No. S272238

In the Supreme Court of the State of California

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

v.

FREDDY ALFREDO CURIEL,
Defendant and Appellant.

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Does a jury's true finding on a gang-murder special circumstance (Pen. Code, § 190.2, subd. (a)(22)) preclude a defendant from making a prima facie showing of eligibility for resentencing under Penal Code section 1170.95?

INTRODUCTION

Freddy Curiel, an active gang member, instigated a confrontation with four individuals who were standing outside an apartment complex, minding their own business. While Curiel continued to provoke the four men, Curiel's companion shot one of them in the chest, killing him. In 2006, a jury convicted Curiel of first degree murder and found a gang-murder special circumstance to be true. In returning that verdict, the jury necessarily concluded that Curiel, while acting as a direct perpetrator or an accomplice, had the intent to kill. (Pen. Code,[1] § 190.2, subd. (a)(22).)

In 2018, the Legislature enacted Senate Bill No. 1437, effective January 1, 2019. The law narrows the felony-murder rule and otherwise limits murder liability to those who personally possess malice. (*People v. Gentile* (2020) 10 Cal.5th 830, 832.) Senate Bill No. 1437 also added section 1170.95, which provides a petition process for individuals with existing murder convictions to seek to vacate those convictions. (*Gentile*, at p. 843.) Under section 1170.95, petitioners who state a prima facie case for relief are entitled to an order to show cause and an evidentiary

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

hearing, at which the prosecution must prove beyond a reasonable doubt that the petitioner could be convicted of murder under the law as it exists today. (§ 1170.95, subds. (a)-(d).)

Curiel sought relief under section 1170.95. The Superior Court concluded that the jury's true finding that Curiel had the intent to kill rendered him ineligible as a matter of law. The Superior Court was correct. The legislation covers only those persons whose convictions could have been based on either the doctrine of natural and probable consequences or a theory of felony-murder that is no longer valid. It does not extend to a defendant like Curiel, whose conviction must have been based on his personal murderous intent.

This conclusion is supported by the legislative history of Senate Bill No. 1437. This history demonstrates that section 1170.95 has a narrow and limited focus, namely providing relief to convicted murderers who acted without a sufficiently culpable mental state. Accordingly, when as here, counsel has been appointed and given an opportunity to brief the matter, but the petitioner's record of conviction shows intent to kill, the petition should be denied for failing to state a prima facie case for relief.

The Court of Appeal determined, however, that Curiel's personal intent to kill did not make him categorically ineligible for relief under section 1170.95. The Court of Appeal based its holding on the fact that direct aiding and abetting has an actus reus element and that this element was not included in the jury's special-circumstance finding. Accordingly, the Court of Appeal

concluded, Curiel was entitled to an evidentiary hearing on his petition.

The Court of Appeal erred. Section 1170.95 did not amend or call for reconsideration of any elements of the crime of malice murder other than the defendant's mental state. The jury's guilty verdict on the underlying murder charge means it conclusively determined that Curiel performed the actus reus—a finding that section 1170.95 does not reopen—and the true finding on the special circumstance means the jury also found malice. Nothing more is required to sustain a conviction under the law of murder as amended by Senate Bill No. 1437, and thus Curiel is ineligible for section 1170.95 relief as a matter of law.

STATEMENT OF THE CASE

A. A jury convicted Curiel of first degree murder and found a gang-murder special circumstance to be true

Early one morning, Cesar Tejada, Raul Ramirez, and three other people were socializing outside Tejada's apartment. (*People v. Curiel* (Feb. 21, 2008) 2008 WL 458520 at *1-2 [nonpub. opn.] (*Curiel I*); CT 225.)[2] Curiel and Abraham Hernandez walked by the group and angrily stared at them. (*Curiel I*, at *2; CT 225-226.) Ramirez briefly went inside to use the restroom and when he came back outside, Curiel and Hernandez were there. (*Curiel I*, at *2; CT 226.)

[2] This opinion was attached to the prosecutor's opposition to Curiel's petition for resentencing and was incorporated by reference into the Superior Court's denial order.

Curiel was arguing with Tejada, and asked him, "Where are you from?" (*Curiel I*, *supra*, 2008 WL 458520, at *2; CT 226.) Tejada answered, "I am from nowhere." (*Curiel I*, at *2; CT 226.) Ramirez told Curiel and Hernandez to leave. (*Curiel I*, at *2; CT 226.) Curiel responded, "Shut the fuck up, get the hell out of here . . . . This is not your problem, it is not your business." (*Curiel I*, at *2; CT 226.) When someone else told Curiel, "this is not your neighborhood," Curiel yelled that "[t]his is my neighborhood" and "[t]his is OTH." (*Curiel I*, at *2, 20; CT 226, 247.)

The arguing continued. (*Curiel I*, *supra*, 2008 WL 458520, at *2; CT 226.) Hernandez pulled out a gun and shot Tejada in the chest, killing him, while Curiel stood by. (*Curiel I*, at *2; CT 226.)

Later that morning, the police arrested Curiel. (*Curiel I*, *supra*, 2008 WL 458520, at *2; CT 226.) Initially, Curiel lied about his presence at the shooting. (*Curiel I*, at *2, 5; CT 226, 229.) He eventually admitted he was there, although he denied knowing that Hernandez had a gun. (*Curiel I*, at *2, 5; CT 226, 229.)

OTH is a criminal street gang in which both Curiel and Hernandez were members. (*Curiel I*, *supra*, 2008 WL 458520, at *3-4; CT 228.) A gang expert testified that, "if there is a gun within a group, that it is expected everybody knows if there is a gun and who has it." (*Curiel I*, at *3; CT 227-228.)

An Orange County jury convicted Curiel of first degree murder (§ 187, subd. (a)), and found true a special circumstance that Curiel committed an intentional killing while Curiel was an

active participant in a criminal street gang and that the murder was carried out to further the activities of the gang (§ 190.2, subd. (a)(22)). The jury also found true a gang enhancement allegation (§ 186.22, subd. (b)(1)(A)) and an arming enhancement (§ 12022.53, subds. (d), (e)), and additionally convicted Curiel of active participation in a criminal street gang (§ 186.22, subd. (a)). (CT 59-60.) As relevant to the issue presented here, Curiel's jury was instructed that it could find him guilty of first degree murder under two theories: as a direct aider and abettor of murder; or as an aider and abettor of a target offense (disturbing the peace or carrying a concealed firearm by a gang member), the natural and probable consequences of which was murder. (*Curiel I*, *supra*, 2008 WL 458520, at *17; CT 243-244.) As to the gang murder special circumstance, the court instructed the jury it had to find Curiel intended to kill, that Curiel was a member of criminal street gang, and that the murder was carried out to further the activities of the gang. (CT 197.)

At sentencing, the trial court imposed a term of imprisonment of life without the possibility of parole, plus 25 years to life. (CT 61-62, 112-115.)

In its unpublished opinion in *Curiel I*, *supra*, 2008 WL 458520, the Court of Appeal, Fourth District, Division Three, affirmed the judgment. The Court of Appeal held there was sufficient evidence to support the trial court's instruction on the natural and probable consequences doctrine with carrying a concealed weapon as a target offense. (*Curiel I*, at *16-18; CT 242-244.)

As to the gang-murder special circumstance, the Court of Appeal found that the special circumstance applies to non-killer aiders and abettors such as Curiel as long as they possessed the requisite intent to kill, assisted the perpetrator, and were active participants in a criminal street gang. (*Curiel I*, *supra*, 2008 WL 458520, at *19-20; CT 246.)

Finally, the Court of Appeal held there was sufficient evidence, for purposes of the gang-murder special circumstance, that Curiel acted with the requisite intent to kill. Recognizing intent could be inferred from conduct, the Court of Appeal noted that while in OTH gang territory, Curiel confronted Tejada's group, claimed to own the neighborhood, argued with Tejada and Ramirez, and followed Hernandez. And, the gang expert placed Curiel's behavior into context by explaining the culture and habits of criminal street gangs. (*Curiel I*, *supra*, 2008 WL 458520, at *20; CT 246-247.)

B. Subsequent limitations on murder liability to require malice

After Curiel's conviction and sentence became final, the murder laws substantially changed, insofar as they concern the mens rea for that crime. Previously, "[a] person who knowingly aid[ed] and abet[ted] criminal conduct [wa]s guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commit[ted] [nontarget offense] that w[as] a natural and probable consequence of the intended crime." (*People v. Medina* (2009) 46 Cal.4th 913, 920, internal quotation marks omitted.) "Thus, for example, if a person aid[ed] and abet[ted] only an intended assault, but a murder result[ed], that person

[could] be guilty of that murder, even if unintended, if it [wa]s a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) A nontarget offense was a "natural and probable consequence" of the target offense when, judged objectively, it was reasonably foreseeable. (*Medina*, at p. 920.) It did not matter whether the aider and abettor actually foresaw the nontarget offense. Instead, liability was measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted. [Citation.]" (*Ibid*., internal quotation marks omitted.) Reasonable foreseeability was "a factual issue to be resolved by the jury." (*Ibid*.)

In 2014, for policy reasons, this court limited murder liability under the natural and probable consequences doctrine to murder in the second degree. (*People v. Chiu* (2014) 59 Cal.4th 155, 165-167.) This court concluded, inter alia, that punishing a person for first degree murder when that person did not perpetrate or intend the killing was inconsistent with "reasonable concepts of culpability." (*Id*. at p. 165.)

In 2018, the Legislature enacted Senate Bill No. 1437, effective January 1, 2019, after it determined there was further "need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides." (*Gentile*, *supra*, 10 Cal.5th at pp. 838-839, quoting Stats. 2018, ch. 1015, § 1, subd. (b).) As amended by Senate Bill No. 1437, section 188 now provides, "Except 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." (§ 188, subd. (a)(3).) This amendment abolished the natural and probable consequences doctrine, as it relates to murder, altogether. (*Gentile*, at pp. 842-851.)[3]

Senate Bill No. 1437 also created section 1170.95, which established a petition procedure for defendants already convicted of murder under the former law to seek resentencing in the trial court if they believe that they "could not presently be convicted" of that crime "because of" the above amendments to sections 188 and 189. (Stats. 2018, ch. 1015, § 4.) Section 1170.95, subdivision (c), requires the court to appoint counsel for all properly pleaded petitions, and then conduct a prima facie analysis, with briefing by the parties, as to the petitioner's eligibility before determining whether to issue an order to show cause. (§ 1170.95, subd. (c); *People v. Lewis* (2021) 11 Cal.5th 952, 960-970.)

If the petitioner "makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause" and "shall hold a hearing to determine whether to vacate the

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[3] Senate Bill No. 1437 also amended section 189 to require that, to be convicted of felony murder, a person must: (1) be the actual killer; (2) a direct aider and abettor; or (3) act as a major participant in the underlying felony and with reckless indifference to human life. (§ 189, subd. (e).) Curiel was not convicted of felony murder and thus, section 189 is not at issue here.

murder . . . conviction and to recall the sentence and resentence the petitioner." (§ 1170.95, subds. (c), (d)(1).) At the order to show cause hearing, the prosecutor bears the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Ibid.*)[4]

C. The Superior Court denied Curiel's petition for resentencing because his conviction necessarily included a finding that he intended to kill

In April 2019, Curiel filed a petition for resentencing under section 1170.95. (CT 115-119.) After receiving briefing from the district attorney and Curiel's counsel (CT 120-206, 209-221), the Superior Court denied the petition in a written order. (CT 222-248.) The Superior Court stated that it had considered "the record of conviction including the minutes of the Superior Court, jury instructions given, and the unpublished opinion of the Court of Appeal, case no. G037359." (CT 222-223.) The court then explained:

> [I]t is apparent that Defendant/Petitioner's conviction and sentence rest upon the jury's finding that although he was not the actual shooter, he acted with the *intent to kill*. This finding was part of the "True" finding of the special circumstance pursuant to

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[4] Senate Bill No. 775, effective January 1, 2022, amended some of the procedural requirements in section 1170.95 and expanded relief to certain defendants convicted of attempted murder and manslaughter. To the effect these amendments affect the analysis here, they are discussed in the Argument section, below.

> Penal Code § 190(a)(22); intentional killing for the benefit of a criminal street gang. The Court of Appeal specifically found that the evidence was sufficient to support that finding. A copy of the opinion is attached and incorporated by reference in this ruling.

(CT 222-223, emphasis in original.)

D. The Court of Appeal reversed the denial of Curiel's petition for resentencing and directed the Superior Court to hold an evidentiary hearing

The Court of Appeal reversed the judgment and remanded the matter to the Superior Court with directions to hold an evidentiary hearing under section 1170.95, subdivision (d). (Opn. 2, 6-9 (*Curiel II*).) The Court of Appeal held that, although the verdict on the gang-murder special circumstance proved beyond a reasonable doubt that Curiel had the intent to kill, it did not prove that he committed the requisite act of encouraging the actual killer as opposed to some other actor who was involved in the commission of the murder. (*Curiel II*, at 7-8.) The court rejected the People's argument that the finding of a specific intent to kill in the gang-murder special circumstance established beyond a reasonable doubt that Curiel possessed the required mental state under the new murder laws and that Curiel was therefore ineligible for resentencing relief as a matter of law. (*Curiel II*, at 6-7.)

ARGUMENT

A TRUE FINDING OF A GANG-MURDER SPECIAL CIRCUMSTANCE REQUIRES AN INTENT TO KILL, WHICH NECESSARILY PRECLUDES RELIEF UNDER PENAL CODE SECTION 1170.95

A person who intends to kill does not fall within the provisions of section 1170.95. This conclusion is compelled by the language of Senate Bill No. 1437 and its legislative history. Thus, when as here, a petitioner's record of conviction shows he or she had such intent, the petitioner has failed to set forth a prima facie case for relief. And once all of the necessary procedural protections are afforded to the petitioner, the petition should be denied at the prima facie stage.

The Court of Appeal's conclusion, that the prosecution must also show the petitioner "committed the necessary acts to subject him to murder liability" as a direct aider and abettor, is contrary to the statutory language and purpose. Moreover, it improperly allows re-litigation of elements already resolved against petitioners and that were unchanged by Senate Bill No. 1437.

A. The Legislature enacted section 1170.95 to provide resentencing relief to defendants charged with or convicted of murder who lacked malice or who do not meet the amended elements of felony murder

The issue here involves the interpretation of section 1170.95, a question of law this court reviews de novo. (*Lewis*, *supra*, 11 Cal.5th at p. 961.) "As in any case involving statutory interpretation, [this court's] fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. [Citation.] [This court] begin[s] by examining the statute's words, giving them a plain and commonsense meaning.

[Citation]. [This court] look[s] to the entire substance of the statute . . . in order to determine the course and scope of the provision . . . [Citations]. That is, [it] construe[s] the words in question in context, keeping in mind the nature and obvious purpose of the statute . . . [Citations.] [This court] must harmonize the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole. [Citation.]" (*Ibid*., internal quotation marks omitted.)

The plain language of section 1170.95 compels the conclusion that the legislation does not cover persons such as Curiel. Subdivision (a)(3) of section 1170.95 requires the petitioner to show that he or she "could not presently be convicted of murder or attempted murder *because of changes to Sections 188* or 189 made effective January 1, 2019." (Italics added.) The only change to section 188 which became effective on January 1, 2019 was the addition of subdivision (a)(3), which prohibits malice from being "imputed to a person based solely on his or her participation in a crime" and specifies that "in order to be convicted of murder, a principal in a crime shall act with malice aforethought." (§ 188, subd. (a)(3).)

Section 188 always defined express malice as "a deliberate intention to unlawfully take away the life of a fellow creature," i.e., an intentional killing. (§ 188, subd. (a)(1).) Senate Bill No. 1437 did not change this. Accordingly, when the jury made a finding that required it to have found that a person had the intent to kill—including as an aider and abettor—that person is

necessarily ineligible for section 1170.95 relief as a matter of law. (*People v. Medrano* (2021) 68 Cal.App.5th 177, 183.) This rule applies even if the jury relies on the natural and probable consequences theory to convict the defendant of murder since the jury made the additional findings now required under Senate Bill No. 1437 when it found the special circumstance true.

If the Legislature had intended for courts to reconsider whether section 1170.95 petitioners committed the actus reus element of murder, it would have expressly said so. However, it did not. For example, the findings and declarations in support of Senate Bill No. 1437 state that "[i]t is necessary to amend the felony-murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, *did not act with the intent to kill*, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f), italics added.) This clarifies that Senate Bill No. 1437's amendments to the law of malice murder were limited, in that they merely changed the mental state requirement in section 188 and nothing more. Moreover, eligibility in section 1170.95 requires that the petitioner could no longer be convicted of murder strictly "because of" those limited changes to section 188. (§ 1170.95, subd. (a)(3).) The Legislature certainly could have amended other elements of the crime of murder and expanded section 1170.95's eligibility criteria to include such other elements. But it chose not to do so. (*In re D.B.* (2014) 58 Cal.4th 941, 948

["When statutory language is unambiguous, [a court] must follow its plain meaning[.]", internal quotation marks and citations omitted].)

In any event, to the extent the language of section 1170.95 is ambiguous, its legislative history supports the conclusion that persons who intended to unlawfully kill are not covered by its provisions. (See *Carter v. California Dept. of Veteran's Affairs* (2006) 38 Cal.4th 914, 927, citation omitted ["Assuming [the statute] is susceptible of two conflicting interpretations, we turn to legislative history for guidance."].) In 2017, after this court decided *Chiu*, *supra*, 59 Cal.4th 155, the Legislature adopted Senate Concurrent Resolution No. 48 (SCR 48), which outlined the Legislature's concerns. (Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.) res. ch. 175); see *Gentile*, *supra*, 10 Cal.5th at p. 845.)

SCR 48 "declared the Legislature's intent to more equitably sentence offenders in accordance with their involvement in the crime. [Citation.]" (*Gentile*, *supra*, 10 Cal.5th at p. 845.) SCR 48 largely addressed the outdatedness of the felony-murder rule and the need to limit that doctrine. But its observations regarding the natural and probable consequences doctrine are illuminating. SCR 48 "recognized a 'need for additional reform when addressing aider and abettor liability . . . , specifically the natural and probable consequences doctrine, which . . . results in greater punishment for lesser culpability.'" (*Gentile*, at pp. 845-846, quoting SCR 48.) "The Legislature found that the natural and probable consequences doctrine 'result[s] in individuals lacking

the mens rea and culpability for murder being punished as if they were the ones who committed the fatal act,' and that 'this leads to overbroad application.'" (*Gentile*, at p. 846, quoting SCR 48.) The Legislature further noted that, except for the felony-murder rule, "in order to prove first degree murder, a jury has to find beyond a reasonable doubt that a person acted with intentional malice[.]" (SCR 48.) The Legislature concluded, "'[i]t can be cruel and unusual punishment to not assess individual liability for non-perpetrators of the fatal act . . . and impute culpability for another's bad act, thereby imposing lengthy sentences that are disproportionate to the conduct in the underlying case.'" (*Gentile*, at p. 846, quoting SCR 48.) The Legislature cited SCR 48 when it enacted Senate Bill No. 1437. (*Gentile*, at p. 846, citing Stats. 2018, ch. 1015, § 1, subd. (c).)

As Senate Bill No. 1437 went through the Legislature, its author, Senator Nancy Skinner, explained that it "seeks to restore proportional responsibility in the application of California's murder statutes, reserving the harshest punishments for those who intentionally planned or actually committed the killing." (Assembly Com. on Public Safety, June 29, 2018 Report on Senate Bill No. 1437 (2017-2018 Reg. Sess.), as amended May 25, 2018, at p. 4.) Senator Skinner noted that the felony-murder doctrine was a "glaring exception" to the rule that "a person's *intent* is a critical element to determine punishment for a criminal offense" and that the doctrine had resulted in "disproportionately long sentences for people who did not commit murder, and who in some cases had, at best, very peripheral

involvement in the crime that resulted in a death." (*Ibid*., italics added.) Senator Skinner added, "SB 1437 clarifies that a person may only be convicted of murder if the individual willingly participated in an act that results in a homicide or that was clearly *intended* to result in a homicide." (*Id*. at p. 5, italics added.) The Assembly quoted this language in urging the need for the legislation. (Assembly Floor Analysis, Aug. 21, 2018, Senate Bill No. 1437 (2017-2018) Reg. Sess., as amended Aug. 20 2018, at p. 5.)

Finally, in the uncodified preamble to Senate Bill No. 1437, the Legislature declared, "There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, § 1, subd. (b).) Accordingly, as discussed above, the Legislature recognized it was necessary to amend the law of murder in California "to ensure that murder liability is not imposed on a person who is not the actual killer, *did not act with the intent to kill*, or was not a major participant in the underlying felony who acted with reckless disregard for human life." (*Id*. at § 1, subd. (f), italics added.) The Legislature addressed imputed malice by establishing that, "[e]xcept as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought." (*Id*. at § 1, subd. (g).)

The Legislature's expressions of purpose demonstrate that its focus was on the mental states necessary for a murder conviction and sought to address that issue. The Legislature never suggested it was concerned with other elements of the

crime. (See, e.g., *People v. Stamps* (2020) 9 Cal.5th 685, 702 [in rejecting claim that Senate Bill No. 1393 was intended to permit trial courts to unilaterally modify a plea agreement, this Court noted that "none of the legislative history materials mention plea agreements *at all*," original italics].)

B. The Superior Court can and should deny a petition for resentencing without issuing an order to show cause when, as here, the record of conviction shows the petition is clearly meritless

Because of the true finding on the gang-murder special circumstance, the Superior Court—which appointed counsel for Curiel and received briefing from both parties—was permitted to deny Curiel's petition without conducting further proceedings. Section 1170.95, subdivision (c) provides, in part, "If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause." While the statute does not define the term "prima facie case," or give examples of when that requirement has been met, in general, a "prima facie case" is "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.)

Lewis, *supra*, 11 Cal.5th 952, considered the term in the context of proceedings under section 1170.95. *Lewis* recognized that "the prima facie bar was intentionally and correctly set very low." (*Id.* at p. 972.) But petitioners must pass this threshold. Accordingly, once counsel is appointed for the petitioner, a superior court can and should look at the record of conviction to

determine whether the petitioner is entitled to an order to show cause. (*Id*. at p. 971.) *Lewis* explained:

> The record of conviction will necessarily inform the trial court's prima facie inquiry under section 1170.95, allowing the court to distinguish petitions with potential merit from those that are clearly meritless. This is consistent with the statute's overall purpose: to ensure that murder culpability is commensurate with a person's actions, while ensuring that clearly meritless petitions can be efficiently addressed[.]

(*Lewis*, *supra*, 11 Cal.5th at p. 971.) *Lewis* continued:

> While the trial court may look at the record of conviction after the appointment of counsel to determine whether a petitioner has made a prima facie case for section 1170.95 relief, the prima facie inquiry under subdivision (c) is limited. Like the analogous prima facie inquiry in habeas corpus proceedings, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause. [Citations . . . .] However, if the record, including the court's own documents, contains facts refuting the allegations made in the petition, then the court is justified in making a credibility determination adverse to the petitioner. [Citation.]

(*Lewis*, *supra*, 11 Cal.5th at p. 952.) Senate Bill No. 775 codified the holdings of *Lewis* regarding "the standard for determining a prima facie case." (Stats. 2021, ch. 551, § 1, subd. (a).)

Here, the record of conviction defeats Curiel's claim of entitlement to relief. Curiel's jury returned a true finding that he committed a murder for the benefit of a criminal street gang. This special circumstance required the jury to conclude that Curiel intended to kill. (*People v. Navarro* (2021) 12 Cal.5th 285,

308.) Accordingly, Curiel's jury was instructed with CALCRIM No. 736 [Special Circumstances: Killing by Street Gang Member] in part as follows:

> The defendant is charged with the special circumstance of committing murder while a member of a criminal street gang.
>
> To prove that this special circumstance is true, the People must prove that:
>
> 1. *The defendant intended to kill*[.]

(CT 197, italics added.) The jury was also instructed that the People had the burden of proving the special circumstance beyond a reasonable doubt, and that a true or not true finding required juror unanimity. (CT 194.) The jury's true finding on the gang-murder special circumstance established that Curiel acted with express malice, a theory of liability unaffected by Senate Bill No. 1437. (*Medrano*, *supra*, 68 Cal.App.5th at pp. 182-183 [Senate Bill No. 1437 did not eliminate the theory of direct aiding and abetting with intent to kill]; see also *People v. Smith* (2005) 37 Cal.4th 733, 749 ["Intent to unlawfully kill and express malice, are in essence, one and the same," internal quotation marks and citation omitted]; *People v. Saille* (1991) 54 Cal.3d 1103, 1114 ["[P]ursuant to the language of section 188, when an intentional killing is shown, malice aforethought is established."].)[5]

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[5] There are several other special circumstances explicitly requiring an accomplice to have intentionally killed, specifically: murder for financial gain (§ 190.2, subd. (a)(1)); the killing of a

(continued...)

Outside of the felony-murder context, the published case law regarding the effect of special circumstance findings on the prima facie analysis is sparse.[6] One Court of Appeal aptly observed, albeit in dicta, that defendants with gang-murder or administration of poison special circumstances are ineligible for relief because "both of these special circumstances require that the defendant intentionally killed the victim[.]" (*People v. Allison* (2020) 55 Cal.App.5th 449, 460.) As another appellate court explained, "[o]rdinarily, a defendant is ineligible for relief if the trier of fact found beyond a reasonable doubt that the defendant intended to kill. Intent to kill constitutes express malice [citation], so the prior finding establishes that the defendant 'act[ed] with malice aforethought' under amended section 188. [Citations.]" (*People v. Jenkins* (2021) 70 Cal.App.5th 924, 934;

(...continued)

peace officer, federal law enforcement officer, or firefighter (§ 190.2, subds. (a)(7)-(9)); the killing of a witness, a prosecutor, a judge, or an elected or appointed official (§ 190.2, subds. (a)(10)-(13)); murder by means of lying in wait (§ 190.2, subd. (a)(15)); hate-crimes murder (§ 190.2, subd. (a)(16)); torture-murder (§ 190.2, subd. (a)(18)); murder by the administration of poison (§ 190.2, subd. (a)(19)); murder of a juror (§ 190.2, subd. (a)(20)); and murder by means of discharging a firearm from a motor vehicle (§ 190.2. subd. (a)(21)).

[6] The impact of Senate Bill No. 1437 on the felony-murder special circumstance is before this court in *People v. Strong*, nonpub. opn., review granted Mar. 10, 2021, S266606.

see *id*. at p. 935 [prior true finding by jury on witness-killing special circumstance establishes ineligibility].)[7]

People v. Bentley (2020) 55 Cal.App.5th 150, review dismissed, Dec. 15, 2021, S265455, provides a useful analogy. In *Bentley*, a jury convicted the defendant of first degree murder and of attempted murder. As to the murder charge, the jury found true a special circumstance allegation under section 190.2, subdivision (a)(21) that the murder "was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person . . . with the intent to inflict death." (*Bentley*, at p. 152, omission in original.) The defendant subsequently filed a petition for resentencing, which the prosecution opposed. The defendant's counsel asked the court for an extension of time to reply to the opposition and for a continuance of the hearing, stating he needed additional time to obtain the trial transcripts. The trial court denied the request. (*Ibid*.) The Court of Appeal concluded that any error in the trial court's denial of the continuance was harmless, because "the jury expressly found that [defendant had] the intent to kill [and] [t]he Legislature did not intend that [defendant] should have lenity." (*Id*. at p. 154.) As such, there was no prima facie case. (See *ibid*.) A finding of intent to kill, the court explained, "satisfied the

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[7] The Court of Appeal in *Jenkins* declined to find ineligibility based on the witness-killing special circumstance because in Jenkins's case, the trial court struck the special circumstance at sentencing. (*Jenkins*, *supra*, 70 Cal.App.5th at p. 935.) That did not happen here.

mandate of section 189, subdivision (e)(2). [Defendant] could properly be convicted of first degree murder even pursuant to the recent amendments to sections 188 and 189. [Citation.]" (*Bentley*, at p. 154.)

In a variety of other contexts, appellate courts have looked to jury instructions and jury verdicts in deciding whether the petitioner set forth a prima facie case. In *Medrano*, the jury found the defendant guilty of conspiracy to commit murder. The Court of Appeal found the defendant ineligible for relief because, as this crime required the intent to kill, the jury could not have relied upon the natural and probable consequences theory in convicting the defendant. (*Medrano*, *supra*, 68 Cal.App.5th at pp. 182-183.)

In *People v. Farfan* (2021) 71 Cal.App.5th 942, a jury found true a special-circumstance allegation that the defendant committed the murder during the course of a robbery. Because the verdict was rendered after this court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522, there was no question that the conviction satisfied the same requirements as exist now for felony-murder under amended section 189. The Court of Appeal therefore held that although the trial court erred in failing to appoint counsel for the defendant, the error was harmless because the defendant was legally ineligible for relief. (*Farfan*, at pp. 947, 953-956.)

In *People v. Verdugo* (2020) 44 Cal.App.5th 320, review dismissed Jan. 5, 2022, S260493, overruled on other grounds in *Lewis*, *supra*, 11 Cal.5th at pp. 961-970, a jury convicted the

defendant of murder, conspiracy to commit murder, and two other unspecified felonies. (*Verdugo*, at p. 324.)[8] In connection with the conspiracy charge, the jury was instructed that "[i]f a number of persons conspire together to commit willful, deliberate, and premeditated murder, and if the killing is done in furtherance of the common design and to further that common purpose, or is the natural and probable consequence of the pursuit of that purpose, all of the co-conspirators are equally guilty of murder in the first degree, whether the killing is intentional, unintentional, or accidental." (*Verdugo*, at pp. 324-325.) The instruction then defined the term "natural and probable." (*Id*. at p. 325.) The jury was also instructed that "[a] conspiracy to commit murder is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of murder and with the further specific intent to commit that murder"; and that "[t]he crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely, the specific intent to kill unlawfully another human being." (*Ibid*.)

Verdugo's later petition for resentencing was denied for lack of a prima facie case, among other grounds because he "was convicted of conspiracy to commit murder, a crime requiring express malice." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 325.) The

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[8] *Lewis* overruled *Verdugo* insofar as it held that a trial court may summarily deny a petition *without* first appointing counsel for the petitioner. (See *Verdugo*, *supra*, 44 Cal.App.5th at pp. 327-333.)

Court of Appeal affirmed. Quoting *People v. Beck & Cruz* (2019) 8 Cal.5th 548, 645, the Appellate Court stated that despite the fact the conspiracy instruction mentioned the natural and probable consequences doctrine, "[defendant] w[as] charged with conspiracy to commit *murder*, not conspiracy to commit a lesser crime that resulted in murder. There is no possibility [he] w[as] found guilty of murder on a natural and probable consequences theory." (*Verdugo*, at p. 336.) This singular focus on intent to kill was correct, as it alone rules out that the conviction was based on any theory of liability eliminated by Senate Bill No. 1437.

And in *People v. Cortes* (2022) 75 Cal.App.5th 198, 204, the Court of Appeal held that the defendant could not make a prima facie showing because the record of conviction demonstrated that "he was convicted of murder and attempted murder either as a perpetrator or a direct aider and abettor, and not under the natural and probable consequences doctrine, or indeed any theory under which malice is imputed to a person based solely on that person's participation in a crime."

The rationale of these cases is sound. As explained in the preceding subsection, in order to obtain relief under section 1170.95, "a petitioner must make a prima facie showing that he or she *could not* be convicted of murder '*because of* changes to Section 188 or 189'" made by Senate Bill No. 1437. (*Farfan*, *supra*, 71 Cal.App.5th at p. 954, quoting § 1170.95, subd. (a)(3).) A petitioner cannot meet this but-for requirement if "the jury's special circumstance finding [shows] . . . that it necessarily found beyond a reasonable doubt that [he] . . . had the intent to kill[.]"

(*Id.* at p. 954.) Nor does it matter that Curiel's jury was also instructed on the natural and probable consequences doctrine. "The jury's special circumstance finding demonstrates that [Curiel's] murder conviction was not predicated on any theory of derivative liability." (*Id*. at p. 957.) Rather, by concluding Curiel intended to kill, there is "no room for speculation that the jury might have relied on . . . natural and probable consequences to convict [Curiel] of murder." (*Ibid*.)

C. The Court of Appeal incorrectly concluded that the gang-murder special circumstance was insufficient to establish ineligibility for resentencing as a matter of law

Misconstruing both section 1170.95 and the aiding and abetting instructions, the Court of Appeal disagreed that the gang-murder special circumstance rendered Curiel ineligible for resentencing as a matter of law. Instead, the Court of Appeal concluded, it was error for the Superior Court to deny relief at the prima facie stage instead of issuing an order to show cause and shifting the burden to the prosecution to prove beyond a reasonable doubt that Curiel could be convicted under the new law. (*Curiel II*, at 6.) In reaching its conclusion, the Court of Appeal admitted that the intent to kill element of the gang-murder special circumstance unquestionably met the malice requirement under the amended definition of murder. (*Curiel II*, at 7 ["the jury [verdict] established Curiel had the mindset of a murderer"].) That should have been both the beginning and ending of the court's inquiry because, as demonstrated above, the sole focus of section 1170.95 is to provide retroactive resentencing

relief to defendants who committed murder without personally harboring malice.

Instead, the Court of Appeal continued and found the gang-murder special circumstance insufficient because, while it established the mens rea for first degree murder, it did not establish the actus reus for that crime. (*Curiel II*, at 7-8.) The court's reasoning is flawed because, as explained above, it ignores both the language of section 1170.95 and the legislative intent behind that provision.

Even assuming for the sake of argument it were proper to consider whether the actus reus was also established by Curiel's record of conviction, it absolutely was. The direct aiding and abetting instructions set forth that requirement. Specifically, CALCRIM No. 400 [Aiding and Abetting: General Principles] provides:

> A person may be guilty of a crime in two ways. One, he or she may have directly committed that crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.
>
> A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.
>
> Under some specific circumstances, if the evidence establishes aiding and abetting one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.

CALCRIM No. 401 [Aiding and Abetting: Intended Crimes] provides, in pertinent part:

> Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the person's commission of that crime.
>
> If all of these requirements are proved, the defendant does not need to have been present when the crime was committed to be guilty as an aider and abettor.

Curiel's jury was instructed with CALCRIM Nos. 400 and 401. (3 TCT 670-672.)[9] The jury was also given a natural and probable consequences instruction, CALCRIM No. 403 [Natural and Probable Consequences (Only Non-Target Offense Charged)], which directed jurors to decide whether Curiel committed the crimes of disturbing the peace/challenging another to fight or carrying a concealed firearm by a gang member. (3 TCT 676-677.) Other instructions defined the elements of those crimes. (3 TCT 683-685.)

Instructions must not be considered in isolation, but rather on the basis of the entire charge to the jury. (See *People v. Harrison* (2005) 35 Cal.4th 208, 252.) CALCRIM Nos. 401 through 403 plainly set forth the actus reus requirements for aiders and abettors, namely promoting, encouraging, or instigating the commission of a crime. CALCRIM No. 700 [Special Circumstances: Introductory] advised the jury to determine the truth of any special circumstance only "[i]f you find the defendant guilty of first degree murder[.]" (CT 194.)

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[9] "TCT" refers to the Clerk's Transcript in *Curiel I*.

A reasonable jury following the above instructions would understand that no matter what mental state theory the prosecution relied upon, any aiding and abetting theory required Curiel to have committed certain acts, i.e., aiding, facilitating, promoting, encouraging, or instigating the commission of a crime. These acts were the same whether the crime was disturbing the peace, carrying a concealed weapon by a gang member, or murder.[10] The natural and probable consequences instruction provided a path to conviction that did not require ascertaining Curiel's mental state. But this approach was *insufficient* to find the gang-murder special circumstance true. To do that required an *additional* mental state finding, i.e., that Curiel intended to kill, in addition to performing the requisite acts. It is wrong to

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[10] Indeed, in its opinion in *Curiel I*, when finding substantial evidence supported Curiel's conviction of murder on a natural and probable consequences theory, the Court of Appeal pointed to the initial gang challenge, Curiel's following Hernandez across the street, and Curiel calling out his gang name and claiming the victim's neighborhood was his. (*Curiel I*, *supra*, 2008 WL 458520, at *16-18; CT 242-244.) These were the very same acts the appellate court relied upon when it rejected Curiel's challenge to the special-circumstance finding. (*Curiel I*, at *20; CT 247.)

As a practical matter, in a variety of situations, the same act can serve as the actus reus for multiple crimes. Consider, for example, the act of driving the perpetrator to the crime. If the defendant drives the perpetrator with the intent to kill (and the perpetrator does kill), the defendant is guilty of murder. If the defendant drives the perpetrator with the intent to shoplift from a store (and the perpetrator does), then the defendant is guilty of shoplifting. The differing criminal liability is based on the defendant's state of mind, not on the defendant's act (driving).

conclude, as the Court of Appeal did here, that the jury believed a true finding on the *more* culpable mental state somehow obviated its duty to find that Curiel committed the required acts. In fact, courts must presume the opposite. (See *People v. Carey* (2007) 41 Cal.4th 109, 130 [reviewing court must assume jurors are intelligent persons capable of understanding and correlating all jury instructions and admonitions they were given].) In short, the jury's verdict on the murder charge conclusively established the necessary actus reus, and the true finding on the special circumstance established the mental state that Curiel had when committing the actus reus.

By misconstruing section 1170.95 and the jury instructions, the Court of Appeal has afforded Curiel an evidentiary hearing at which actus reus must be litigated anew. But the Court of Appeal's ruling leads to absurd results even if its reading of the statute, in a vacuum, were reasonable. (See *Gilbert v. Chiang* (2014) 227 Cal.App.4th 537, 554 ["Where the language of a statute is reasonably susceptible of two constructions, one which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which will be productive of absurd consequences, the former construction will be adopted . . . since absurd results are not supposed to have been contemplated by the legislature," internal quotation marks and citations omitted].) The gang-murder special circumstance requires that: the defendant must be an active participant in a criminal street gang, as defined in subdivision (f) of section 186.22; and, the murder must have been carried out to further

the activities of the criminal street gang. (§ 190.2, subd. (a)(22).) By shifting its focus away from Curiel's mental state—the only relevant issue in this section 1170.95 proceeding—the Court of Appeal ostensibly opens the door to relitigate those elements as well, which are far afield from anything the Legislature contemplated in Senate Bill No. 1437.

But the Legislature did not intend for section 1170.95 to be used as a vehicle for a petitioner to challenge any aspect of the fact finding from the original trial that he or she wishes to revisit, even if unrelated to the specific amendments made to sections 188 and 189. (See *Allison*, *supra*, 55 Cal.App.5th at p. 461 ["subdivision (a)(3) of section 1170.95 says nothing about erroneous prior findings or the possibility of proving contrary facts if given a second chance"].) Rather, section 1170.95 is a remedial resentencing provision that brings existing murder convictions in line with the narrow amendments to the laws of murder. (*Ibid*. ["The purpose of section 1170.95 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."].)

The law governing the evidentiary hearing stage of the petition process, section 1170.95, subdivision (d)(3), is instructive in this regard. When the statute states that eligibility means "[t]he petitioner could not be convicted of . . . murder . . . *because of changes to Section 188 or 189 made effective January 1, 2019*" (§ 1170.95, subd. (a)(3), italics added), it does not mean the petitioner is entitled to "a whole new trial on all the elements of

murder" if he or she reaches that stage. (*People v. Clements* (2022) 75 Cal.App.5th 276, 298.) Even there, the issues are narrowly limited to what is "made relevant by the amendments to the substantive definition of murder" in Senate Bill No. 1437. (*Id.* at p. 298.) It follows that if the evidentiary hearing is so limited, then the prima facie stage is similarly limited, because both stages are governed by the same underlying eligibility requirements of subdivision (a). As a matter of statutory interpretation, it would make little sense for a petitioner to pass the prima facie stage by casting doubt on the jury's fact finding regarding extraneous issues that then become irrelevant at the evidentiary hearing stage.

Moreover, allowing petitioners to challenge fact finding on matters extraneous to Senate Bill No. 1437, such as actus reus, is illogical because relief under section 1170.95 is not predicated upon the existence of trial error. To the contrary, resentencing is available as an "act of lenity" to petitioners with final and presumptively correct murder convictions that were based on law that was valid at the time of the trial, but whose juries were not required to make the additional findings that Senate Bill No. 1437 now requires. (*People v. James* (2021) 63 Cal.App.5th 604, 609; see also *People v. Burhop* (2021) 65 Cal.App.5th 808, 815 [unless and until section 1170.95 petition is granted, conviction remains presumptively valid].) Only those *additional* findings—malice or the amended elements of felony-murder—are now at issue because the leniency does not extend to any other issues. (See *People v. Secrease* (2021) 63 Cal.App.5th 231, 257, review

granted June 30, 2021, S268862 [Section 1170.95 has a "narrow and particular focus" in "applying *specific* substantive changes in the law of murder retroactively to final judgments, and for resentencing those who stand to benefit from *these changes*," italics added].)

At Curiel's initial trial, the jury found, unanimously and beyond a reasonable doubt, that the gang-murder special circumstance was true. By doing so, the jury concluded Curiel intended to kill. Consequently, the prosecution did not have to establish, in the section 1170.95 proceedings, any additional facts to show that Curiel was ineligible for resentencing. Since the jury already made the finding necessary to demonstrate that Curiel could be convicted of murder under newly amended section 188, there is no need for an evidentiary hearing. (*People v. Gomez* (2020) 52 Cal.App.5th 1, 17, review granted Oct. 14, 2020, S264033 ["The People should not be required to prove beyond a reasonable doubt, a second time, that Gomez satisfied th[e] requirements for the special circumstance findings."].)

Other portions of section 1170.95 show that evidentiary hearings are meant only for petitioners who were affected by changes to sections 188 or 189. (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1090 ["[T]he words [of a statute] must, of course, be read in the context of the provision as a whole . . . and in the context of the statutory scheme as a whole[.]" internal quotation marks and citations omitted].) At the prima facie stage of the section 1170.95 proceedings, "a trial court should not engage in factfinding

involving the weighing of evidence or the exercise of discretion. [Citation.]" (*Lewis*, *supra*, 11 Cal.5th at p. 972, internal quotation marks omitted.) "However, if the record, including the court's own documents, contain[s] fact refuting the allegations made in the petition, then the court is justified in making a credibility determination adverse to the petitioner. [Citations.]" (*Id*. at p. 971, internal quotation marks omitted.)

The Legislature's inclusion of the prima facie review stage is inconsistent with a procedure that generally permits challenges to underlying factual findings. The point of the prima facie review is to permit trial courts to deny "clearly meritless petitions" where the record of conviction shows that the conviction was not based on a faulty theory as defined by Senate Bill No. 1437. (*Lewis*, *supra*, 11 Cal.5th at p. 971.) However, if any factual finding supporting the murder conviction may be challenged in section 1170.95 proceedings, then the prima facie review is meaningless. Any petitioner, including those whose convictions were completely unaffected by the now-faulty theories discussed in Senate Bill No. 1437, could overcome the prima facie review by simply challenging any factual basis for the conviction. The Legislature would not have established a prima facie review process if petitioners could circumvent it in this way. (See *People v. Loeun* (1997) 17 Cal.4th 1, 9 ["Interpretations that lead to absurd results or render words surplusage are to be avoided," citation and quotation marks omitted].)

D. Limiting section 1170.95 proceedings to the specific amendments made to sections 188 and 189 is appropriate given defendants' access to other post-conviction remedies

Section 1170.95, subdivision (f) provides, "This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner." By enacting this provision, the Legislature recognized that petitioners had access to appellate and collateral remedies to address alleged errors in their convictions and sentences unrelated to the new murder laws.

Indeed, there is little need for error correction in a case such as this one. Judgments are presumed correct, including all factual findings supporting the judgment. (*In re Lawley* (2008) 42 Cal.4th 1231, 1240 ["criminal judgments rendered after procedurally fair trials" are afforded "the presumption of correctness"].) "The Legislature has established an elaborate appellate system in which a criminal defendant may present his or her claims for relief from alleged trial court errors." (*In re Harris* (1993) 5 Cal.4th 813, 827, disapproved on other grounds in *Shalabi v. City of Fontana* (2021) 11 Cal.5th 842, 855.) Accordingly, "when a criminal defendant believes an error was made in the trial that justifies reversal of his conviction, the Legislature intends that he should appeal to gain relief." (*Harris*, at p. 827.)

In the unlikely event that direct appeal provides an insufficient avenue for error correction, habeas corpus remains as "a 'safety valve' for those rare or unusual claims that could not reasonably have been raised at an earlier time." (*In re Reno* (2012) 55 Cal.4th 428, 452, superseded by statute on other

grounds as stated in *In re Friend* (2021) 11 Cal.5th 720, 728.) Thus, habeas corpus provides "an avenue of relief to those for whom the standard appellate system failed to operate properly." (*Harris*, *supra*, 5 Cal.4th at p. 828.) The availability of a habeas corpus safety valve further refutes any argument that the Legislature intended to provide for error correction in the section 1170.95 process because it was not needed for that purpose. Since appeal is the established procedure to address errors at trial, it would be illogical to conclude that the Legislature intended to also permit error correction in section 1170.95 proceedings, nor is there any indication the Legislature had such an intent.

Finally, due to the enactment of Senate Bill No. 775, defendants with non-final judgments may forego the petition process and raise Senate Bill No. 1437 issues on direct appeal from a judgment of conviction. New subdivision (g) of section 1170.95 provides, "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill No. 1437." By specifying that the appeal can include issues "*based on changes made to Sections 188 and 189*," the Legislature implicitly acknowledged that other alleged errors would be raised separately and not under the rubric of the new legislation.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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April 21, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 8,506 words.

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April 21, 2022

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Case Name: People v. Curiel No.: S272238

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 21, 2022, at San Diego, California.

Almeatra W. Morrison	*Almeatra W. Morrison*
Declarant	Signature

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