IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S141519

THE PEOPLE,
Plaintiff and Respondent,

v.

MAO HIN,
Defendant and Appellant.

CAPITAL CASE

Superior Court of California
San Joaquin County
No. SF090168B
Hon. Bernard J. Garber

FIFTH SUPPLEMENTAL OPENING BRIEF

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Fifth Supplemental Opening Brief

I. INTRODUCTION

A. Procedural Background and Prior Briefing.

Defendant-appellant Mao Hin (hereafter "appellant") respectfully submits the following Fifth Supplemental Brief pursuant to California Rules of Court, rule 8.204 and 8.630(a) to addresses a recent amendment to Penal Code section 1170.95 (hereafter "section 1170.95") enacted by Senate Bill 775 which will go into effect on January 1, 2022, before appellant's direct appeal is final. (See https://leginfo.legislature.ca.gov, Senate Bill 775, Chapter 551; Cal. Const,, art. IV, (c)(1).) This amendment supports the claims made in appellant's First and Third Supplemental Opening Briefs that he could not properly be convicted under the natural and probable consequence doctrine of aiding and abetting attempted willful, deliberate and premeditated murder

In addition to aiding and abetting a capital crime, appellant was charged and convicted of aiding and abetting six counts of attempted willful, deliberate and premeditated murder (3 CT 701–703, 706–717; Pen. Code, § 187, subd. (a); § 664, subd. (a); Counts 3, 5, 6, 7, 8 & 9.) The jury instructions, the prosecution's closing argument, and multiple questions from the jury during deliberations demonstrate a reasonable possibility that the jury reached those verdicts based on the natural and probable consequence doctrine. (*See* Sections II., B.&C, below.)

Appellant's first supplemental brief, filed on February 13, 2015, argued that in order to convict him of aiding and abetting attempted premediated murder the jury should have been instructed that it must find that he personally acted with premeditation or, at a minimum, that an aider and abettor must reasonably foresee that a premeditated attempt to murder was the natural and probable consequence of any intended target offense in light of *Alleyne v. United States* (2013) 570 U.S. 99 and *People v. Chiu* (2014) 59 Cal.4th 155 *(Chiu)*. Therefore, *People v. Favor* (2012) 54 Cal.4th 868 *(Favor)*, which held the contrary, should be overruled. (1st Supplemental Opening Brief [hereafter "1st SAOB"] at pp. 2–22.)

On October 2, 2019, appellant filed a third supplemental brief arguing that amendments to Penal Code sections 188 and 189, enacted by Senate Bill 1437 (effective January 1, 2019; Stats. 2018, Ch. 1015, Sects. 1, 2 & 3; hereafter "S.B. 1437") had eliminated the natural and probable consequence doctrine for murder by providing that "[e]xcept as stated in subdivision (e) of Section 189 [governing felony murder], in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Penal Code, § 188, subd. (3); subsequent references to statutes are to the Penal Code unless noted otherwise.) The same should apply to attempted murder because it also requires malice aforethought in the form of the specific intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613, 623 *(Lee)*; Third Supplemental Opening Brief [hereafter "3rd SAOB"] at pp. 24–30, 38–44.)

S.B. 1437 also enacted section 1170.95 to permit a defendant claiming a wrongful conviction for murder under the natural and probable consequence doctrine to petition the trial court for resentencing. (§ 1170.95, subd. (a).) Appellant argued that he was not required to do so under rules permitting review on direct appeal of nonfinal convictions resulting from instructional error and application of an ameliorative change in the law. (3rd SAOB at pp. 80–89; § 1170.95, subd. (f) ["This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner."]; § 1259 ["Upon an appeal taken by the defendant, the … appellate court may also review any instruction given … if the substantial rights of the defendant were affected thereby."]; *In re Estrada* (1965) 63 Cal.2d 740.)

B. The Status of the Issues in this Court.

On December 17, 2020, after the parties finished their third round of supplemental briefing in this case, this Court issued its first opinion addressing S.B. 1437 in *People v. Gentile* (2020) 10 Cal.5th 830 *(Gentile)*, where the defendant was convicted of second degree murder as an aider and abettor after the jury had been instructed on both directly aiding and abetting principles and under the natural and probable consequence doctrine. (*Id.* at pp. 840–841.)

Gentile held that "the most natural reading of Senate Bill 1437's operative language [amending section 188] is that it eliminates natural and probable consequences liability for first and second degree murder." (*Id.* at p. 849.) *Gentile* also held that the "the procedure set forth in section 1170.95 is the exclusive

mechanism for retroactive relief and thus the ameliorative provisions of Senate Bill 1437 do not apply to nonfinal judgments on direct appeal." (*Id.* at p. 139.)

On November 13, 2019, before issuing its opinion in *Gentile*, this Court granted review in *People v. Lopez* ("*Lopez*") (S258175/ B2715161; formerly *People v. Lopez* (2019) 38 Cal.App.5th 1087) of questions similar to those raised by appellant's First and Third Supplemental Briefs, namely: "(1) Does Senate Bill No. 1437 (Stats. 2018, ch. 1015) apply to attempted murder liability under the natural and probable consequences doctrine? (2) In order to convict an aider and abettor of attempted willful, deliberate and premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *Favor*, *supra*, 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) 50 U.S. 99 and *Chiu*, *supra*, 59 Cal.4th 155?" (*See* appellatecases.courtinfo.ca.gov, Case No. S258175.) This Court has not yet issued its opinion in *Lopez*. (*Ibid.*)

As discussed below, appellant submits that the recent amendment to section 1170.95 by Senate Bill 775 ("S.B. 775") supports answers favorable to appellant on both questions and permits appellant to present this claim in his direct appeal. On October 8, 2021, the Court asked the parties in *Lopez* to "to serve and file supplemental briefs on the significance, if any, of Senate Bill No. 775 (Stats. 2021, ch. 551) to the issues presented in this case" with briefing to be completed by November 3, 2021. (*See* appellatecases.courtinfo.ca.gov, Case No. S258175.)

II. ARGUMENT

A. The Amendment To Section 1170.95 Enacted by S.B. 775 Eliminates The Natural And Probable Consequence Doctrine For Attempted Murder And Permits A Defendant To Present Claims On Direct Appeal That He Was Erroneously Convicted Of Attempted Willful, Deliberate And Premeditated Murder Under That Doctrine.

On October 5, 2021, Governor Gavin Newsom signed into law Senate Bill 775, "[a]n act to amend Section 1170.95 of the Penal Code, relating to murder." (https://leginfo.legislature.ca.gov, Legislative Counsel's Digest, Senate Bill 775, Chapter 551.) Section 1(a) of the Bill states: "The Legislature finds and declares that this legislation … [c]larifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories." (*Ibid*.)

As pertinent to attempted murder, Section 1170.95 as amended states:

> "(a) A person convicted of … attempted murder under the natural and probable consequences doctrine … may file a petition with the court that sentenced the petitioner to have the petitioner's …attempted murder …conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

> "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of … attempted murder under the natural and probable consequences doctrine.
>
> "(2) The petitioner was convicted of … attempted murder[.]
>
> "(3) The petitioner could not presently be convicted of … attempted murder because of changes to Section 188 or 189 made effective January 1, 2019."

In addition, "[a]person convicted of … attempted murder … whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." (§ 1170.95, subd. (g).) The amendment to section 1170.95 goes into effect on January 1, 2022. (Cal. Const., art. IV, (c)(1), sect. 8, subd. (c)(1))

This amendment in three salient ways supports the claims made in appellant's First and Third Supplemental Briefs.

First, a petition in the sentencing court is no longer the "exclusive mechanism for retroactive relief" under "the ameliorative provisions of Senate Bill 1437" as held by *Gentile* in construing section 1170.95 prior to its amendment by S.B. 775. (*Gentile*, *supra*, 10 Cal.5th at p. 839.) A defendant such as appellant may now present a claim for relief on direct appeal of a "not final" conviction of attempted murder. (§ 1170.95, subd. (g).)

Appellant's convictions for attempted murder will not be final as of the effective date of the amendments to on January 1, 2022. "'[F]or the purpose of determining the retroactive application of

an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed' [Citation]." (.) As the date of this supplemental brief (November 8, 2021), it is not reasonably possible that the 90-day period for petitioning the high court (U.S.S.C., rule 13.1) will have passed by January 1, 2022, because this Court has not yet scheduled oral argument in this case or noticed its intent to do so. (*See People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [finding ameliorative statute applied where "it is highly unlikely that defendant's judgment will in any event be final by" statute's effective date.)

Second, S.B. 775 supports appellant's prior claim that the amendments made to sections 188 and 189 by S.B. 1437 eliminated the natural and probable consequence doctrine as a theory of culpability for attempted murder in addition to murder. (3rd SAOB at pp. 24–34.) Appellant emphasizes that under section 188 as amended by S.B. 1437, "[m]alice shall not be imputed" to an aider and abettor "based solely on his or her participation in a crime." (§ 188, subd. (3).) The same now unequivocally applies to attempted murder under section 1170.95 as amended by S.B. 775. (§ 1170.95, subd. (g) ["A person convicted of … attempted murder … may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)."].)

As *Gentile* recognized, "this provision, construed in the context of Senate Bill 1437 as a whole and in the context of the Penal Code, bars a conviction for first or second degree murder under a natural and probable consequences theory. Except for felony

murder, section 188(a)(3) makes personally possessing malice aforethought a necessary element of murder." (*Gentile*, *supra*, 10 Cal.5th at p. 849.)

The felony-murder rule does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 328 ["'there is no crime of attempted felony murder when no death occurs during the course of a felony'"], citation omitted.) Therefore, under S.B. 775, a conviction for aiding and abetting attempted murder is barred by the natural and probable consequence doctrine unless the aider and abettor personally acted with the malice aforethought necessary for attempted murder, *i.e.*, the "specific intent to kill [the] victim." (*People v. Smith* (2005) 37 Cal.4th 733, 739 ["in order for defendant to be convicted of the attempted murder of the [victim], the prosecution had to prove he acted with specific intent to kill that victim"]; § 21a ["An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission."].)

Third, as argued in appellant's First Supplemental Brief, the Court should overrule *Favor*, *supra*, 54 Cal.4th 868 and bar imposition of a life term for willful, deliberate and premeditated attempted murder under the natural and probable consequence doctrine under the section 664. (§ 664, subd. (a) ["if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole"]; 1st SAOB at pp. 2–22.)

Favor held that "both the direct perpetrator and the aider and abettor are subject to section 664(a)'s penalty provision … once the jury finds that an aider and abettor, in general or under the

natural and probable consequences doctrine, has committed an attempted murder[.]" (*Favor*, *supra*, 54 Cal.4th at pp. 879–880.) This holding is no longer tenable because, as *Favor* itself recognizes, imposition of section 664's penalty provision requires a valid conviction for attempted murder. (*Id.* at p. 879 ["the jury does not decide the truth of the penalty premeditation allegation until it first has reached a verdict on the substantive offense of attempted murder"], citing *People v. Bright* (1996) 12 Cal.4th 652, 661, disapproved on another ground in *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.)

"[T]he penalty provision in section 664, imposing a greater punishment for an attempt to commit a murder that is 'willful, deliberate, and premeditated' does not create a greater degree of attempted murder but, rather, constitutes a penalty provision that prescribes an increase in punishment (a greater base term) for the offense of attempted murder." (*People v. Bright*, *supra*, 12 Cal.4th at pp. 656–657.) "Thus, 'premeditated attempted murder is not a separate offense from attempted murder.' [Citation.]" (*Favor*, *supra*, 54 Cal.4th at p. 877.)

As explained above, under the amendment to section 1170.95 enacted by S.B. 775, "section 188(a)(3) [now] makes personally possessing malice aforethought a necessary element of [attempted] murder" and bars a conviction for attempted murder by the natural and probable consequence doctrine. (*Gentile*, *supra*, 10 Cal.5th at p. 849; § 1170.95, subd. (g) ["the changes made to Sections 188 and 189" by S.B. 1437 apply to attempted murder].) Therefore, unless the jury has made a proper finding that an alleged aider and abettor personally acted with the malice aforethought necessary for attempted murder, *i.e.*, the

"specific intent to kill" the victim (*People v. Smith*, *supra*, 37 Cal.4th at p. 739), a life-term penalty may not be imposed by § 664, subd. (a).

B. The Prosecution Of Appellant Proceeded In A Way That Permitted An Unlawful Conviction For Attempted Murder Under The Natural And Probable Consequence Doctrine In Violation Of The Standards of S.B. 1437 and S.B. 775.

The next question is whether the prosecution of appellant for the attempted murders proceeded in a way allowing the prosecutor to convict appellant of those crimes under the natural and probable consequence doctrine in violation of S.B. 1437 and S.B. 775. The Information, jury instructions requested by the prosecution and prosecutor's closing argument show that this is the case as discussed below in Section C.

The prosecution jointly charged appellant and co-defendant Rattanak Kak ("Kak") with six counts of "attempted, willful, deliberate and premeditated murder" (§ 664, subd. (a)/§ 187, subd. (a); Counts 5, 6, 7, 8 & 9; 3 CT 701–703, 706–717.) The Information did not allege that appellant was the direct perpetrator of any of those crimes because it charged only Kak with personal use and discharge of a firearm in both incidents. (§ 12022.7; § 12022.53, subds. (b), (c), (d); 3 CT 701–703, 706–717; 3 RT 726–727; 3 CT 701–703, 706–717; 3rd SAOB at p. 4.)

The record also shows that the prosecution sought to convict appellant as an aider and abettor of those attempted murders under the natural and probable consequence doctrine. Before guilt phase deliberations, the trial court at the request of the

prosecution instructed the jury that it could convict appellant of attempted murder on two theories: (1) directly aiding and abetting attempted murder with "express malice aforethought, namely, a specific intent to kill unlawfully another human being" (4 CT 1038, CALJIC No. 8.66 ["Attempted Murder (Penal Code, §§ 664 & 187)"]; 4 CT 974, CALJIC No. 3.00 ["Principals--Defined (Penal Code § 31)"]; 4 CT 976, CALJIC No. 3.01 ["Aiding And Abetting--Defined"]); and (2) if attempted murder "was committed by a principal" and "a natural and probable consequence of" a lesser target crime "originally aided and abetted" by the defendant. (4 CT 976, CALJIC No. 3.02 ["Principals--Liability For Natural And Probable Consequences"].)

For the alleged attempted murder of Debra Pizano in American Legion Park (Count 3), the court instructed the jury that it could find appellant guilty of attempted murder if it was "a natural and probable consequence of the crimes of robbery or kidnapping[.]" (4 CT 976, CALJIC No. 3.02.) For the Bedlow Drive incident, the court instructed the jury that it could find appellant guilty of all five counts of attempted murder (Counts 5, 6, 7, 8 & 9), if they were "the natural and probable consequence of the crime of … shooting at an occupied dwelling, shooting at an occupied motor vehicle, or discharging a firearm from a motor vehicle." (*Ibid*.)

As to both incidents, the court further instructed that, "[i]n determining whether a consequence is 'natural and probable,' *you must apply an objective test, based not on what the defendant actually intended*, but on what a person of reasonable and ordinary prudence would have expected likely to occur. (*Ibid*.,

emphasis added.) As to the premeditation allegation, the court instructed that it was sufficient for "the *would-be slayer*" to "weigh and consider the question of killing and the reasons for and against such a choice and having in mind the consequences, decides to kill and makes a direct but ineffectual act to kill another human being." (4 CT 978; CALJIC No. 8.67 ["Attempted Murder – Willful, Deliberate, and Premeditated (Penal Code, §§ 664, subd. (a) & 189)"], emphasis added.)

As explained above, in light of the amendments enacted by S.B. 1437 and S.B. 775, CALJIC Nos. 3.02 and 8.67 were legally erroneous because, "[e]xcept as stated in subdivision (e) of Section 189 [felony murder], in order to be convicted of murder [or attempted murder], a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (3).). As noted, the felony-murder rule is irrelevant here because, "'there is no crime of attempted felony murder when no death occurs during the course of a felony' [Citation]." (*People v. Bland*, *supra*, 28 Cal.4th at p. 328.)

Therefore, under the law as recently amended, the trial court erred by instructing the jury that appellant could be convicted of all the alleged attempted murders under the natural and probable consequences theory.

C. The Prosecution's Closing Argument And Questions From The Jury Demonstrate A Reasonable Possibility That The Jury Convicted Appellant Of The Attempted Murders Based On Erroneous Jury Instructions On The Natural And Probable Consequence Doctrine And, Therefore, Those Convictions Must Be Reversed.

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless … we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted" the alleged crime. (*Chiu*, *supra*, 59 Cal.4th at p. 167.) Stated differently, reversal is required if there is a "'reasonable possibility'" that the instructional error "'might have contributed to the conviction.' [Citation]." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Chiu found prejudicial error and reversed a conviction for aiding and abetting premediated murder because the "record shows that the jury may have based its verdict of first degree premeditated murder on the natural and probable consequences theory." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) After the jury deadlocked, the court questioned several jurors, including one holdout juror. (*Id.* at pp. 167–68.) Their responses confirmed "that the jury may have been focusing on the natural and probable consequence theory of aiding and abetting ... first degree premeditated murder based on that theory. Thus, we cannot conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on a different theory, i.e., the legally valid theory that defendant directly aided and abetted the murder." (*Id.* at p. 168.)

The factors identified by Chiu as demonstrating prejudice are also present here.

In his guilt phase jury arguments, the prosecutor repeatedly argued that the jurors could find appellant guilty of the alleged attempted murders at both American Legion Park and Bedlow Drive under the natural and probable consequences doctrine. (*See, e.g.,* 16 RT 4610 [appellant was "equally guilty" as the direct perpetrator], 4617 [under the natural and probable consequence doctrine, appellant was as guilty as the person who pulled the trigger], 4618 [attempted murder was a foreseeable consequence of the target crimes], 4624 [the shooting of Debra Pizano was the natural and probable consequence doctrine of robbery], 4758–4759 [appellant was guilty of attempted murder under the natural and probable consequence doctrine because a gun was used in the crimes].) The prosecutor asserted that the question for the jury was "what is the natural and probable consequences when you['re] gang members with guns and you are in fact going about these activities of robberies, shooting at houses, shooting at people, shooting at cars." (16 RT 4610.)

A note and series of questions to the trial judge during deliberations and repeated jury instructions show that jurors may have focused on the invalid natural and probable consequence theory to convict appellant of the six attempted murders.

Guilt phase deliberation commenced on the afternoon of November 15, 2005. (3 CT 818–19.) On November 17, 2005, the jury submitted a written question to the trial judge about the natural and probable consequences doctrine: "Your Honor – [¶] Would it be possible for you [to] give the jury clarification on

CALJIC 3.01, aiding and abetting – defined, CALJIC 3.02, principals, - liability for natural and probable consequences and CALJIC 8.27, first degree felony-murder – aider and abettor (Penal Code, 189). [¶] There is some confusion as to some of the wording and interpretation. Perhaps an example would also help. [¶] Thank you" (4 CT 1100; 17 RT 4845.)

At a hearing, the trial judge asked, "What was the confusion?" (17 RT 4847.) The foreperson (Juror No. 12) said it related to CALJIC No. 3.02. "Item four … says 'The crime, crimes of murder or attempted murder were a natural and probable consequence of the commission.' Probable is kind of throwing a curve to us." (17 RT 4848.) In response, the court reread a portion of CALJIC No. 3.02. "And that is, 'A natural consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. Probable means likely to happen.'" (17 RT 4848.) Nevertheless, Juror No. 12 reiterated, "we seem to be hung up … on that issue." (17 RT 4849.) The court added, "this instruction applies to both incidents. … American Legion Park and it applies to Bedlow Drive. (17 RT 4849.) Juror No. 12 said they "understood" that. (*Ibid*.) "I think our hang up is what was in the mind of the defendant before the actual occurrence? Whether the defendant –" (17 RT 4849.)

The court interrupted and stated, "It's not just before the occurrence, it's also at the time." (17 RT 4849.) Juror No. 12 responded, "Okay" (17 RT 4849) and then asked, "But the question in the mind is, did the – did the Defendant believe that – that these were actually going to happen before it happened in his mind?" (17 RT 4850.) The court responded by asking, "Or were they a natural and probable consequence? … That's exactly

the issue. … So that's for the jury to decide." (17 RT 4850.) After this exchange, the court re-read for a second time the definition of "natural and probable" in CALJIC No. 3.02 and sent the jury back for further deliberations. (17 RT 4851–4854.)

The next morning (Friday, November 18, 2005), Juror No. 12 stated: "We have another question. … There's a question – the jury has a question on the – we are having an issue again, what we talked about, on the – on the word probable. If we can get a clarification on the word probable. Is it possible to get a – is there a legal definition of the word or -" (17 RT 4869.) The court interrupted and said that the "legal definition is contained in – I believe it's [CALJIC No.] 3.02." (17 RT 4869.) Juror No. 12 responded: "Okay, That – if that's it, then we have got it." (*Ibid.*) The court added: "And probable means likely to happen. That's the definition." (*Ibid.*) Juror No. 12 responded, "Okay. I guess that's what we are looking for." (*Ibid.*) The court added, "I'd say take a look at [CALJIC No.] 3.02." (*Ibid.*)

At the request of the prosecutor, the court orally gave the jury "an additional instruction that I hope will be of assistance. I'm going to read it and then my clerk is going to type it and we will send it into the jury room. This is the instruction: 'Natural and probable consequence for an aider and abettor means whether the co-principal's crimes are reasonably foreseeable, whether … the act committed was the natural and probable consequence of the act encouraged, and the extent of the defendant's knowledge concerning the crime contemplated are questions of fact for the jury.'" (17 RT 4875.) The court then sent the jury back for further deliberations with the same instruction in written form. (17 RT 4875–76; 3 CT 827.)

The jury did not deliberate on Monday, November 21, 2005, but after deliberations resumed on Tuesday, November 22, 2005, the jury at 10:10 a.m. informed the court that it had reached its verdicts. (17 RT 4888–4889.) In pertinent part, the jury found appellant guilty of the "attempted murder" of Debra Pizano in American Legion Park and five counts of "attempted murder" at Bedlow Drive and, using the passive voice, that each "attempted murder was willful, deliberate and premeditated." (4 CT 1116 [Count 3, Debra Pizano]; 4 CT 1120 [Count 5, Sober Pen]; 4 CT 1122 [Count 6, Ream Veouth]; 4 CT 1124 [Count 7, Nath Sok]; 4 CT 1126 [Count 8, Sokhom Hing]; 4 CT 1128 [Count 9, Krisna Khan].)

This record shows that: (1) the jury did not believe that appellant was the direct perpetrator of the shootings; (2) the jurors focused on the instruction on the natural and probable consequence doctrine (CALJIC No. 3.02) during deliberations and knew that it applied to the charges for both the American Legion Park and Bedlow Drive incidents; (3) the jurors after questions to the court and several days of deliberations about the natural and probable consequence instruction convicted appellant of the attempted murders; and (4) the jury did not find that appellant personally acted with premeditation because the court instructed that it was sufficient for the "would be slayer" (co-defendant Kak) to have acted with that mental state.

This Court should therefore reverse appellant's six convictions of attempted willful, deliberate and premeditated murder because of a reasonable possibility that they resulted from jury instructions violating the legal standards imposed by S.B. 775 and S.B. 1437.

III. CONCLUSION

For the foregoing reasons, the judgement of conviction for Counts 3, 5, 6, 7, 8, and 9 should be reversed and the case remanded to the trial court for re-sentencing on any remaining counts. (§ 1170.95, subd. (a).)

Respectfully submitted,

Dated: November 9, 2021 By: /s/ Donald R. Tickle

Attorney for Defendant and Appellant
Mao Hin

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **4,461** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(d) or by Order of this Court.

Dated: November 9, 2021 By: /s/ Donald R. Tickle

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STATE OF CALIFORNIA
Supreme Court of California

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