defendant Thomas's conduct, even if not an intentional killing, was *at the very least* an implied malice murder. Accordingly, adoption of the "*Thomas* test" regarding the actus reus of implied malice murder is unwarranted and this Court should decline OSPD's invitation to redefine this element of the crime.

III. A SECTION 1172.6 PETITION DOES NOT REQUIRE THE SUPERIOR COURT TO CONDUCT A NEW MURDER TRIAL ENTIRELY AND RESOLVE FACTUAL DISPUTES UNAFFECTED BY THE CHANGES TO SECTIONS 188 AND 189

OSPD argues that SB 1437's and Senate Bill No. 775's amendments of section 1172.6, subdivision (d)(3), require that the prosecution "must prove *each element* of murder under current law." (OSPD 42, italics in original.) But OSPD's interpretation is directly contradicted by the language of the statute, which only requires that the prosecution prove "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." (§ 1172.6, subd. (d)(3), italics added.) The statute further makes clear that a petitioner is only eligible for resentencing if he or she is no longer liable for murder "*because of changes* to Section 188 or 189" effectuated by SB 1437. (§ 1172.6, subd. (a)(3), italics added.)

Despite any lack of ambiguity, OSPD, like Reyes, argues that a section 1172.6 petition requires what is, effectively, another opportunity to attack the sufficiency of the evidence on factual disputes unaffected by SB 1437. But "[t]he purpose of section [1172.6] is to give defendants the benefit of amended sections 188 and 189 with respect to issues not previously determined, not to provide a do-over on factual disputes that have already been resolved." (*People v. Allison* (2020) 55 Cal.App.5th 942, 947, disapproved on another ground in *People v. Strong* (Aug. 8, 2022, S266606) ___ Cal.5th ___, 2022 WL 3148797 at *10.) Nor does a section 1172.6 petition "afford the petitioner a new opportunity to raise claims of trial error or attack the sufficiency of the evidence . . . ." (*People v. Farfan*

(2021) 71 Cal.App.5th 942, 947.) Put another way, "in a section [1172.6] petition, the trial judge isn't charged with holding a whole new trial on all the elements of murder. Instead, the parties will focus on evidence made relevant by the amendments to the substantive definition of murder." (*People v. Clements* (2022) 75 Cal.App.5th 276, 298.)

The amendments to sections 188 and 189 made effective January 1, 2019, had no effect on implied malice as a viable theory of murder. Nor did they amend the objective actus reus requirements of the crime of malice murder under section 188. As such, the only issue at Reyes's evidentiary hearing that needed to be resolved was whether he was guilty beyond a reasonable doubt of having the mental state of implied malice, as required by the newly-amended mens rea requirements. (See ABM 25–29.)

OSPD also misapprehends or ignores the full consequences of requiring the prosecution to prove, beyond a reasonable doubt, every element of murder at every adjudication of a section 1172.6 petition. Under OSPD's view, all persons convicted of murder under one of the now-invalid theories would be provided with far more than the opportunity to petition for resentencing: they would be given what is functionally a new trial where any and all factual disputes can be relitigated, even if unrelated to the changes to section 188 or 189. Offering all such convicted murderers a second-chance bench trial—in some cases, decades after the original trial and sometimes without a transcript—would pose significant practical challenges upon which the

statutory scheme is silent and would go far beyond the Legislature's stated intent to ensure a "person's culpability for murder [is] premised upon that person's own actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1(g).) As this Court reiterated in its most recent SB 1437 decision, "[h]ad the Legislature intended to permit wholesale relitigation of findings supporting murder convictions in the context of section 1172.6 resentencing, we expect it would have said so more plainly." (*Strong* (Aug. 8, 2022, S266606), *supra*, 2022 WL 3148797 at *9, citing *Whiteman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 468 [under the no-elephants-in-mouseholes canon, we infer legislatures do not hide profound changes in ancillary provisions].)

IV. A SUPERIOR COURT'S RULING ON A SECTION 1172.6 PETITION SHOULD BE REVIEWED UNDER THE SUBSTANTIAL EVIDENCE STANDARD, NOT INDEPENDENTLY REVIEWED

Finally, OSPD argues that "the appellate court should conduct independent review" when a superior court denies relief at a hearing pursuant to section 1172.6, subdivision (d)(3), "based on a cold record." (OSPD 45.) As previously argued in the answer brief, respondent urges this Court to "decline [any] invitation to conduct an independent review of the evidence and should instead extend to the superior court the deference the law requires." (ABM 20; see also ABM 22–24.)

First and foremost, the hearing below was not based on a cold record. The superior court heard new testimony from two witnesses—both Reyes and Dr. Cauffman—neither of whom testified at Reyes's trial. As such, the superior court necessarily

made credibility determinations that must be afforded deference given that the trial court's firsthand observations are unavailable to the Court of Appeal or to this Court. (See *In re Hardy* (2007) 41 Cal.4th 977, 993 [fact finder is afforded "special deference . . . on factual questions requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the [fact finder] has the opportunity to observe the witnesses' demeanor and manner of testifying"].)

Moreover, all superior courts that determine whether a section 1172.6 petitioner committed murder under a still-valid theory necessarily resolve a *factual* question. "The Legislature made this clear by explicitly holding the People to the beyond a reasonable doubt evidentiary standard and by permitting the parties to submit new or additional evidence at the hearing on eligibility." (*Clements*, *supra*, 75 Cal.App.5th at p. 295, citing former § 1170.95, subd. (d)(3); see also CALCRIM No. 220 [fact finder tasked with holding the prosecution to the beyond a reasonable doubt standard "must impartially compare and consider all the evidence that was received through the entire trial" and determine whether that proof "leaves you with an abiding conviction that the charge is true"].) Indeed, the trial judge's role—to sit as a fact finder in a section 1172.6, subdivision (d)(3), hearing—is made even more clear by a recent amendment to the statute, which provides that a trial court's "finding that there is substantial evidence to support a conviction for murder . . . is insufficient to prove" ineligibility for resentencing. (See former § 1170.95, subd. (d)(3), as amended by Stats. 2021, ch.

551.) Thus, even if the trial court below only considered a cold record, that court would still be making factual findings about what actually happened, and such determinations are entitled to the deference normally afforded to findings of fact.

OSPD mistakenly relies on *People v. Vivar* (2021) 11 Cal.5th 510, 528, which does not support its position and is easily distinguished. In *Vivar*, this Court held that an appellate court should independently review a superior court's denial of relief under section 1473.7, which pertains to individuals who have served their sentences but remain subject to deportation due to a past conviction. (*Id.* at pp. 524–525.)[9] *Vivar* reasoned that a lower court's consideration of whether an attorney's immigration advice was misleading and prejudicial is a mixed question of law and fact,[10] and thus subject to independent appellate review. (*Ibid.*)

But as the *Clements* decision pointed out, the reasoning in *Vivar* does not apply to appeals from a section 1172.6 evidentiary hearing. Unlike the predominantly legal inquiry of determining whether a defendant was adequately advised by counsel, the question of whether a section 1172.6 petitioner's actions and mental state satisfy the newly-amended laws of murder "is

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[9] In *Vivar*, respondent conceded that the independent standard of review applies to all prejudice determinations under section 1473.7, subdivision (a)(1).

[10] Section 1473.7 permits vacatur of a conviction if, for example, the petitioner can show that he or she did not understand the immigration consequences that stemmed from it. (§ 1473.7, subd. (a)(1).)

predominantly a factual determination." (*Clements*, *supra*, 75 Cal.App.5th at p. 301.) Moreover, unlike in *Vivar*, the relevant facts in a section 1172.6 case do not "derive entirely from written declarations and other documents" (*Vivar*, at p. 528), but rather, from the disputed trial testimony of witnesses. Especially when witnesses testify at a section 1172.6 evidentiary hearing, as was the case here, the superior court must engage in an even more fact-intensive analysis.[11]

Accordingly, this Court properly framed the question presented here as whether substantial evidence supports the superior court's finding. OSPD provides no cogent reasons to deviate from the general rule that factual findings are reviewed for substantial evidence.

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[11] One key consideration in *Vivar* was that appellate courts had applied an independent standard of review before section 1473.7 was amended in 2018, and the Legislature did not signal in the amendment that the courts had erred in doing so. (*Vivar*, *supra*, 11 Cal.5th at p. 525.) Thus, *Vivar* saw no reason to "disturb the prevailing independent standard of review." (*Id.* at p. 526.) Like section 1473.7, section 1172.6 was also recently amended by SB 775. (Stats. 2021, ch. 551.) But unlike in *Vivar*, the prevailing case law in 2020 and 2021—before SB 775 took effect—unanimously held that a substantial evidence standard should apply. (See *People v. Ramirez* (2021) 71 Cal.App.5th 970, 985; *People v. Williams* (2020) 57 Cal.App.5th 652, 663; *People v. Bascomb* (2020) 55 Cal.App.5th 1077, 1087.) Had the Legislature disagreed with this standard, it presumably would have made that clear when it enacted SB 775 and amended section 1172.6. (*Vivar*, at p. 525.) But the Legislature declined to do so. Thus, there is no reason to disturb the prevailing standard.

CONCLUSION

The arguments of amici should be rejected and the judgment affirmed.

Respectfully submitted,

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August 29, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S CONSOLIDATED ANSWER TO BRIEFS OF AMICI CURIAE uses a 13 point Century Schoolbook font and contains 4,965 words.

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August 29, 2022

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Declarant for eFiling

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/s/Ilana Sinklier

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