FILED WITH PERMISSION

IN THE SUPREME COURT OF CALIFORNIA

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

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

APPELLANT'S OPENING BRIEF ON THE MERITS

Richard A. Levy (SBN 126824)
3868 W. Carson St., Suite 205
Torrance, CA 90503-6706
(310) 944-3311
RLevy@RichardALevy.com

Attorney for Andres Reyes

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ISSUES PRESENTED

This Court has specified the issues as follows:

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

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

(Order filed October 29, 2021.) (See Cal. Rules of Court, rule 8.520(b)(2)(A).)

STATEMENT OF THE CASE

I.

Procedural history

A. Underlying criminal conviction.

Defendant and appellant Andres Reyes and four codefendants were charged by information with two counts arising out of a single incident in 2004, when Reyes was 15 years old. The two counts, with the special allegations applicable to Reyes, were:

> COUNT 1: Murder (Pen. Code, § 187, with a gang enhancement (Pen. Code, § 186.22, subd. (b)) and an enhancement for discharge of a firearm by a gang principal causing death (Pen. Code, § 12022.53, subd. (d), (e)); and
>
> COUNT 2: Participation in a criminal street gang (then known as street terrorism) (Pen. Code, § 186.22, subd. (a)).

(CT (1) 65-67, as amended at CT (1) 25-26.) Reyes's case was severed for a separate jury trial. (Exh. (1) 52.)[1]

When the jurors were unable to agree on the degree of murder, the court granted the People's motion to dismiss that charge. (CT (1) 43-44; Exh. (3) 596-600.) The jury thereupon

[1] "CT" and "RT" refer to the transcripts of the petition evidentiary hearing in 2019, the basis of the direct appeal. "Exh." refers to People's exhibit 1 in the evidentiary hearing, consisting of the three-volume RT of the original trial in 2006. (See CT (1) 62; RT 123:12-127:26.) All trial exhibits were received and cited by the original exhibit number. (RT 188:18-190:8.)

found Reyes guilty of second-degree murder, with true findings on the gang and gang-principal firearm enhancements, and guilty of participation in a criminal street gang (count 2). (CT (1) 44, 69-72.)

On count 1 for second-degree murder the court sentenced Reyes to 15 years to life, with a consecutive term of 25 years to life for the gang-principal firearm enhancement, and a stayed term for the gang enhancement. (CT (1) 47, 98.) On count 2 for participation in a criminal street gang the court imposed a concurrent term of the middle term of two years. (CT (1) 47, 100.) The trial court emphasized its reluctance to impose the mandatory sentence:

> I really wanted to try to do something for you, if I could. I looked at the law with respect to referring you out to the Youth Authority for an amenability report. But the law does not provide for any sentence other than what I'm about to impose. [¶] And the reason I wanted to try and do something for you is because you sit here 17 years old. You're only 5'6" tall, and weigh 110 pounds. And you're here for any number of reasons, some of which boil down to the fact that when we're 15 years old we make stupid decisions and dumb mistakes.

(Exh. (3) 613.)

The Court of Appeal (Fourth District, Division Three) affirmed the judgment in an unpublished opinion in 2007. (CT (1) 49, 245-249.) (See People v. Reyes (August 21, 2007, No. G037395) [nonpub. opn.] 2007 WL 2372617.) The opinion did not

address the sufficiency of evidence.

B. This appeal from the superior court's denial of Reyes's Penal Code section 1170.95 petition for resentencing.

In 2019 Reyes, acting pro se, petitioned the superior court to vacate the murder conviction based on recent amendments to the murder statutes, which were retroactive pursuant to the petition procedure set forth in Penal Code section 1170.95. (CT (1) 102.) (See Stats. 2018, ch. 1015 (S.B. 1437), amending Pen. Code, § 188 and adding Pen. Code, § 1170.95.) That court appointed the Orange County Alternate Defender to represent him. (CT (1) 50.) (In this brief, superior court refers to the court that conducted the section 1170.95 hearing.)

The court found a prima facie case and proceeded to conduct an evidentiary hearing. (CT (1) 56, (See Pen. Code, § 1170.95, subds. (c), (d)(3).) The People relied on the three-volume reporter's transcript of the 2006 trial (People's exhibit 1). (CT (1) 62; RT 123:12-127:26.) The defense presented live testimony by a developmental psychologist and by Reyes himself. (CT (1) 62.) (Reyes had not testified in the jury trial.) The court also considered the 2007 Court of Appeal opinion affirming the judgment (reproduced at CT (1) 245-249), the trial court docket containing the jury instructions, and the pro se petition, including Reyes's declaration (CT (1) 103-109, 132). (RT 123:2-7; 127:15-26; 227:15-19.)

The court did not rely on any firsthand knowledge of evidence in the underlying trial. It had not presided over Reyes's trial, which had been severed from the trial of the codefendants.

(See exh. (3) 52.) It did preside over the joint trial of the actual killer, Francisco (Frank) Lopez, and another defendant, but had only "a vague memory" of the evidence in that case and "no independent recall from that trial of the defendant's activity." (RT 124:10-17.)

The court denied the petition, finding that there was "a valid theory of murder of the second degree," namely, implied malice. (CT (1) 64; RT 297:12-299:2.) The Court of Appeal affirmed the order denying the petition. (People v. Reyes (August 4, 2021, No. G059251) [nonpub. opn.] 2021 WL 3394935.) This Court granted Reyes's pro se petition for review, limiting the issues as specified above.

II.

Statement of facts

The superior court found that although appellant Reyes was not the actual killer, he was guilty of second-degree murder based on implied malice. (RT 297:12-299:2.) The following facts are either undisputed or viewed in the light most favorable to this finding, except where specifically noted.

A. The charged murder committed by gang member Frank Lopez.

Fifteen-year-old Andres (Andy) Reyes was an active member of F-Troop, a criminal street gang in Santa Ana. (Exh. (1) 206; (2) 387, 410-414, 435; RT 194:10-20.) He was "not part of the high echelons of F-Troop." (Exh. (2) 456.)

On the afternoon of August 10, 2004, Reyes was playing handball at El Salvador Park, which was in F-Troop's territory. (Exh. (2) 323, 357, 408-409, 450-451; RT 186:25-188:9; see exhibit 1 (map).) Twenty-year-old Frank Lopez, another member of F-Troop, who would later be identified as the actual gunman, was also there, along with Michael C. (an associate of F-Troop), Michael C.'s brother, and Severo D. (a 16-year-old member of an allied gang, who happened to be doing community service at the park that afternoon). (Exh. (2) 323-325, 357-359, 379-381, 389-390, 436; RT 198:6-14; 214:21-26; exhibit 18.) Some of them were also playing handball. (Exh. (2) 323, 357.)

Sometime that afternoon, Frank Lopez showed off a revolver in the presence of Reyes, Severo, and Michael C. and his brother. (Exh. (2) 357-358; RT 187:15-25.) There was no

discussion about what Lopez was going to do with the gun, if anything. (Exh. (2) 367-368.) There was no evidence that anyone else had a gun. (See exh. (2) 367.) Reyes resumed his handball game and continued to play for at least two more hours. (RT 187:21-188:12.)[2]

Around 5 p.m., Reyes, Lopez, and Severo left the park on bicycles. (Exh. (2) 359-360; RT 188:10-12 (Reyes specifies the time).) Michael C., who remained at the park with his brother, did not tell the detective where the group was headed or whether they had any discussion about what they were going to do. (Exh. (2) 369.) Reyes, however, testified that they headed south to Monte Vista St., to visit two friends who were members of the West F-Troop clique. (RT 188:13-16; 192:14-193:5.) This street, which was about two blocks south of the site of the shooting, was in the territory of the West F-Troop clique or faction. (RT 190:10-191:12; 193:4-5; see also exh. (2) 406-407, 51-452.)

Reyes testified that after spending 30 to 45 minutes with the West F-Troop friends, Reyes, Lopez, and Severo got back on

[2] Only two witnesses provided evidence as to what occurred in the park. It was Reyes who said he remained at the park at least two hours after seeing the gun. (RT 187:21-188:12.) Gang associate Michael C. did not give a time frame, but never indicated that the group left immediately after seeing the gun. (See exh. (2) 359-360 (detective testifies that Michael C. told him "that Mr. Lopez showed the gun to everybody prior to Severo, Mr. Frank Lopez and Andy Reyes leaving the park on their bicycles").)

Michael, who was about 12 years old at the time of the crime and 14 at the time of trial, professed lack of recollection of all significant events when he testified at the trial. (E.g., exh. (2) 322, 327-333.) A detective testified to a statement Michael gave to the police about a month after the shooting. (Exh. (2) 355-356.)

their bicycles to return to El Salvador Park. (RT 193:6-20.) They were joined by three other members of F-Troop, Israel Lopez (age 21), Jesus P. (age 17), and Luis P. (age 16). (RT 196:13-198:14; exh. (2) 436-437.) At age 15, Reyes was the youngest of the group. (See also RT 198:15-18.)

The group pedaled north toward El Salvador Park, retracing the same route they had taken to visit their West F-Troop friends: north on S. Sullivan St. toward W. First St. (RT 190:13-192:16 (route to friends' home); 193:10-17 (return trip).) This route required transiting W. Willits St. at the intersection with S. Sullivan. (RT 192:10-13; 193:10-17; see exhibit 1 (map showing intersection of S. Sullivan and W. Willits near lower left corner, and El Salvador Park in the upper middle.) The Sullivan-Willits intersection was a "gray area" or "fringe area" in gang territory, that is, on the fringe of the territory claimed by the West Myrtle gang, a rival of F-Troop. (Exh. (2) 453-454; see also RT 195:6-19 (Reyes's testimony); 199:19-200:5 (same).)

The six bicyclists (or seven, according to independent eyewitness Steven G.) pedaled in a group on the west sidewalk of Sullivan, approaching Willits. (Exh. (1) 136-138.) It was now about 6:20 p.m. and still light outside. (Exh. (1) 170-171.) Reyes knew that Lopez still had the revolver that he had shown off in the park several hours earlier. (RT 195:20-25.)

According to Steven G., who was on Sullivan St. helping his mother clean the interior of the truck from which she had been selling tacos, a blue Honda passed the bicyclists, going in the same direction (northbound), toward Willits. (Exh. (1) 139-140,

164.) One of the bicyclists yelled to the driver: "hey, homey, stop. We want to talk to you." (Exh. (1) 136, 139-141, 148-149.) When the driver did not stop, the bicyclists followed him. (Exh. (1) 140, 146.) Steven continued his work. (Exh. (1) 164.) He heard a gunshot and turned to look north. (Exh. (1) 146, 150-151, 156, 164.) The blue Honda was now going south on Sullivan, below Willits, and it came to a stop on Sullivan just south of Willits. (Exh. (1) 107-109, 157; exhibit 4; exhibit 5; exhibit 6; exhibit 7.) (The intersection was controlled by stop signs in all four directions. (Exhibit 2; exhibit 6.))

Although the bicyclists were initially together, they had separated into two groups before arriving at the intersection and before the shooting. (Exh. (1) 147-148 ("When they were barely getting to the corner is when they kind of separated"), 163, 166.) After the shooting, the two groups fled in different directions. (Exh. (1) 158.)

Matthew Selinske, an undercover detective from another jurisdiction, happened to be driving south on Sullivan, looking for a parking spot. (Exh. (1) 168-169, 173-174, 190-191.) When he was about 40 yards from the intersection with Willits he heard a gunshot, turned to look straight ahead, and saw the rear window of the blue Honda "explode" as it was traveling through the intersection. (Exh. (1) 175-176.) Then he noticed an Hispanic male in the east-west crosswalk on the north side of the intersection; he was straddling a bicycle and putting a revolver into his waistband. (Exh. (1) 177-178, 180-181, 198-199.) This was Lopez, as the prosecutor conceded to the jury. (See, e.g., exh.

(3) 529 (opening summation: "Andy Reyes was not the shooter in this case. Frank Lopez was").)

Two other bicyclists were within a few feet of Lopez. (Exh. (1) 178-179.) Those three bicyclists pedaled north on Sullivan. (Exh. (1) 179-180.)

The undercover detective testified that the blue Honda must have been traveling south on Sullivan before it entered the intersection, and could not have been making a U-turn at that intersection. (Exh. (1) 176-177, 204.) Thus, it could not have been the same car that Steven G. saw a bicyclist accost when it was traveling northbound.[3]

In the evidentiary hearing Reyes described the incident. As the bicyclists approached the intersection from the south they ended up in two groups: Reyes' group was on one sidewalk and Lopez and some others on the other, on the opposite side of Sullivan. (RT 208:1-210:4.) This was consistent with the testimony of both Steven G. and the undercover detective. (See exh. (1) 147-148, 178-179.)

When Reyes crossed Willits, he turned to look back and saw that Lopez had stopped in the middle of the intersection and was saying something to the driver of the blue Honda. (RT 210:13-

[3] Steven G. believed that the car going north, which one of the bicyclists had accosted, was the same as the car that was struck as it traveled south. (Exh. (1) 158.) He therefore evidently assumed that the driver must have made a U-turn at Willits; however, though he initially testified that he saw the U-turn, he ultimately conceded that he did not. (Exh. (1) 140, 146, 150, 158, 166.)

211:8.) Reyes, who was about 30 feet away, could not make out what Lopez or the driver was saying. (RT 210:18-211:11.) He did not know why Lopez had stopped. (RT 211:21-24.) Lopez had not yet taken out his gun. (RT 211:9-11.) Less than ten seconds later, Lopez took out his gun and shot through the rear window of the Honda. (RT 211:25-212:7; exhibit 9.) (The driver had evidently begun to drive off, for Lopez must have been behind the car when he fired directly at the rear window, rather than at the driver's side, where he likely had been in order to talk to the driver through the driver's open window. (See exhibit 11.))

Reyes saw the shooting. (RT 206:9-19.) He realized the driver was struck when he saw the car "hobble over and kind of bump into another car and stop." (RT 212:8-15 (adopting questioner's phrasing); see also 206:12-16 ("I was standing close enough to know he was hit, the way the car drifted to the side and just stopped going").) Reyes fled. (RT 206:20-23; 212:16-17.) Reyes testified that he himself had not yelled at any of the cars on Sullivan but did not remember if any of the other bicyclists had done so. (RT 212:24-213:7.)

The driver of the blue Honda, Pedro Javier Rosario, died from the single shot, which struck his head. (Exh. (1) 106, 113; (2) 256-258.) No weapons were found in the car. (Exh. (1) 113.) The prosecutor's gang expert could not say that Rosario was an active gang member, but in his home the police found several Polaroid photos showing him making West Myrtle gang signs with his hands. (Exh. (2) 265-267, 442-443; exhibit 17J; exhibit 17K; exhibit 17L.)

B. Reyes's subsequent conduct.

Some 40 minutes later, at about 7 p.m., Reyes was riding his bicycle near the intersection of W. Tenth St. and English St., about a block west of El Salvador Park. (Exh. (1) 212:16-214:15; exhibit 1 (the top center of the map shows the "E" of the north-south English St.).) He was with three others. (Exh. (1) 214:5-13.) (According to Michael C., the witness who saw Lopez show his gun at the handball court, there were in fact two others, Michael himself and Reyes's brother, Eddie. (Exh. (2) 328, 360.))

Reyes was carrying the same revolver that Lopez had used to shoot at Rosario in the blue Honda. (RT 200:15-201:17; exh. (1) 113-115; (2) 231-232, 258:2-260:22, 263:10-264:13 (stipulated testimony of toolmark examiner).) He testified, however, that he did not get the gun directly from Lopez. (RT 200:15-201:13.)

Reyes approached a pedestrian, Felix Jaimes Nieves (about 18 years old), and asked him in Spanish where he was from. (Exh. (1) 211, 216-217, 225-226; (2) 360-361, 368.) As the gang expert explained, this was a "hit-up," or challenge. (Exh. (2) 402-403.) It would likely lead to "some sort of violent confrontation" if the challenged person was in fact a member of a rival gang. (Exh. (2) 402-403.) On the other hand, if he indicated that he was not in a gang, he might well be left alone. (Exh. (2) 404.)

Nieves had never been in a gang. (Exh. (1) 217.) He was, however, familiar with Reyes because Reyes had challenged him in the same manner some seven or eight times before this when Nieves was in the neighborhood to visit his girlfriend. (Exh. (1) 217, 228-229, 234.) On some of the prior occasions Reyes was alone, and on others he was with companions. (Exh. (2) 226-227.)

On each of those occasions the encounter ended with no violence. (Exh. (2) 235-236.) The prior encounters were in fact nonthreatening and nonviolent. (Exh. (2) 236.) Reyes "would just say hello," ask where he was from, and tell him that he was in F-Troop and this "was their neighborhood." (Exh. (2) 236.) Reyes himself did not recall ever seeing Nieves before, much less seven or eight times, but he confirmed that on this occasion he accosted Nieves, asked him where he was from, and identified himself as a member of F-Troop. (RT 201:14-202:15.)

The evidence was conflicting as to what happened next. According to Nieves, he responded that he did not belong to a gang (he was "[f]rom nowhere") and did not want any problems. (Exh. (1) 218; (2) 227, 237.) Reyes became aggressive and offered to fight. (Exh. (1) 218; (2) 237.) He put his hand on his waistband, but though Nieves did not see a gun, he fled. (Exh. (1) 218; (2) 237.) Michael C., on the other hand, said that when Reyes asked where he was from, Nieves told him: "Fuck you." (Exh. (2) 360, 370.) Reyes responded with obscenities of his own, upon which Nieves fled. (Exh. (2) 360-361; 370-371.)

Reyes and his companions pursued him. (Exh. (2) 360-61.) Just before Nieves reached his girlfriend's house, Reyes caught up with him, pushed him, and began a fist fight. (Exh. (2) 228-229, 241.) Reyes's companions joined in, and then some people in a passing truck stopped, got out, and joined in the fight against him. (Exh. (2) 229, 240, 245-246.) Michael C. said that "when he rounded the corner at 12th Street and English he saw Andy Reyes engaged in a fight with this subject and saw the individual push Andy Reyes to the ground." (Exh. (2) 360-361.) Michael

said several times that Reyes "had been scratched on the stomach," which he thought had been caused by a knife wielded by Nieves, but when the detective accused him of lying he admitted that he did not actually see a knife. (Exh. (2) 360-362, 371-372; see also (2) 364, 376.)

At one point Nieves felt a gun at his neck, turned around, saw Reyes holding the gun, and struck him. (Exh. (2) 230-231, 241-243, 249.) The gun fell to the ground. (Exh. (2) 243.) (Reyes and Michael C. both said that the gun fell from Reyes's waistband during the fighting. (Exh. (2) 361-362; RT 202:16-203:15.)) Nieves and Reyes both reached for it, but Nieves managed to get control of it and he pointed it at Reyes and his companions and ordered them to "step back." (Exh. (2) 231, 243-244.) Reyes and his two original companions fled. (Exh. (2) 245-246.) The people from the truck remained. (Exh. (2) 245-246.) At this point, the girlfriend's father arrived home and took the gun from Nieves. (Exh. (2) 231-232, 245-246.)[4]

C. Reyes's admission and other evidence.

Two days after the shooting, when Reyes was in custody, detectives drove him to the juvenile detention center. (Exh. (1)

[4] Nieves told the jury two distinct versions about whether Reyes was holding or brandishing a gun. Initially he said that when he turned around he saw Reyes holding the gun. (Exh. (2) 230-231.) Later, he testified that he "felt something on [his] neck" but did not actually see the gun until he looked on the ground and saw it lying there. (Exh. (2) 243.) Later still, he returned to his earlier version and agreed with the prosecutor that he saw Reyes "pointing the gun at [his] neck during this fight." (Exh. (2) 249.)

205-206.) He asked what he was charged with. (Exh. (1) 208.) One of the detectives showed him the booking slip and said: "It looks like it's a probation violation. You[r] charges are probation violation." (Exh. (1) 208.) The detective recalled Reyes's response:

> He told me, "No, I'm going to be charged with murder, because me and five of my homies were down on Sullivan at a shooting. And I didn't shoot, but because I was there with my homies, I'm going to get charged with murder too."

(Exh. (1) 208.)

The lead detective, testifying as a gang expert, concluded that Reyes was an active member of F-Troop at the time of the shooting. (Exh. (1) 102; (2) 435.)[5]

Responding to a hypothetical based on the prosecutor's case, the expert concluded that the shooting of Rosario was for the benefit of and in association with the F-Troop gang. (Exh. (2) 439-441.) The shooting was "going to promote, further, and assist the gang, not only the individual members, but the gang itself." (Exh. (2) 441-442.)

The expert discussed "backup" among gang members. He explained:

[5] The expert relied in part on field-identification cards, gang notifications (STEP notices) served on suspected gang members, and police reports. (Exh. (2) 415-417.) As the superior court recognized, such evidence was not admissible for its truth. (RT 272:23-275:20.)

> Everybody that goes and participates is going to get the same amount of respect and status as the guy that pulled the trigger. They might as well have pulled the trigger too. They're there for backup. They're there to support what's going on there. They're there to help whoever has the gun, if there's only one gun there. They're there to make sure that person – they're there to support that person. They're there to back them up in any incident. They're trusted to be there. They're trusted within the gang that if the person needs help or backup they are there first and foremost.

(Exh. (2) 395; see also (2) 399-400.)

D. Defense case.

At the evidentiary hearing the court heard expert testimony about the impulsivity and immaturity of adolescents, and the physiological reasons they are far less capable than adults of thinking through the consequences of their actions. (See, e.g., RT 147:9-22; 167:25-168:6.)

Reyes testified at the evidentiary hearing for the first time. As summarized in subsection (A), he said he was at the El Salvador Park playing handball and was present when another member of F-Troop, Lopez, showed off a gun. (RT 187:9-188:9.) Reyes continued playing handball for at least another two hours but then his group, which included Lopez, bicycled to the territory of West F-Troop, a couple of blocks south of Sullivan and Willits, to visit some friends. (RT 188:3-193:5.) When they left

their friends they retraced their route, intending to return to El Salvador Park. (RT 193:10-20.) Reyes and his companions, now consisting of six bicyclists in total, were traveling in two groups, on opposite sidewalks, as they approached the intersection of Sullivan and Willits. (RT 208:1-210:4.) Reyes happened to turn to look back and saw Lopez talking to a motorist in the intersection. (RT 210:13-211:11.) He did not know why Lopez had stopped. (RT 211:21-24.) He was 30 feet away and could not hear what was said. (RT 210:18-211:11.) Less than ten seconds later, Lopez fired at the car. (RT 211:25-212:7.) He realized that the driver must have been struck when he saw the car drift to the side and stop. (RT 206:20-23; 211:25-212:15.)

ARGUMENT

I.

Substantial evidence does not support the conclusion that Reyes acted with implied malice

A. Standard of decision and standard of review.

In an evidentiary hearing under Penal Code section 1170.95, in which the petitioner seeks resentencing because he was convicted of murder under a now-invalid theory, the superior court sits as trier of fact, and it is the prosecutor's burden to prove beyond a reasonable doubt that defendant (petitioner) is guilty of murder under current law. (Pen. Code, § 1170.95, subd. (d)(3), as amended effective January 1, 2022, by Stats. 2021, ch. 551 (S.B. 775), § 2.) S.B. 775 is declarative of existing law. (Stats. 2021, ch. 551, § 1, subd. (c).) In any event, a change in the criminal law that benefits defendant, as in this case, is deemed retroactive to cases still on appeal in the absence of any legislative intent to the contrary. (In re Estrada (1965) 63 Cal.2d 740; People v. Superior Court (Lara) (2018) 4 Cal.5th 299, 308.))

Generally, when the superior court sits as the finder of fact, its factual findings are reviewed for substantial evidence. (People v. Williams (2020) 57 Cal.App.5th 652, 663-665 (applying this principle to a subdivision (d)(3) hearing); see generally People v. Salazar (2005) 35 Cal.4th 1031, 1042.) Where, however, the underlying evidentiary record that supports the findings of fact is documentary, and thus does not involve live testimony from which the trier of fact may draw credibility inferences from

demeanor evidence that is not part of the cold record, there is no need to defer to the superior court's findings. This Court has therefore held that in such cases the reviewing court considers the evidence independently and draws its own factual conclusions, without being bound by the superior court's findings. (E.g., People v. Duff (2014) 58 Cal.4th 527, 551 (*Miranda* motion); People v. Vivar (2021) 11 Cal.5th 510, 528 (post-conviction petition to withdraw a plea for failure to advise defendant of the immigration consequences (Pen. Code, § 1473.7, subd. (a)(1)).)

Here, the People's case depended almost entirely on the record of the original trial. (See CT (1) 62; RT 123:12-127:26.) (Only the defense presented live witnesses: a developmental psychologist and Reyes himself. (CT (1) 62.)) Given that the superior court's findings against Reyes depended on the transcript of the trial, rather than on exculpatory evidence presented in the live defense case, those findings are subject to independent review for the reasons discussed above. In any event, as explained below, whether under the substantial-evidence standard or independent review, there was insufficient evidence.

B. There was insufficient evidence of implied malice.

A conviction or finding based on the theory of implied malice must be reversed unless the record, viewed in the light most favorable to the judgment, "discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant

guilty beyond a reasonable doubt." (People v. Cravens (2012) 53 Cal.4th 500, 507.)

A defendant is guilty of second-degree murder based on implied malice (Pen. Code, § 188) when "the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (People v. Knoller (2007) 41 Cal.4th 139, 143, quotation marks and citation omitted.) Reversal is required unless there is sufficient evidence of the objective component and, separately, of the subjective component of implied malice, "the physical component being the performance of an act, the natural consequences of which are dangerous to life, and the mental component being the requirement that the defendant knows that his conduct endangers the life of another and acts with a conscious disregard for life." (People v. Cravens, supra, 53 Cal.4th at p. 508, quotation marks, emendations, and citations omitted; see also CALCRIM No. 520 (breaking down the two components into four elements).) These components may be proved by circumstantial evidence. (People v. McNally (2015) 236 Cal.App.4th 1419, 1424.)

Here, the superior court denied Reyes's petition on the ground that the People had proved implied-malice murder beyond a reasonable doubt. (RT 297:12-299:2.) There was, however, insufficient evidence of both the objective and the subjective components.

1. **There was insufficient evidence of objective conduct that involved a high probability of death.** Liability for implied-malice murder, even for an aider and abettor, must be based on defendant's own act (conduct), as well as his own mental state. (People v. Gentile (2020) 10 Cal.5th 830, 850 ("an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life"). Where the actual killer acts with implied malice, the aider and abettor must still "know *and share*" that state of mind. (Gentile at p. 850, emphasis added, quotation marks and citation omitted.)

"[A]n act, the natural consequences of which are dangerous to life," is an act which "involves a high degree of probability that it will result in death." (People v. Knoller, supra, 41 Cal.4th at pp. 156-157 (reaffirming that the two tests "articulated one and the same standard") (quotation marks and citations omitted); see also People v. Cravens, supra, 53 Cal.4th at p. 514 (Liu, J., concurring) (the dangerous-to-life formulation "requires some probabilistic assessment of when an act becomes sufficiently 'dangerous' to life"); People v. Calderon (2005) 129 Cal.App.4th 1301, 1310.) It is not enough that the conduct be unreasonable or imprudent. (People v. Vanegas (2004) 115 Cal.App.4th 592, 601 ("In our view there is a significant difference between doing an act which may not be 'reasonable' or 'prudent' and doing an act which carries a 'high probability that it will result in death' as required for implied malice") (citations and footnotes omitted).)

"Whether a defendant's underlying acts are inherently dangerous *in the abstract* is not dispositive in the jury's determination as to whether a defendant acted with malice." (People v. Nieto Benitez (1992) 4 Cal.4th 91, 107, italics in original.) Rather, the court considers "the circumstances preceding the fatal act." (Ibid.) Nonetheless, although not "dispositive," the fact that an act is not inherently dangerous to life in the abstract, and does not even constitute felony or misdemeanor conduct, is relevant. (See People v. Contreras (1994) 26 Cal.App.4th 944, 954-955 ("Considerations such as whether the act underlying the homicide is a felony, a misdemeanor, or inherently dangerous in the abstract are not dispositive," but the absence of such evidence, such as "the absence of intoxication or high speed flight from pursuing officers," are "circumstances to be considered in evaluating culpability").) It is intuitively evident that if an act is so benign that it is neither a misdemeanor nor a felony, nor inherently dangerous in the abstract, the particular circumstances would have to be compelling to establish that this otherwise benign act is dangerous to life in those circumstances. Thus, for example, the infraction of speeding is not inherently dangerous to life in the abstract, though it may rise to that level when the speeding is accompanied by other contemporaneous instances of recklessness. (See People v. Wells (1996) 12 Cal.4th 979, 982-983, 987-988 (discussing involuntary manslaughter).)[6]

[6] Cases dealing with involuntary manslaughter are particularly

Here, Reyes's conduct – the act at issue – was bicycling with five or six fellow gang members from one part of town to get to another part, knowing that one of the other cyclists was armed, and knowing that the route briefly crossed a "fringe" area that was claimed by a rival gang. As explained below, none of these facts carried a high probability of death, whether independently or cumulatively.

apposite because that crime encompasses the objective component of implied malice. (See People v. Butler (2010) 187 Cal.App.4th 998, 1008 ("Both murder (based on implied malice) and involuntary manslaughter involve a disregard for life; however, for murder the disregard is judged by a subjective standard whereas for involuntary manslaughter the disregard is judged by an objective standard").) Involuntary manslaughter, however, requires only "an act which involves a high degree of risk of death or great bodily injury" (People v. Cleaves (1991) 229 Cal.App.3d 367, 378), whereas for implied malice the objective act must be dangerous to life (People v. Knoller, supra, 41 Cal.4th at p. 143).

(a) Transiting the fringe area of a rival gang's territory while going from one part of town to another had no significant probative value to support a high probability of death. Briefly transiting a fringe area of a rival gang in order to get from one place to another is not a crime at all and, in the abstract, seems not to "involve[] a high degree of probability that it will result in death." (People v. Knoller, supra, 41 Cal.4th at pp. 156-157.) It is far more benign than actual crimes that courts have found to be noninherently dangerous even though they carry an obvious risk. (See, e.g., People v. Greenberger (1997) 58 Cal.App.4th 298, 380 ("Felony false imprisonment is not an inherently dangerous felony" for purposes of involuntary manslaughter); People v. Morales (1975) 49 Cal.App.3d 134, 143 ("grand theft from the person is not an inherently dangerous felony when viewed in the abstract," for purposes of the former second-degree felony-murder rule).)

None of the particular circumstances of Reyes's case tend to show that this act, innocuous in the abstract, was transformed into an act that was highly probable to result in death. First, there was no evidence that Reyes's group entered rival territory for the purpose of attacking or confronting rival gang members. No such plan, or indeed any plan, was hatched at the park. Michael C., the prosecution witness who was present when Lopez showed off his gun at the park (see exh. (2) 358), testified that there was no discussion about what, if anything, Lopez was going to do with the gun:

> Q And there was no discussion of what Frank [Lopez] was going to do with that gun, was there?

A That's correct.

Q And there was no discussion about going and shooting somebody with that gun, was there?

A That's correct.

Q And there was no discussion about going and hitting up anybody with that gun, was there?

A He didn't tell us that there was, no.

(Exh. (2) 367-368.) There was no evidence that anyone else had a gun. (See exh. (2) 367.) There was no evidence that the group immediately left for rival territory after Lopez showed the gun, which perhaps might have allowed an inference that the group planned to make use of the gun. Gang associate Michael C. did not give a time frame, but never indicated that the group left immediately after seeing the gun. (See exh. (2) 359-360.) Reyes himself testified that he resumed his handball game and continued to play for at least two more hours until the group left. (RT 187:21-188:12.) Although the court, as trier of fact, was not obliged to credit Reyes's testimony, disbelief of Reyes could not constitute affirmative evidence of the contrary, namely, that the group left immediately. (See People v. Lara (2017) 9 Cal.App.5th 296, 319 ("While the jury was not required to accept Lara's account of events, merely disbelieving him does not amount to evidence Lara was in fact the shooter") (quotation marks and citation omitted); People v. Velazquez (2011) 201 Cal.App.4th 219, 231 ("Disbelief of defendant's testimony" cannot constitute substantial evidence of the contrary).)

The only evidence of the group's intent at the time Reyes and the others left the park was that they were going to visit

friends in the territory of West F-Troop, which was another clique or faction of Reyes's F-Troop gang. (RT 188:13-16; 192:14-193:5; see exh. (2) 451-452.) This was corroborated by the fact that the shooting occurred when Reyes's group was bicycling north toward El Salvador Park. (Exh. (1) 137 (independent eyewitness Steven G.).) The home of the West F-Troop member that Reyes's group visited was two blocks south of the intersection of Sullivan and Willits, where the shooting would occur. (See exh. (2) 406-407, 451-452; RT 190:10-191:12; 193:4-5.) Thus, the group must have pedaled past the fringe territory going south from El Salvador Park, and then returned north some time later. If the group had left El Salvador Park intending to attack or confront rival gang members, there would have been no need to continue past rival territory and then double back.

The People's own gang expert conceded that it would have been reasonable, and in fact necessary, for the group to pedal past the intersection of Sullivan and Willits in order to reach the home of a friend in West F-Troop territory, going south from F-Troop territory, even though the intersection was in a "fringe area" claimed by the rival West Myrtle gang:

> Q And is it a likely scenario that F-Troopers from El Salvador [Park] or Artesia would want to go down to visit their cohorts in West F-Troop area and is it possible that they do that?
>
> A Sure.
>
> Q And that they have to go through a fringe area to get there?
>
> A Yes.

(Exh. (2) 453; see also (2) 453-454 (expert acknowledges that the intersection was in fact a "fringe area" or "gray area," at the outer boundary of the territory claimed by the West Myrtle gang, a rival of F-Troop. (Exh. (2) 453-454; RT 195:6-19; 199:19-200:5.) Reyes recognized that "we could have taken another route" to return to El Salvador Park without going through the intersection of Sullivan and Willits (RT 213:8-12), but that would have required taking a detour west or east (see exhibit 1 (map)). The record does not show what gang territories the group would have had to traverse if they had taken a detour, and thus does not establish that the group entered the fringe area for the purpose of confronting rivals.

Thus, none of the particular circumstances transformed this benign act into something highly probable to cause death. This was not a case in which there was no evidence of any benign purpose for briefly transiting fringe territory, such that it might perhaps be reasonable to infer that the conduct at issue was an incursion to hunt down rivals. Rather, the undisputed evidence, partly corroborated by the direction of travel at the time of the shooting, was that the group briefly transited the fringe area to visit friends and then return to El Salvador Park, taking the same route south and then north. (See RT 190:13-192:16; 193:10-17.) Given that record, as well as the absence of any actual evidence as to what else the group might have had in mind, the theory that the conduct was dangerous to life would not be a reasonable inference. (See In re B.M. (2018) 6 Cal.5th 528, 538 (where the evidence showed how the defendant (minor) actually used the knife, "various conjectures as to how she could have

used it" could not constitute substantial evidence); People v. Soriano (2021) 65 Cal.App.5th 278, 289 (expert's opinion was insufficient to establish that defendant carried a concealed knife in order to promote his gang); People v. Sanford (2017) 11 Cal.App.5th 84, 94 (isolated evidence was not substantial where "other, uncontroverted evidence undermines the reasonableness" of the proposed inference).)

It is also significant that there was no evidence of any ongoing or recent conflict between F-Troop and West Myrtle, such that the brief transiting could be considered objectively provocative. (See People v. Soriano, supra, 65 Cal.App.5th at p. 289 ("if there was some evidence of recent hostilities with a rival gang, it might be reasonable to infer [defendant] possessed the weapon on the day of his arrest for a specific gang purpose").) Although West Myrtle was a rival to Reyes's gang (exh. (2) 408), there was no indication that it was any more of a rival than other gangs, and no evidence that there was an ongoing or recent gang war or incident of hostility involving this specific gang. As the expert candidly explained, the "rivals" of F-Troop included "[p]retty much anybody except F-Troop" and its ally, Fifth Street. (Exh. (2) 407-408; see also RT 195:6-11.)

Finally, as noted above, Reyes's group was not in fact penetrating into the established territory of a rival gang. The expert conceded that the intersection was "not hard-core rival gang territory." (Exh. (2) 454.) In fact, he was speculating that it was even claimed by West Myrtle. He could not recall ever actually asking any members of that gang whether they "claim[ed] that corner"; he merely supposed that if he *had* asked

around, "the vast majority of them would say, yeah, that's our area." (Exh. (2) 452-453.) And he was careful to emphasize that he was not giving exact boundaries:

> Q And that – trying to get your words – and that you're sure that West Myrtle – some people in West Myrtle claim that territory?
>
> A No. What I said was I'm sure West Myrtle would probably claim that corner, but it's right on the fringe of where they claim their territory. And when I give you claims of boundaries, I'm not giving you exact block to block. It's a rough generalization area. And, like I said, with the core being right there on Myrtle. [¶] So I think if you went and talked to West Myrtle guys, and I can't sit here and tell you I've ever asked them specifically if they claim that corner, but I think the vast majority of them would say, yeah, that's our area.

(Exh. (2) 452-453.) The expert's assertion that he was "sure" that something was "probably" true (exh. (2) 452) seems an insufficient basis for any inference based on Reyes's brief passage through the intersection. Further, Reyes testified that "that's actually the borderline of F-Troop and West Myrtle. We can also say it's F-Troop territory too." (RT 199:19-200:5; but see RT 195:12-22 (earlier, Reyes conceded that the intersection was "the corner of [West Myrtle's] territory").)

The superior court reasoned that Reyes "intentionally committed an act," namely, accompanying fellow gang members,

one of whom was armed, as they "traveled to rival gang territory." (RT 297:23-26.) As explained above, however, there was no substantial evidence that they were traveling *to* "rival gang territory." To the contrary, the undisputed evidence was that they were traveling *through* that fringe intersection to get from one point to another and then to return the same way.

The superior court relied on the expert's testimony for its supposition that Reyes was traveling to rival territory (RT 298:1-6), but the expert was in fact responding to a hypothetical that *assumed* that Reyes's group was going *to* that territory. (Exh. (2) 439 (hypothetical: "They are traveling from El Salvador Park over to West Myrtle territory").) His answer must be taken in light of the premises laid out by the prosecutor.

Further, the expert was responding to a hypothetical addressing the gang enhancement, which of course applied only if it was already established that Reyes had committed a substantive crime in the first place. (See Exh. (2) 439-441, esp. (2) 441 (end of hypothetical question: "Have I given you enough facts at this point in time to offer your opinion whether *the crime, specifically the homicide*, was done for the benefit of, or in association with the F-Troop gang?") (emphasis added).) The expert merely opined that *assuming* that Reyes had committed a crime (aiding and abetting the homicide), that crime was for the benefit of the gang. The superior court therefore erred in using the conclusion to try to prove the premise, that is, in inferring that because an assumed crime was gang related, the assumption – that Reyes committed a crime – must be true.

The Court of Appeal adopted and paraphrased the superior

court's reasoning. (People v. Reyes, supra, 2021 WL 3394935 at pp. *5-*6.) That court therefore erred for the same reasons.

(b) Bicycling with Lopez, among other gang members, knowing that Lopez had a gun, had no significant probative value to support a high probability of death. Possessing a concealable firearm, even by a felon, is not an inherently dangerous felony. (People v. Cunningham (2001) 25 Cal.4th 926, 1009 (resolving the question in the context of the former second-degree felony-murder rule).) Mere possession, after all, is far different from, say, brandishing or exhibiting a gun in an angry or threatening manner. (See People v. Southack (1952) 39 Cal.2d 578, 584.)

A fortiori, Reyes's association with someone, knowing that that person possessed a firearm, would not be inherently dangerous in the abstract. That leaves only his association with a fellow gang member. This, too, in the abstract, is not inherently dangerous to life. It is no crime for gang members to associate with each other. (E.g., People v. Flores (2019) 38 Cal.App.5th 617, 627 ("without more, it is not a crime to associate with a criminal street gang"); People v. Huynh (2021) 65 Cal.App.5th 969, 984.) The combination of two acts that are not dangerous in themselves cannot rise to the level of abstract inherent dangerousness.

Nothing in the circumstances of this case made Reyes's conduct in bicycling with an armed gang member objectively dangerous to life, that is, involving a high probability of death, even though the conduct in the abstract was not dangerous to life. The People's gang expert recognized that a gang member

will show off a gun in order to enhance his reputation, without any present intention to use it:

> Well, when they have a gun, they want to show that they're willing to carry it. That's part of the respect within the gang. Hey, I've got it and I'm willing to use it. And they show even other guns when they've got them.

(Exh. (2) 405.)

The prosecution expert also explained that a gang member might show off a gun in order to forewarn a fellow gang member who might get in trouble by being around a gun. (Exh. (2) 405 ("So when they have a gun, they share that information with each other not only to brag about having it, but to let everybody know, hey, I got it in case you can't be around").) Here again, the demonstration of the gun would not signal an intent to use it, whether that day or at any time in the future.

The prosecution's expert noted that a gang member might show off a gun to let others know about it in case the group was attacked by rivals in the gang's own territory. (Exh. (2) 405 ("And another prong to that is I've got it in case you need it. If I can't get to it and rivals drive in and chaos breaks out, I've got it if anybody needs it").) Gang members would also arm themselves when they had to traverse rival territory, since they know what they "very well could encounter." (Exh. (2) 439; see also exh. (2) 453 (expert acknowledges that if gang members had to traverse a "fringe area" on the way to their destination, that would explain "why they arm themselves before they go down there").) This

indicates arming for self-defense, not for offensive action. (See United States v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1246 ("The fact that gang members attend a function armed with weapons may prove that they are prepared for violence, but without other evidence it does not establish that they have made plans to initiate it"); United States v. Peterson (D.C.Cir. 1973) 483 F.2d 1222, 1232, fn. 61 ("One may deliberately arm himself for purposes of self-defense against a pernicious assault which he has good reason to expect").)

Nothing in the circumstances suggests that possession of a gun by Lopez involved a high probability of death, for as noted earlier, the only evidence of the group's intent at the time Reyes and the others left the park was that they were going to visit friends in the territory of West F-Troop and then return to the park. (RT 188:13-16; 192:14-193:5; exh. (1) 137.)

For these reasons, accompanying an armed gang member on a bicycle trip to visit friends was not an act that involved a high probability of death.

(c) A bicycling companion's shouts at a passing car had no significant probative value to support a high probability of death. An overt or implied challenge to a suspected rival gang member to fight may result in violence. (People v. Dennis (2020) 47 Cal.App.5th 838, 854-855, review granted July 29, 2020, S262184 (grant and hold).) Merely creating a ruckus or disturbance, however, may be entirely nonviolent. For example, disrupting a busy bank by blocking the tellers' windows and obstructing entry

constitutes disturbing the peace, even though nonviolent. (People v. Green (1965) 234 Cal.App.2d Supp. 871, 873 ("It is not necessary that any act have in itself any element of violence in order to constitute a breach of the peace").)

Here, there was some evidence that as the bicyclists were approaching the intersection of Sullivan and Willits, one of them shouted at a passing motorist, "Hey, homey, stop. We want to talk to you." (Exh. (1) 141, 142, 149 (testimony of bystander Steven G.).) This, however, on its face was not an overt or even implied challenge to an immediate fight. (See People v. Dennis, supra, 47 Cal.App.5th at p. 855 (implied challenge where members of one gang approached possible rivals adjacent to rival territory and asked them, "Where you from," which the gang expert said was a form of "aggression").) Nor was it objectively likely to provoke an immediate violent reaction, for it was a matter of speculation why the bicyclist wanted to talk to an unknown passing motorist. The shouting therefore cannot reasonably be construed as conduct that objectively carries a high probability of death.

Appellant does not concede that even an overt gang challenge involves a high probability of death, as contrasted with a risk of injury. In fact, the prosecution expert in this case conceded that if the target professes not to be a gang member, the confronter may just walk away rather than attack him, and the expert admitted: "I don't know if one happens more often than not than the other." (Exh. (2) 404.) If the expert could not say that one was more probable than the other, the trier of fact

certainly could not infer that there was a high probability of death from one of the possibilities.

Further, neither Steven G. nor the undercover detective ever saw any of the bicyclists display gang signs, shout out the name of a gang, or refer at all to a gang. (Exh. (1) 164-165, 196-197.) (Cf. People v. Soriano, supra, 65 Cal.App.5th at p. 289 (insufficient evidence of gang purpose where "there was no evidence Soriano and Ceja were displaying gang signs or gang clothing when they were detained"); People v. Perez (2017) 18 Cal.App.5th 598, 609 (same: "There is no evidence that any participant shouted out a gang name or threw up a gang sign"); In re Daniel C. (2011) 195 Cal.App.4th 1350, 1363 ("No gang signs or words were used"); People v. Ochoa (2009) 179 Cal.App.4th 650, 662 ("Defendant did not call out a gang name, display gang signs, wear gang clothing, or engage in gang graffiti while committing the instant offense").) Thus, it is a matter of speculation whether the bicyclist who wanted the motorist to slow down contemplated a gang confrontation. The bare fact that Lopez was a gang member cannot show that his conduct in accosting a motorist was the initiation of a gang confrontation that was dangerous to life. (Cf. People v. Perez, supra, 18 Cal.App.5th at p. 610 ("And the glaring absence of evidence connecting the shooting to a gang, other than the mere fact the perpetrator was a gang member, leaves the evidence woefully short of the sufficiency needed to sustain the enhancement").)

Moreover, the motorist that Steven G. saw being accosted by Lopez or another of the bicyclists was not even the same one

whom Lopez shot. Steven believed that the car going north, which was the one that the bicyclist had accosted, was the same as the car going south, at which Lopez shot moments later. (Exh. (1) 158.) He therefore evidently assumed that the driver must have made a U-turn at Willits; however, though he initially testified that he saw the U-turn, he ultimately conceded that he did not. (Exh. (1) 140, 146, 150, 158, 166.) The undercover detective testified that the victim's car must have been traveling south on Sullivan before it entered the intersection, and could not have been making a U-turn at that intersection. (Exh. (1) 176-177, 204.) Thus, it could not have been the same car that Steven G. saw going north. Steven's mere assumption therefore cannot constitute substantial evidence that this was the same car. (See In re I.C. (2018) 4 Cal.5th 869, 892 ("isolated evidence torn from the context of the whole record" cannot constitute substantial evidence) (quotation marks and citation omitted).)

Finally, Reyes himself was far removed from the commotion and yelling. Steven G. testified that by the time one of the bicyclists began shouting to a motorist, they had already separated into two groups. (Exh. (1) 143, 147-148.) There was no evidence that Reyes was part of the group that had accosted any motorists. Reyes himself denied shouting at any motorist and said he was not near Lopez's group. (RT 209:9-210:23.) In short, he was merely present near the scene when one of his five bicycling companions tried to flag down a passing car. This cannot reasonably be considered conduct dangerous to life on Reyes's part.

(d) The supposition that Reyes was "backing up" Lopez was not supported by substantial evidence. The fact that defendant associates with other gang members does not allow an inference that he had any role in a particular crime. (See People v. Nguyen (2015) 61 Cal.4th 1015, 1055 ("gang evidence standing alone cannot prove a defendant is an aider and abettor to a crime") (quotation marks and citation omitted).) For example, in People v. Memory (2010) 182 Cal.App.4th 835, 859, the jury learned that defendant was in a specified gang, and was therefore "required to fight when challenged, to not back down, and to carry knives." Admission of this evidence was reversible error: "Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion." (Ibid., quoting In re Wing Y. (1977) 67 Cal.App.3d 69, 79; see also People v. Perez, supra, 18 Cal.App.5th at p. 610 (rejecting gang expert's "sweeping generalization untethered, as it is, to specific evidence" of the gang enhancement); People v. Samaniego (2009) 172 Cal.App.4th 1148, 1179 (it is speculative to infer "specific conduct of gang members in a particular case" based on gang culture).)

The federal court of appeals has made the same point that mere gang membership – even accompanied by a general understanding that members would come to each other's aid – was insufficient to support guilt:

> The government points to expert testimony at the trial by a local gang unit detective, who stated that generally gang members have a "basic agreement" to back one another up in fights, an agreement

> which requires no advance planning or coordination. This testimony, which at most establishes one of the characteristics of gangs but not a specific objective of a particular gang – let alone a specific agreement on the part of its members to accomplish an illegal objective – is insufficient to provide proof of a conspiracy to commit assault or other illegal acts.

(United States v. Garcia, supra, 151 F.3d at pp. 1245-1246; see also Kennedy v. Lockyer (9th Cir 2004) 379 F.3d 1041, 1055 ("Evidence of gang membership may not be introduced, as it was here, to prove intent or culpability"); Mitchell v. Prunty (9th Cir. 1997) 107 F.3d 1337, 1342 ("Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting"), overruled on other grounds in Santamaria v. Horsley (9th Cir. 1998) 133 F.3d 1242, 1248.) As this Court has tersely explained: "Certainly association with a criminal is not to be equated with connection with the crime." (People v. Robinson (1964) 61 Cal.2d 373, 399.)

In that light, membership in a gang and association with fellow gang members on any particular occasion does not itself objectively carry a high probability of death. Such an inference amounts to nothing but guilt by association or bad-character evidence. (See People v. Sanchez (1997) 58 Cal.App.4th 1435, 1449; People v. Rodriguez (2018) 4 Cal.5th 1123, 1129 ("The corroborating evidence that was presented could do no more than establish the crimes occurred and raise a suspicion against every Sureno gang member in Stanislaus County") (quoting Attorney

General's argument with approval); People v. Pedroza (2014) 231 Cal.App.4th 635, 655.)

By way of contrast, in People v. Guillen (2014) 227 Cal.App.4th 934, 992, "[t]here was more evidence connecting [defendant] to [the victim's] murder than just his participation in the Paisanos," including the fact that he participated in the beating of the victim and knew that "he had a choice whether to participate." In People v. Navarro (2021) 12 Cal.5th 285 [285 Cal.Rptr.3d 861, 882], there was more than mere association with the perpetrators to prove defendant's participation in the murder conspiracy: he had "a personal motive to commit the killing; was, pursuant to his standing in the gang, the shooters' boss; permitted them to use his property in committing the crime; and was in communication with them before and at the time of the shooting."

Here, there was no substantial evidence that Reyes engaged in the conduct of backing up Lopez. No one testified to any act indicating that he was undertaking the role of backup; he was merely present near the intersection when fellow gang member and bicyclist Lopez decided to confront a motorist. The People's gang expert did not supply the missing evidence of an act or conduct. The expert said:

> Q Let's say there's a number of gang members that go out and do this drive-by shooting. What's the impact of the other people who are present at the time?
>
> A Everybody that goes and participates is going to

> get the same amount of respect and status as the guy that pulled the trigger. They might as well have pulled the trigger too. They're there for backup. They're there to support what's going on there. They're there to help whoever has the gun, if there's only one gun there. They're there to make sure that person – they're there to support that person. They're there to back them up in any incident. They're trusted to be there. They're trusted within the gang that if the person needs help or backup they are there first and foremost. So their status is the same as all for one and one for all, as far as that goes.

(Exh. (2) 394-395; see also (2) 399-400.)

The expert thus testified that *if* gang members go out to commit a crime together, it can be inferred that even seemingly passive members have a role as backup persons. Nothing in the expert's testimony suggests that the inference works the other way around, that is, that if a fellow gang member happens to be in the vicinity of a crime committed by another gang member, then he is in fact acting as backup. Such an opinion would be speculative. (See People v. Samaniego, supra, 172 Cal.App.4th at p. 1179 ("While that [expert] opinion may generally be true regarding gang culture, it is still speculative in its application to the specific conduct of gang members in a particular case").) Thus, the trier of fact could not infer that Reyes undertook to act as backup in this specific incident simply because that is what gang members sometimes do.

There was no substantial evidence of the expert's premise

or assumption that gang members were going out to commit a crime together. As noted above, there was no evidence of a plan to commit a crime of any sort when the group left El Salvador Park to visit friends in another clique of the gang. Nor was there any evidence that such a plan was hatched at any time en route or on the way back to El Salvador park, much less that Reyes was a part of any such planning or even had knowledge of it. Thus, there was no evidence that he *acted* as a backup for Lopez. He therefore engaged in no act that was objectively dangerous to life.

(e) Reyes's failure to intervene had no significant probative value to support a high probability of death. Failure to act cannot, on its own, constitute an intentional act for implied-malice murder, unless defendant has a duty to act. (People v. Whisenhunt (2008) 44 Cal.4th 174, 216; see, e.g., Zemek v. Superior Court (2020) 44 Cal.App.5th 535, 550-552 (defendant was liable for implied-malice murder based on failure to act where she had a contractual duty to act as the victim's caretaker).) There is no evidence that Reyes had any legal duty to intervene and prevent Lopez from confronting a motorist and then unexpectedly shooting at the car as the motorist drove off. Accordingly, his failure to intervene could not constitute an act that involved a high degree of probability of death.

(f) Reyes's subsequent conduct had no significant probative value to support a high probability of death. Some 40 minutes after the shooting at the intersection, when Reyes was back in F-Troop territory in the area of El Salvador Park, he approached a

pedestrian (Nieves), and asked him where he was from, which amounted to a gang challenge. (Exh. (1) 211, 216-217, 225-226; (2) 360-361, 368, 402-403.) According to Nieves, who had never been in a gang, he responded that he was "[f]rom nowhere" and did not want any problems. (Exh. (1) 217-218; (2) 227, 237.) Reyes became aggressive and offered to fight. (Exh. (1) 218; (2) 237.) Nieves fled, but Reyes and his companions caught up with him and began fighting him. (Exh. (1) 218; (2) 228-229, 237, 241.) Reyes put a gun to Nieves's neck but Nieves was able to wrest it away. (Exh. (2) 230-231, 241-244.) Reyes and his companions fled. (Exh. (2) 245-246.)

The Court of Appeal appeared to rely on this subsequent conduct as evidence of the objective component of implied malice:

> Defendant's appellate briefs focus on whether defendant's action in walking or riding his bicycle to the place where Rosario was shot was a culpable act or dangerous to human life. However, like the trial court, we believe implied malice cannot be determined based only on that one piece of the puzzle. Rather, it was incumbent upon the trial court to consider the totality of defendant's actions on the day in question.

(Id. at p. *6.) This is erroneous. A crime cannot be objectively dangerous to life based on an act or conduct that takes place afterward, for a crime cannot be a natural *consequence* of something that has not even taken place yet and was never contemplated until later. (There was no evidence that Reyes knew that sometime after the shooting Nieves or another

outsider would turn up in F-Troop territory.) This Court has emphasized that *prior* conduct may be relevant because the crime may be the natural consequence of that prior conduct. (People v. Nieto Benitez, supra, 4 Cal.4th 91, 107 ("The very nature of implied malice, however, invites consideration of the circumstances preceding the fatal act. . . . Thus, in determining in the case at bar whether defendant intentionally committed an act the natural consequences of which are dangerous to human life, the jury was entitled to consider all of the events leading up to the shooting") (quotation marks and citation omitted); see also, e.g., People v. James (1998) 62 Cal.App.4th 244, 277-278.) As implied by Nieto Benitez's analysis, *subsequent* conduct has no bearing on the issue. (Whether subsequent conduct is relevant to the subjective component of implied malice is discussed in subsection (B)(2) below.)

(g) Conclusion. In summary, none of Reyes's *acts* objectively carried a high probability of death. Even cumulatively, the acts were insufficient. This was a case of a 15-year-old boy bicycling from a park to the home of friends, accompanied by fellow members of his gang, and then returning by the same shortest route before dusk, during which time one of the bicyclists suddenly got into a quarrel with someone and shot at his departing car at a busy intersection. As this Court has recognized in another case of multiple bits of suspicious circumstantial evidence: "Each item of evidence against defendant is so weak and inconclusive that together they are insufficient to constitute proof beyond a reasonable doubt."

(People v. Hall (1964) 62 Cal.2d 104, 112.) Accordingly, whether under the substantial-evidence standard or this Court's independent review, there was insufficient evidence of the objective component, namely, that Reyes's conduct, under all the circumstances, "involve[d] a high degree of probability that it will result in death" or, what is the same thing, was such that its "natural consequences" were "dangerous to life." (People v. Knoller, supra, 41 Cal.4th at pp. 156-157.)

2. There was insufficient evidence of the subjective component. "[I]mplied malice requires a defendant's awareness of engaging in conduct that endangers the life of another – no more, and no less." (People v. Knoller, supra, 41 Cal.4th at p. 143.) Knoller specifically held that it was insufficient that defendant knew that his conduct risked causing serious bodily injury. (Ibid.) On the other hand, it was not necessary to show that defendant was aware that his conduct had a "*high probability* of resulting in death," for that requirement applies only to the objective component. (Ibid., italics in original; id. at p. 157 ("But 'high probability of death' is the *objective*, not the *subjective*, component of the Thomas test"), italics in original, citing People v. Thomas (1953) 41 Cal.2d 470.)

Here, assuming arguendo that Reyes committed one or more acts that objectively involved a high probability of death, there was insufficient evidence that he subjectively knew that his conduct endangered the life of another.

(a) Reyes's comment after his arrest that he knew he was being charged with murder does not tend to show knowledge and conscious disregard of endangering the life of another at the time of the crime. A defendant's recognition of what he is being charged with is not an admission that he committed a crime. (See State v. Stewart (Mo. App. 1976) 542 S.W.2d 533, 537 ("the defendant's response that he knew he was charged with possession of marihuana did not constitute an admission or inference of guilt, but was merely an acknowledgement that he knew why he was in jail").)

Here, on August 12, 2004, two days after the shooting, when Reyes was arrested on a probation violation, two detectives drove him from the Santa Ana police department to the juvenile detention facility. (Exh. (1) 205-208.) En route, Reyes asked "what his charges were." (Exh. (1) 208.) One of the detectives showed him the booking slip and said: "It looks like it's a probation violation." (Exh. (1) 208.) The detective recalled Reyes's response:

> He told me, "No, I'm going to be charged with murder, because me and five of my homies were down on Sullivan at a shooting. And I didn't shoot, but because I was there with my homies, I'm going to get charged with murder too."

(Exh. (1) 208.) (The statement was not taped, but the detective memorialized it after taking Reyes to the juvenile facility. (Exh. (1) 209; see also exh. (1) 29-30.)).[7]

The superior court reasoned that this was an admission tending to show that Reyes was conscious that his conduct was dangerous to life. (RT 298:13-19 ("The Court does find that admission by the defendant does show Element Number 3, that he knew that what he was doing was dangerous to human life").) This was not fully considered. As explained above, knowing or suspecting what one is being charged with has no tendency in reason to prove that one is guilty. (State v. Stewart, supra, 542 S.W.2d at p. 537.)

This was not a case in which the defendant revealed information that he would not have known unless he were guilty. There was no dispute that Reyes, like many other people, was present at this busy intersection and saw the shooting. (See exh. (1) 174-175 RT 195:26-196:4.) Further, Reyes made his comment just two days later. (Exh. (1) 205.) The unforgettable incident would have been fresh in his memory and therefore would have come to mind as the obvious reason for the arrest, even though he was not in fact involved but only present.

[7] In his rebuttal summation at trial, the prosecutor profoundly misstated the admission, declaring that Reyes had confessed: "Five of my homies and I did a murder, but I didn't shoot." (Exh. (3) 571.) Before sending the jury out to deliberate, the trial court considered it necessary to read to the jury exactly what the detective testified that Reyes had said, which of course was not an admission that he "did a murder." (Exh. (3) 588-589.)

The statement was in fact exculpatory. Reyes admitted only that he was present on a street with his "homies" "at a shooting." He did not say that he had any role or even knew what was going to take place. He denied firing a gun himself. (Exh. (1) 208; see also exh. (1) 209.) He simply expressed the bleak recognition that because he was a gang member who happened to be with other gang members in the vicinity of a shooting by one of them, he was an obvious suspect. (See RT 212:3-5.) It revealed nothing about whether he knew that his own conduct endangered the life of another and nonetheless acted with conscious disregard for life.

The superior court and the Court of Appeal relied on Reyes's admission to show that "he knew that what he was doing was dangerous to human life." (RT 298:13-19, quoted in People v. Reyes, supra, 2021 WL 3394935 at p. *5.) To the contrary, the admission shows only that he knew that what *Lopez* had done – shooting at a moving car – was dangerous to life.

Further, Reyes's realization after the fact that the incident had culminated in a homicide had no tendency in reason to prove that *at or before the time of his actions* he himself knew the danger to life from Lopez's action. The reasoning of the superior court and the Court of Appeal is in fact an illustration of the powerful fallacy of hindsight bias, which is "the recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred." (Chavez v. City of Los Angeles (2010) 47 Cal.4th 970, 986-987; see also Christiansburg Garment Co. v. Equal Employment Opportunity

Comm. (1978) 434 U.S. 412, 421-422 (exhorting district courts to "resist the understandable temptation to engage in post hoc reasoning" by interpreting prior information in light of subsequent developments); see generally Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame* (2003) 56 Vanderbilt L.R. 1383, 1428 (hindsight bias "inclines observers ex post to believe that actual events were probable ex ante even when they were not. This, in turn, inclines observers to infer intention, knowledge, or recklessness from the foreseeability of events that were in fact not foreseeable") (footnote omitted).) Thus, the fact Reyes belatedly realized that Lopez's conduct was dangerous to life does not mean that he had such knowledge before Lopez actually took out his gun and fired a shot, much less that Reyes undertook any action in conscious disregard of the danger.

(b) Reyes's knowledge that Lopez had a gun had no significant probative value to support knowledge and conscious disregard of endangering the life of another. There was no evidence that Reyes actually knew that Lopez intended to brandish, much less use, the gun that he had shown off long before the shooting. (See exh. (2) 367-369 (eyewitness Michael C. told police that there was no discussion about shooting someone or challenging anyone, and in fact there was no discussion at all "about what they were going to do when they left"); RT 187:21-188:12 (Reyes testifies that the group left the park at least two hours after seeing the display of the gun).) Thus, Reyes's

knowledge that Lopez had a gun could not have alerted him that there would be any danger to human life from the fact that he accompanied Lopez and others to visit friends.

In fact, as discussed in subsection (B(1)(b), the People's gang expert himself explained that showing off a gun as a way of boasting was a common and routine occurrence. (See exh. (2) 405 ("Well, when they have a gun, they want to show that they're willing to carry it").) Further, there were numerous other reasons to show a gun that had nothing to do with offensive use, such as to alert a fellow gang member whose parole or probation conditions required him not to be in the presence of guns, or to let others know that it was available in case it was needed for self-defense. (Exh. (2) 405, 439, 453.) As the expert conceded, "[g]uns are huge in the gang culture." (Exh. (2) 390.) And they are needed not just to commit crimes but for self-defense:

> If they don't have guns defensively to protect that turf we just talked about, rival gangs that do have guns will come in, shoot them all, take over their area, take over the drug trade, whatever it be they need to do with those guns.

(Exh. (2) 390.)

Reyes declared: "I was aware that Francisco Lopez did carry a firearm from time to time as a known gang member with his rank would do." (CT (1) 132.) Given the frequency with which Lopez carried a gun, according to this uncontradicted declaration, Reyes had no reason to suspect that there was any

significance to the fact that Lopez was carrying a gun on this occasion as well.

This is not a case in which Lopez had had a history of such shootings and Reyes knew that history. There was no evidence that Lopez had shot at anyone before, much less that Reyes was aware of any such incident. (Cf. In re Scoggins (2020) 9 Cal.5th 667, 681 (in case involving closely analogous issue of reckless indifference, "[a] defendant's knowledge of a confederate's likelihood of using lethal force, which may be evident before or during the felony, is significant to the analysis of the defendant's mental state").) To the contrary, Reyes declared: "I'm also aware that on other [occasions] [Lopez] has carried a firearm and has never discharge[d] it around me in other confrontations with other rival enemy gang members." (CT (1) 132.)

(c) There were no circumstances that would have alerted Reyes in advance that a confrontation was about to occur that would endanger the life of another As explained in subsection (B)(1)(a), there was no evidence that a confrontation or attack was planned, whether in the park or thereafter, much less that Reyes was aware of any such plan. (See exh. (2) 367-368.) There was no evidence that anyone else had a gun (exh. (2) 367), which would reasonably be expected if the gang had been planning an attack against a rival. Although one of the bicyclists accosted one or more motorists (exh. (1) 148-149 ("hey, homey, stop. We want to talk to you")), there was no actual evidence that this was gang related. Neither of the two independent eyewitnesses (Steven G.

and the undercover detective) ever saw any of the bicyclists display gang signs, shout out the name of a gang, or refer at all to a gang. (Exh. (1) 164-165, 196-197.) As the gang expert conceded, he did not know what Lopez was thinking, and it was possible that the shooting was not gang related on Lopez's part. (Exh. (2) 450.) Reyes testified that he never said anything and did not recall if anyone else did. (RT 212:24-213:7.) He did not know why Lopez "was stopping out in the middle of the intersection." (RT 211:21-24.)

(d) There was no intentional act on Reyes's part that tends to show knowledge and conscious disregard of endangering the life of another. An essential part of the subjective component of implied malice is that defendant commit the act intentionally or deliberately. (Pen. Code, § 188, subd. (b) ("If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought"); People v. Dellinger (1989) 49 Cal.3d 1212, 1215 ("malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life").)

Here, there was no evidence of an intentional act or conduct by Reyes, such as deliberately positioning himself to stand ready to act as backup. Perhaps Lopez hoped that if he got into

difficulties with the motorist, Reyes or one of the others would come to his aid. Lopez's private hopes or assumptions, however, could not transform a passive bystander into an implied-malice killer.

(e) Reyes's subsequent possession of the murder weapon had no significant probative value to show knowledge and conscious disregard of endangering the life of another at the time of the crime. About 40 minutes after the shooting, when Reyes was back in the vicinity of El Salvador Park, he was in possession of the murder weapon that Lopez had used. (Exh. (1) 113-115, 212-214; (2) 231-232, 258-260, 263-264; RT 200:15-201:17.)

Both the superior court and the Court of Appeal relied on this fact to support the subjective element of implied malice. (RT 298:22-25 (superior court: "and I specifically found persuasive the conduct of the defendant 40 minutes later where he is involved in an altercation using the same gun"); People v. Reyes, supra, 2021 WL 3394935 at p. *6 ("A mere half hour later, defendant was in possession of the same gun that Lopez had used to kill Rosario").)

Neither court explained *how* this subsequent possession showed conscious indifference to the risk of death at the time of the charged crime. The People's own expert acknowledged that it was common to pass guns around, whether for offensive or defensive use:

> A gang gun is a gun that can be used by the various members of that gang and passed around to the entrusted members of that gang to, whether again, be

> [sic] offensively go out and commit a crime for the gang or maybe they're standing around and protecting their neighborhood and whatever they're doing. So it's a gun that can be used by the various members and passed around.

(Exh. (2) 401.) Thus, there was no significance to the fact that it was "the same gun."

The two courts may have believed that there was some significance to Lopez handing the gun off directly to Reyes, perhaps to show that Reyes was a trusted comrade. There was, however, no evidentiary basis for assuming that Lopez handed him the gun. Reyes testified that he did not get the gun directly from Lopez (RT 200:15-201:13), and there was no evidence disputing this. In fact, the undercover detective saw the gunman put the gun back in his waistband at the scene of the shooting. (Exh. (1) 177-178, 180-181, 198-199.) He therefore could not have handed it off to him at that time. Further, when Lopez bicycled off, he was in the vicinity of two of the cyclists, but not of Reyes's group, which pedaled away in a different direction, one group going down Willits St. and the other down Sullivan St. (Exh. (1) 158, 166; see also exh. (1) 180 (undercover detective saw only three bicyclists).) (There was no evidence that Reyes was in Lopez's small group.) In fact, Lopez could not have handed the gun off even to someone in his own group, for they were separated by half a street: Lopez was riding in the middle of the street and the other two were pedaling on the sidewalk. (Exh. (1) 179-180.) In any event, it is speculative whether handing the

gun directly to Reyes would have revealed anything about Lopez's relationship to Reyes. Having recently fired a gun and killed someone, Lopez would have wanted to hand the gun off, and the logical choice would be a young juvenile, who would not be severely punished if caught, and for whom Lopez had no particular solicitude.

(f) Reyes's subsequent fight with Nieves had no significant probative value to show knowledge and conscious disregard of endangering the life of another at the time of the crime. The subjective component of implied malice "is ordinarily proven by illustrating the circumstances leading to the ultimate deadly result." (People v. Guillen, supra, 227 Cal.App.4th 934, 988, citing People v. Nieto Benitez, supra, 4 Cal.4th at p. 107.) *Subsequent* events have little or no probative value because the information was not available to defendant at the time of the charged crime, so that those events could not have been part of the circumstances he considered and consciously disregarded. Subsequent events amount to mere propensity evidence, such as to show "a general indifference to human life." (In re Taylor (2019) 34 Cal.App.5th 543, 560 (rejecting People's argument that defendant's callous comment to a friend the day after the murder supported reckless indifference).)

Some cases have treated subsequent conduct that relates directly to the charged crime as corroboration of pre-crime evidence of state of mind. For example, in People v. Cravens, supra, 53 Cal.4th at p. 511, even though there was already

substantial evidence of implied malice from the circumstances of the attack and the events preceding it, there was corroboration in the fact that "having knocked [the victim] unconscious and with his head split open on the ground, defendant took no steps to ascertain [the victim's] condition or to secure emergency assistance," but in fact "expressed a willingness 'to come back at him if he had to.'" In People v. Latham (2012) 203 Cal.App.4th 319, 321-322, 327, defendants, the parents of the minor child, were found guilty of implied-malice murder after "failing to obtain medical treatment for her in the days preceding her death," which as parents they were under a duty to provide. The court relied principally on the circumstances preceding the death. (Id. at pp. 328-332.) In addition, "although far from overwhelming, there was some evidence from which the jury could have inferred that appellants were unconcerned with [their daughter's] fate, even *after* she had suffered cardiac arrest." (Id. at p. 332, italics in original); see also People v. Ogg (1958) 159 Cal.App.2d 38, 51 ("Defendant's failure to seek the assistance of his friends or to obtain medical aid even though he knew that his wife was seriously injured indicates a heartless attitude and callous indifference toward her"); People v. McNally, supra, 236 Cal.App.4th 1419, 1426 (defendant, during drunken horseplay, brandished a gun and unintentionally fired it, and later made admissions about the incident); People v. Taylor (1961) 189 Cal.App.2d 490, 497-498 (sufficient evidence of implied malice where defendant "inflicted a severe beating upon his wife,"

causing a nine-inch skull fracture, and later admitted "that he thought he 'killed her this time'").)[8]

Here, however, the subsequent crime did not directly relate to the charged crime, but rather involved sharply different circumstances. For the Nieves incident, Reyes was *defending* his gang's territory, not offensively intruding into a rival gang's territory (under the People's theory) in order to help Lopez assault rival gang members. Specifically, for the Nieves incident Reyes was in the territory of his own gang in the vicinity of El Salvador Park. (Exh. (2) 236, 450-451.) He asked Nieves where he was from, which the gang expert explained was a challenge. (Exh. (1) 211, 216-217, 225-226; (2) 360-361, 368, 402-403.) Nieves recalled that this was the eighth or ninth time that Reyes had challenged him, and the prior encounters were all nonthreatening and nonviolent. (Exh. (1) 217; exh. (2) 236.) (Reyes himself did not recall encountering him before. (RT 201:18-20.)) Nieves told him that he was "[f]rom nowhere," that is, not in a gang, and he said he did not want any problems. (Exh. (1) 217-218; (2) 225.) (According to Michael C., Nieves's response was not quite so conciliatory: he told Reyes, "Fuck you." (Exh. (2) 360, 370.)) Reyes challenged him to a fight, but when Nieves thought he saw him reaching for a gun in his waistband,

[8] Appellant does not concede that subsequent events other than direct admissions are ever relevant to the subjective component of implied malice. As Justice Kennard observed in her dissent to Cravens: "But defendant's behavior *after* the blow does not tend to establish his knowledge *at the time* of the blow that his act endangered [the victim's] life." (People v. Cravens, supra, 53 Cal.4th at p. 517 (dis. opn. of Kennard, J.) (italics in original).)

he fled. (Exh. (1) 218; (2) 237.) (Michael C. said that after being told, "Fuck you," Reyes responded with his own obscenities, upon which Nieves fled. (Exh. (2) 360-361, 370-371.)) When Reyes and his companions caught up with Nieves, they began to punch him. (Exh. (2) 228-229, 240-241, 360-361.) According to Nieves, Reyes had taken out his gun and put it to Nieves's neck, but he was able to strike Reyes and cause him to drop the gun. (Exh. (2) 230-231, 241-243, 249.) (Reyes and Michael C. both said that the gun fell from Reyes's waistband during the fight, and Reyes specifically denied holding the gun. (Exh. (2) 361-362; RT 202:16-203:15.)) Nieves managed to grab the gun, and Reyes and his group fled. (Exh. (2) 231, 243-246.)

Thus, Reyes was the instigator and led the physical attack on Nieves, even brandishing a gun (under the People's version), in order to defend his gang's territory. For the charged crime, on the other hand, the People's theory was that Reyes was passive, acting only as backup, while someone else initiated and led an offensive intrusion into a rival gang's claimed territory. (See exh. (3) 525 (opening summation: "And, quite frankly, the theme that is very, very obvious in this case is backup. It's backup"); exh. (3) 529 (same: "Backup. The theme of this case. Backup. I think it's evidence"); exh. (3) 568 (rebuttal summation: "My theme, again, was backup").) The circumstances are thus so different that the subsequent event reveals nothing about Reyes's state of mind at the time of the charged crime.

Further, as noted above, in Cravens, McNally, Latham, and Ogg, the subsequent events merely corroborated a strong case

based on circumstances prior to the crime. Here, in contrast, under the analysis of both the trial court and the Court of Appeal, the subsequent Nieves incident was a major part of the evidence to support malice, perhaps even the principal evidence. The trial court reasoned:

> The final element, that he deliberately acted with conscious disregard for human life, the Court has found that present as well, and I specifically found persuasive the conduct of the defendant 40 minutes later where he is involved in an altercation using the same gun.

(RT 298:20-25.) The Court of Appeal agreed. (People v. Reyes, supra, 2021 WL 3394935 at pp. *5-*6.) The Court of Appeal reasoned that pre-crime circumstances were only "one piece of the puzzle," which had to be supplemented with "the totality of defendant's actions on the day in question." (Reyes at p. *6.)

The probative value of the Nieves incident to explain Reyes's state of mind is further attenuated by the sharp conflict in the evidence as to that incident, which the superior court did not resolve with any factual findings. (The court merely referred to "the conduct of the defendant 40 minutes later where he is involved in an altercation using the same gun." (RT 298:20-25.)) As noted above, in the version of both Reyes and of Michael C., Reyes never brandished the gun, much less pressed it against Nieves's neck. Rather, the gun fell out of his waistband during a fist fight. Further, Reyes was not pressing for a fist fight, but rather responding to Nieves's insulting response, "Fuck you." In

that light, the logical chain connecting the challenged evidence to the disputed issue is so attenuated as to be almost speculative." (People v. Jefferson (2015) 238 Cal.App.4th 494, 507.)

(g) Reyes's failure to seek aid for the motorist had no significant probative value to show knowledge and conscious disregard of endangering the life of another at the time of the crime. In the evidentiary hearing the prosecutor elicited the fact that Reyes "didn't stay and render any help" to the shooting victim. (RT 206:20-25.) The trial court and the Court of Appeal correctly did not rely on this fact to prove the subjective element. *First*, the shooting occurred on a busy street, and in fact Steven G. immediately went to check on the motorist. (Exh. (1) 157.) Reyes therefore would have known that emergency medical services would be immediately summoned and would arrive quickly. There was no evidence that he himself had any training in CPR or bleeding control that could have made any difference.

Second, as Reyes's testimony as a whole and the physical evidence shows, he did not in fact know that the driver had been killed. He *inferred* that the driver had been struck because the car drifted. (RT 206:12-16 ("I was standing close enough to know he was hit, the way the car drifted to the side and just stopped going").) Since Lopez fired just one bullet through the rear window while the car was evidently driving away (see exh. (1)113-115, 143, 175-176; exhibit 9; exhibit 13), it was unlikely that this single bullet would have struck just that part of the head that would have caused an injury that was immediately

fatal, rather than, say, temporarily incapacitating. Reyes would not have been able to see the driver because the rear window had "shattered in a spider web fashion," completely obscuring the driver's side interior. (Exh. (1) 175; exhibit 9.)

Third, a 15-year-old boy who had just witnessed his gang companion shoot at a car would naturally panic and flee. (See RT 146:13-147:26 (testimony of developmental psychologist about impulse control).) Such impulsive conduct reveals nothing about a conscious disregard for life.

(h) Reyes's youth tends to negate the mental component of implied malice. A defendant's youth is an important factor in evaluating his state of mind. This is illustrated by cases that relied in large part on defendant's age in holding that there was no substantial evidence of reckless indifference, which involves an analogous, though heightened, state of mind. (See People v. Johnson (2016) 243 Cal.App.4th 1247, 1285.) For example, in People v. Ramirez (2021) 71 Cal.App.5th 970 [2021 WL 5458105, *1-2], defendant, age 15, participated in an attempted carjacking, during which another participant killed the victim as he was trying to flee in his car. In reversing the denial of defendant's petition for resentencing under Penal Code section 1170.95, the Court of Appeal held that there was no substantial evidence that defendant acted with reckless indifference, in large part because of his youth:

> Significantly, [defendant's] youth at the time of the shooting greatly diminishes any inference he acted

> with reckless disregard for human life by participating in the attempted carjacking knowing Rios was armed. As argued by Ramirez, the hallmark features of youth include immaturity, impetuosity, and failure to appreciate risks and consequences. The background and mental and emotional development of a youthful defendant must be duly considered in assessing his culpability. . . . A juvenile's immaturity and failure to appreciate the risks and consequences of his or her actions bear directly on the question whether the juvenile is subjectively aware of and willingly involved in the violent manner in which the particular offense is committed and has consciously disregard[ed] 'the significant risk of death his or her actions create.

(Id. at p. *11, quotation marks, emendations, and citations omitted.) Thus, even though defendant was aware that his companion "had a gun and intended to use it in the carjacking, as a 15-year-old he may well have lacked the experience and maturity to appreciate the risk that the attempted carjacking would escalate into a shooting and death, and he was more susceptible to pressure from his fellow gang members to participate in the carjacking." (Id. at p. *1.)

Similarly, in In re Moore (2021) 68 Cal.App.5th 434 [283 Cal.Rptr.3d 584, 599-600], there was insufficient evidence that the 16-year-old defendant harbored reckless indifference. The Court of Appeal relied in part on the fact that the young

defendant "lacked the experience, perspective, and judgment to adequately appreciate the risk of death posed by his criminal activities." (Id. at p. 599; see also People v. Harris (2021) 60 Cal.App.5th 939, 944, 960 ("Moreover, given [defendant's] youth [age 17] at the time of the crime, particularly in light of subsequent case law's recognition of the science relating to adolescent brain development, it is far from clear that [he] was actually aware of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants") (quotation marks and citations omitted).)

At the evidentiary hearing the superior court heard expert testimony about the impulsivity and immaturity of adolescents, and the physiological reasons they are far less capable than adults of thinking through the consequences of their actions. Elizabeth Cauffman held a doctorate in developmental psychology and was a professor of psychology at U.C. Irvine, and her research had been cited in the United States Supreme Court's landmark decision on the death penalty for juveniles, Roper v. Simmons (2005) 543 U.S. 551. (RT 131:9-141:23.)

Dr. Cauffman explained that the brain develops from front to back, so that the frontal lobe, which governs "thinking long-term" (among other roles), is not fully developed until age 25. (RT 148:5-22.) As a result, "[a]dolescents are typically using different parts of their brain when making different decisions compared to adults." (RT 150:5-17; see also 160:17-162:10; 167:5-16.) It is not simply a matter of knowing what to do and yet

impulsively disregarding that knowledge, though such impulsivity itself does play a large role. (See, e.g., RT 148:8-149:12.) Rather, adolescents are less able to respond thoughtfully and reason through the consequences:

> Kids can know the difference between right and wrong. They can tell you the right answer to something. Kids aren't stupid. They know the answer to questions. But in the moment, in what we call a hot cognition or an emotionally aroused situation, they're more apt to do something more reckless, *less thoughtful, not necessarily thinking through all of the things that an adult would be doing in those situations*.

(RT 147:9-22, emphasis added.) And:

> The teens are less likely to use the prefrontal cortex. They're less likely to use the self-regulatory response center. They're more likely to use the amygdala, the gut, the emotional, *not as thoughtful type of response*. It's a much more primitive reactionary response.

(RT 167:25-168:6, emphasis added.) In short, a 15-year-old is much less able than an adult to think through the consequences and recognize (and consciously disregard) how his conduct might ultimately be dangerous to life.

Even cognition, however, is not fully developed in younger adolescents. A typical adolescent reaches adult levels of cognitive ability around age 16 to 17. (RT 143:24-26 ("What you see in this

particular study is that around age 16, 17, adolescents were very similar to adults in their cognitive ability").) In other parts of her testimony Dr. Cauffman specified 16 as the age when adolescents have similar cognitive development to adults. (E.g., RT 147:10-11 ("Remember, we said that [adolescents] reached adult levels around 16"); 143:26-144:6 ("roughly 16"); 180:2-3.) As shown in the graph that displayed the research results on which she relied, however, cognitive development is measured according to three distinct elements: working memory, verbal fluency, and digit span. (Defense exhibit A, third slide.) The graph shows that two of the three components peaked at age 16-17, but the third (verbal fluency) did not peak till age 18-21. (See RT 143:10-23; defense exhibit A, third slide.) (See generally Icenogle et al., *Adolescents' Cognitive Capacity reaches Adult Levels Prior to their Psychosocial Maturity: Evidence of a "Maturity Gap" in a Multinational, Cross-Sectional Sample* (2019) 43 Law & Human Behavior 69, 74-75

The analysis of Ramirez and the other recent opinions, in conjunction with Dr. Cauffman's testimony, applies with at least equal force to Reyes's case. (Dr. Cauffman had not interviewed Reyes and did not offer any opinion. (See RT 130:18-131:4.)) As the court knew, Reyes was only 15 and a half at the time of the crimes. (See, e.g., CT (1) 73 (probation report).) He was therefore at the lower end of the ability to reason through to consequences, and even his cognitive ability had not yet fully developed.

Further, other factors would have impeded his ability to

understand and consciously disregard the risk of death, given his youth. As in Ramirez, "the shooting occurred quickly, without [defendant] having a meaningful opportunity to intervene." (People v. Ramirez, supra, 2021 WL 5458105 at p. *1.) There were none of the obvious facts that might have alerted even a boy: as in Ramirez, he "did not provide the murder weapon, instruct his confederate to shoot, or know of his confederate's propensity toward violence." (Ibid.; see also In re Taylor, supra, 34 Cal.App.5th at p. 557 (the fact that defendant "did not supply [the killer] with the murder weapon" was a factor against reckless indifference).)

The superior court elicited the unexceptionable fact that if adolescents deliberately drive a car toward a brick wall, "they know that if that car collides with the brick wall, somebody is going to get killed. It's just whether they're willing to take that risk." (RT 180:19-181:4 (expert adopts court's phrasing).) Here, however, the question was whether bicycling with a fellow gang member, where that gang member, typically for a more-senior gang member, happened to be carrying a gun, was something that a 15-year-old boy was likely to be able to infer would lead to a shooting at a busy intersection in daytime. These circumstances are much subtler than the decision to drive into a brick wall. (See People v. Ramirez, supra, 2021 WL 5458105 at p. *1 (even though defendant was aware that his companion "had a gun and intended to use it in the carjacking, as a 15-year-old he may well have lacked the experience and maturity to appreciate

the risk that the attempted carjacking would escalate into a shooting and death").)

(i) Cases finding sufficient evidence of implied malice have required a much greater showing of the mental component than appears here. No published opinion has found sufficient evidence of the mental component of implied malice on facts similar to those of this case. Rather, the cases have found it necessary to rely on much more evidence of actual knowledge and conscious disregard.

Thus, in People v. Cravens, supra, 53 Cal.4th at p. 511, defendant specifically encouraged another person to fight the victim, and he himself knocked the victim unconscious. Here, there was no evidence that Reyes encouraged a fight or confrontation, and no evidence that he physically took part.

In People v. Guillen, supra, 227 Cal.App.4th at pp. 988-982, all of the defendants not only physically participated in the beating of the victim (a suspected child molester housed with them in jail) but also knew that this was not a typical "taxing" of an inmate who had violated the inmates' rules; rather, because the victim was suspected of child molestation, there were no limits to the length and severity of the beating. Nothing comparable occurred in this case.

In People v. Garcia (2020) 57 Cal.App.5th 100, 117, review granted February 10, 2021, S265692 (grant and hold), defendant not only "willfully participated in a brutal gang assault upon a person who had been 'green-lighted' by the gang," but also "told another gang member to stab the victim." In People v. Woods

(1991) 226 Cal.App.3d 1037, 1048, defendant personally and intentionally fired "at the victim at close range" in an incident of gang retaliation. And in People v. Palomar (2020) 44 Cal.App.5th 969, 977-978, defendant personally struck the victim, saw that the victim's head hit the curb "like a watermelon being dropped off a building," and walked away without trying to assist him. Here, Reyes did not physically participate in the attack and gave no orders or encouragement.

Cases not involving a physical confrontation or beating, though not as apposite, also illustrate the considerable quantum of evidence needed to show the subjective component. In People v. Contreras, supra, 26 Cal.App.4th 944, 947, 952, 957, defendant was a "bandit" tow truck driver who, knowing that the brakes of his truck were defective, "drove recklessly, racing at high speed in a residential area," and ultimately rear end a car, killing one of the passengers. In People v. Tseng (2018) 30 Cal.App.5th 117, 129-131, defendant, a physician who overprescribed opioids, "had expert knowledge of the life-threatening risk posed by her drug prescribing practices," took sophisticated steps to circumvent controls over such prescriptions by major pharmacies, and continued her conduct even after learning of the deaths of other patients. In People v. McNally, supra, 236 Cal.App.4th at p. 1422, defendant, who was a federal correctional peace officer, and a friend were drinking and taking drugs. As a "joke," defendant brandished a gun and accidentally fired it, killing the friend. (Ibid.) Given defendant's "extensive training in firearm safety,"

he was aware of the risk of pointing his gun at the victim with his finger on the trigger, among other highly negligent acts. (Id. at pp. 1424-1426.) There were no deliberate (intentional) acts on Reyes's part that were remotely comparable.

In summary, just as in People v. Hall, supra, 62 Cal.2d at p. 112, "[e]ach item of evidence against defendant is so weak and inconclusive that together they are insufficient to constitute proof beyond a reasonable doubt.

II.

Substantial evidence does not support the conclusion that Reyes's actions constituted murder or aided and abetted murder

The superior court relied exclusively on the theory of implied malice to support the conviction for second-degree murder. (RT 297:14-18.) The court therefore made no credibility finding as to Reyes's testimony with respect to any other theory. Even disregarding that exculpatory testimony, however, there was insufficient evidence of any other theory of murder as a matter of law. Further, as explained in subsection (C) below, even assuming arguendo that there was sufficient evidence of implied malice, there was insufficient evidence of proximate cause, the remaining essential component of implied-malice murder.

A. There was insufficient evidence that Reyes directly committed the murder with express malice.

The "actual killer," as contrasted with an aider and abettor, "is the person who personally kills the victim, whether by shooting, stabbing, or . . . taping his mouth closed, resulting in death by asphyxiation." (People v. Garcia (2020) 46 Cal.App.5th 123, 152 (construing "actual killer" under felony-murder special circumstance).) Thus, for example, the perpetrator "who hands a murder weapon to another person but who does not directly inflict any harm on the victim" is not the actual killer. (Id. at p. 153.) Here, as the prosecutor conceded to the jury and to the superior court, there was no substantial evidence that Reyes was the actual killer. (E.g., exh. (3) 529 (opening summation: "Andy

Reyes was not the shooter in this case. Frank Lopez was"); exh. (3) 544 (same: Reyes "didn't pull the trigger that day, but he stands in the shoes of the shooter"); RT 234:14-15 ("Just to be clear to this Court, we are not arguing that this defendant shot the victim").) The People would be bound by that concession even if there had been substantial evidence to the contrary. (See People v. Nunez and Satele (2013) 57 Cal.4th 1, 37 (sufficiency of evidence of predicate gang crimes could not be based on currently charged crimes where the prosecutor relied solely on different crimes); People v. Centers (1999) 73 Cal.App.4th 84, 92.)[9]

B. There was insufficient evidence that Reyes aided and abetted an express-malice murder.

The actus reus of aiding and abetting requires overt conduct, not silent acquiescence or even silent approbation. Defendant must "by act or advice aid[], promote[], encourage[], or instigate[]" the commission of the crime. (People v. Prettyman (1996) 14 Cal.4th 248, 259.) He can do this by acts, words, or gestures (People v. Lee (2003) 31 Cal.4th 613, 623), but he must

[9] The undercover detective who happened to be near the intersection at the time of the shooting thought he recognized Reyes as the suspect who was putting his gun in his waistband immediately after the shooting. (Exh. (1) 182-183.) However, he described that suspect as 6'2" to 6'3" tall, weight of 165 lbs., and age between 17 and 20. (Exh. (1) 181, 195, 203.) Reyes was 15, and even at the time of trial two years later he was only 5'6" tall and weighed 110 lbs. (Exh. (1) 206; (3) 613.) The undercover detective conceded at trial that Reyes did not fit the description. (Exh. (1) 190.) The lead detective concluded that *Lopez's* height and weight "almost identically match[ed]" the undercover detective's description. (Exh. (2) 461.)

do *something*. Thus, in People v. Stankewitz (1990) 51 Cal.3d 72, the defendant argued that a trial witness was an accomplice to the crimes, citing the following evidence:

> he was present when the others planned the kidnapping and he obeyed Tina Topping's directions to get into the car after the abduction; he was aware defendant had a pistol and Marlin Lewis had a knife; he remained in the car with the victim and Lewis while the others went into the Olympic Hotel; and he followed Topping's order to give a false name to two police officers when they questioned the group outside the Seven Seas Bar.

(Id. at p. 91.) The Supreme Court held that such evidence was insufficient:

> At most, the foregoing evidence demonstrates that Billy B. was present during the planning and execution of the offenses and failed to prevent their commission. That is not sufficient to establish aiding and abetting.

(Ibid.; see also In re Jose O. (2014) 232 Cal.App.4th 128, 134 ("Jose's knowledge of and presence during A.N.'s delinquent behavior simply does not prove he caused or contributed to it"); People v. Woodward (1873) 45 Cal. 293, 293-294 (defendant who was with another group of boys, and watched them rape the victim, would not be guilty without evidence that he "aided or encouraged the other boys in their unlawful design"); People v. Yates (1925) 71 Cal.App. 788, 794 ("At any rate, whatever may

have been Moore's real intentions, whether he was willing or unwilling to become a partner in the criminal enterprise, is of little consequence in view of the lack of evidence that as a matter of fact he ever actually did anything in furtherance thereof").)
The pattern instruction succinctly states this requirement: "The defendant's words or conduct *did in fact* aid and abet the perpetrator's commission of the crime." (CALCRIM No. 401, fourth element, emphasis added, reproduced at CT (2) 412.)

Defendant must also share the perpetrator's intent to commit the charged crime. (People v. Lee, supra, 31 Cal.4th at p. 624; People v. Gentile, supra, 10 Cal.5th at p. 843.)

Here, there was no substantial evidence of either essential element. As explained in issue (I)(B)(1)(a), there was no evidence that Reyes shared Lopez's ***intent*** to commit any crime at all, much less murder. The only evidence of the group's intent at the time Reyes and the others left the park was that they were going to visit friends in the territory of West F-Troop, which they evidently did, for the shooting occurred when they were going north, in the direction back to El Salvador Park. (Exh. (1) 137; exh. (2) 451-452; RT 188:13-16; 192:14-193:5.)

There was no evidence that a plot developed later on, much less that Reyes intended to aid and abet any such plot. To the contrary, as the group approached the intersection, Reyes was not even with Lopez; the bicyclists had drifted apart, and only two of them were close to Lopez. (See exh. (1) 143, 147-148, 178-179; RT 209:9-210:23.)

Finally, even assuming arguendo that Reyes intended to aid and abet in a gang confrontation or challenge, this could not

show intent to kill.

Separately, there was no substantial evidence of ***conduct*** on Reyes's part to facilitate the charged crime of murder. No one testified that he took any affirmative act, such as shouting at a passing motorist, handing a gun to someone, or encouraging a confrontation. He was not acting as backup, for no one placed him near Lopez and the car. (See also issue (I)(B)(1)(d) above.) Reyes himself testified that he was about 30 feet away and could not even hear what Lopez was saying. (RT 210:18-211:11.) As noted above, although the superior court was not required to credit this evidence, disbelief could not constitute affirmative evidence of the contrary. (People v. Lara, supra, 9 Cal.App.5th 296, 319.)

Even if Reyes happened to have been in a position to act as backup, that would not constitute substantial evidence that he did in fact undertake that role. As the Court of Appeal explained long ago:

> Of course it is elemental that one who keeps watch during the commission of the crime to facilitate the escape of the criminal is guilty as a principal. But evidence of his mere presence without showing his preconcert with the actors is insufficient as proof of guilt.

(People v. Hill (1946) 77 Cal.App.2d 287, 294; cf. United States v. Penagos (9th Cir. 1987) 823 F.2d 346, 349 (even the fact that defendant " 'scanned' up and down the street" during drug sale was insufficient to support defendant's involvement in the conspiracy as a lookout); Fuller v. Anderson (6th Cir. 1981) 662 F.2d 420, 424 (fact that defendant was present and "*may* have

been acting as a lookout" was not substantial evidence that he did in fact act as lookout) (quoting lower court's holding with approval; emphasis added).)

Further, as explained in issue (I)(B)(1)(d), the gang expert never testified that Reyes (in the hypothetical) acted as backup; he testified that *if* gang members go out to commit a crime together, it can be inferred that even seemingly passive members have a role as backup persons.

This Court's opinion, People v. Nguyen, supra, 61 Cal.4th 1015, is not factually apposite. There, defendant was not merely present at the scene. (Id. at p. 1055.) He was in the killer's car, "stared back at the occupants of [the targeted] car," and remained in the car when, moments later, one of defendant's fellow passengers opened fire. (Ibid.) Given the "context of the ongoing gang war" between his gang and the victim's gang, in light of the expert's testimony about "how Asian gang members in Orange County would drive around 'hunting for their rivals,'" jurors could have inferred from "defendant's act of staring at the occupants of [the] car – followed by his car's maneuver in and out of the restaurant parking lot," that he "was aware of the impending shooting and acted to facilitate it by identifying [rival gang] members riding in [the] car." (Ibid.)

Here, there was no evidence of any act at all, such as staring back in suspicious circumstances just before the shooting. And whereas in Nguyen the defendant was in the car with the killer as the driver maneuvered to get a clear shot, Reyes was far removed from Lopez and there was no evidence of any communication between them, or even that communication over

that distance would have been feasible. Finally, as noted in issue I, although Reyes's gang and the West Myrtle gang were "rivals," there was no indication that they were any more of a rival than other gangs, and no evidence that there was an actual "ongoing gang war" or "state of war," as in Nguyen. (Id. at p. 1055.)

Nguyen recognized that "the issue is close" as to whether there was sufficient evidence even on those facts. (Id. at p. 1056.) The dissent would have found insufficient evidence. (Id. at p. 1098 (conc. and dis. opn. of Cuéllar, J.).) The dissent's analysis is applicable to Reyes's case, which contains none of the evidence that made Nguyen a close case on the side of sufficiency. For example, the expert's "broad observations about the general culture of [Hispanic] gangs does not, in and of itself, prove what defendant's actions and intentions were with respect to any given incident." (Nguyen at p. 1096 (conc. and dis. opn. of Cuéllar, J.).)

C. There was insufficient evidence that Reyes committed murder based on an uncharged conspiracy.

The jury was instructed on an uncharged conspiracy solely for purposes of the now-invalid theory of natural and probable consequence: the jury was allowed to find that murder was the natural and probable consequence of disturbing the peace or assault. (CT (2) 427-430.)[10] Accordingly, Reyes could not now be convicted based on an uncharged conspiracy. (Cf. People v.

[10] The superior court took judicial notice of the jury instructions. (RT 123:2-7; 127:19-128:2.) A complete set is contained in the CT of the petition proceeding as an exhibit to a defense memorandum. (CT (2) 383-446.)

Rivera (2015) 234 Cal.App.4th 1350, 1354.)

In any event, "[t]he mental state required for conviction of *conspiracy* to commit murder necessarily establishes premeditation and deliberation of the target offense of murder – hence all murder conspiracies are conspiracies to commit first degree murder, so to speak." (People v. Cortez (1998) 18 Cal.4th 1223, 1232, italics in original; see also id. at p. 1233, fn. 3 ("the mental state required for conviction of conspiracy to commit express malice murder *necessarily equates with and establishes* the mental state of deliberate and premeditated first degree murder") (italics in original).) Here, when the jurors revealed that they were deadlocked on first-degree murder, the prosecutor moved to dismiss that degree of murder, and the court granted that request. (CT (1) 43-44; Exh. (3) 596-600.) Accordingly, in the petition proceeding the superior court could not, and did not, rely on a theory of uncharged conspiracy to support second-degree murder. (Cf. People v. Barboza (2021) 68 Cal.App.5th 955, 965 ("once a conviction is reduced, and that decision is final, it is reduced for all purposes").)

There is no such crime as conspiracy to commit implied-malice murder. (People v. Swain (1996) 12 Cal.4th 593, 603.) Reyes therefore could not have been convicted under that fictitious theory.

D. There was insufficient evidence that Reyes directly committed an implied-malice murder.

As explained in issue I, there was insufficient evidence of both the physical and mental component of implied malice. Even

assuming arguendo that there was sufficient evidence of both of those essential elements, there was no substantial evidence of proximate cause, the remaining element of implied-malice murder. (See People v. Cravens, supra, 53 Cal.4th at p. 500 (recognizing proximate cause as a distinct element of implied-malice murder).) Reyes did nothing, and doing nothing when there is no duty to act cannot proximately cause a murder. (See People v. Whisenhunt, supra, 44 Cal.4th 174, 216; cf. People v. Nguyen, supra, 61 Cal.4th at p. 1097 (conc. and dis. opn. of Cuéllar, J.) ("While [the expert] testified as to multiple concrete, specific actions a gang member might take to 'back up' a fellow gang member in a confrontation – such as serving as the getaway driver, assaulting rival gang members, or taking over for the shooter – there is no evidence that defendant did or intended to do any of those things").)

E. There was insufficient evidence that Reyes aided and abetted an implied-malice murder.

A defendant may be guilty of murder by aiding and abetting an implied-malice murder committed by someone else. (People v. Gentile, supra, 10 Cal.5th at p. 850.) That theory, however, does not dispense with the essential mental component on the part of defendant (the aider and abettor) himself. As the Court of Appeal recently explained:

> 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.

(People v. Powell (2021) 63 Cal.App.5th 689, 713, italics in original; see also Gentile at p. 850 ("an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life"); People v. Rivera (2021) 62 Cal.App.5th 217, 232 ("a person may still be convicted of second degree murder, either as a principal or an aider and abettor, if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life"), review granted June 9, 2021, S268405 (grant and hold).)

A pre-S.B. 1437 Court of Appeal opinion reasoned that conscious disregard on the part of the aider and abettor is not required:

> Under a second degree implied malice theory, defendants' convictions rest not on their own conscious disregard for human life, which is not required, but on their aiding and abetting of an attempted robbery in which the direct perpetrators acted with implied malice. Accordingly, having found defendants aided and abetted Crocker and Schnebly's attempted robbery, all 12 jurors, whether relying on a

> theory of felony murder or a theory of implied malice murder, found the requisite malice to support convictions of second degree murder.

(People v. Johnson, supra, 243 Cal.App.4th 1247, 1287.) In light of Gentile, this is incorrect. In fact, Johnson's theory amounts to imputed malice: regardless of defendant's own state of mind, malice is imputed to him based on the objective nature of the conduct or the state of mind of the actual killers. Such imputation is precisely what the 2019 amendments abolished. (See Pen. Code, § 188, subd. (a)(3) ("Malice shall not be imputed to a person based solely on his or her participation in a crime"); Stats. 2018, ch. 1015 (S.B. 1437), § 1(g) (Legislature's findings and declaration: "A person's culpability for murder must be premised upon that person's own actions and subjective mens rea"); Gentile at pp. 845-846.)

Here, there was some evidence that Lopez himself did not intend to kill but rather acted with implied malice: When the victim began to drive off, Lopez took out his gun and angrily or spitefully fired a shot through the rear window, knowing but disregarding the risk that the bullet just might strike the driver in precisely the small area of the anatomy that would cause death. (See exhibit 9; RT 211:2-11 (Reyes testifies that Lopez did not have his gun out when he was talking to the driver).) Under this theory, however, the mental state of Reyes was insufficient. He did not harbor conscious disregard of the risk of death for the reasons discussed in issue I(B)(2).

Separately, there was no evidence that he shared Lopez's

intent to shoot at the car. Indeed, Lopez's intent is a matter of speculation on this record. (The essential requirement that defendant share the actual killer's intent distinguishes the theory of aiding and abetting an implied-malice murder from the "hybrid" theory that this Court has rejected. (See People v. Gentile, supra, 10 Cal.5th at pp. 849-851.))

Finally, there was no substantial evidence of any physical act on Reyes's part that aided Lopez, whether Lopez intended to kill the victim or merely to shoot at the car. (See subsection II(B) and issue I(B)(1) above.)

For these reasons, there was insufficient evidence to support any valid, charged theory of murder. The case should therefore be remanded so that the superior court may dismiss the murder conviction and resentence Reyes pursuant to Penal Code section 1170.95. Assuming arguendo that there was substantial evidence of a theory of murder other than direct implied malice, the case should nonetheless be remanded to the superior court to consider in the first instance, as the trier of fact making credibility determinations, whether any of these other theories was proved beyond a reasonable doubt.

Federal constitutional violation. On this record, the superior court's ruling that Reyes committed implied-malice murder rose to the level of a violation of due process under the Fourteenth Amendment. (See generally Richmond v. Lewis (1992) 506 U.S. 40, 50 (arbitrary or capricious state sentencing

decision may violate due process); Cole v. Sullivan (2020) 480 F.Supp.3d 1089, 1097 (considering whether state-law sentencing error under section 1170.95 violated petitioner's right to due process, but finding that on the particular facts of the case it did not).)

CONCLUSION

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

Dated: December 28, 2021. Respectfully submitted,

/s/ Richard A. Levy

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Richard A. Levy
Attorney for Andres Reyes

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I certify that the word count of this computer-produced document, calculated pursuant to rule 8.520(c) of the Rules of Court (which specifically excludes the required statement of issues presented and other specified material) is **20,244** words. (See accompanying application for permission to file a brief in excess of 14,000 words.)

/s/ Richard A. Levy

_____

Richard A. Levy

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