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

No. S141519

THE PEOPLE,
Plaintiff and Respondent,

v.

MAO HIN,
Defendant and Appellant.

CAPITAL CASE

No. ________

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

FIFTH SUPPLEMENTAL REPLY BRIEF

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Fifth Supplemental Reply Brief

I. INTRODUCTION

Defendant-appellant Mao Hin (hereafter "appellant") respectfully submits the following reply to Respondent's Fifth Supplemental Respondent's Brief ("5th SRB") addressing the amendments to Penal Code section 1170.95 recently enacted by Senate Bill 775 ("S.B. 775").

Respondent "agrees that Senate Bill No. 775 eliminates the natural and probable consequences doctrine for attempted murder and allows appellant to present the claim on direct appeal." (5th SRB at p. 10; *see* Pen. Code, § 1170.95, subd. (g) ["A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)."].)

Respondent also concedes that the jury instructions permitting appellant's conviction for attempted murder under the natural and probable consequence doctrine were prejudicial to five counts (Counts 5–9) of attempted murder with premeditation (Pen. Code, §§ 187(a)/664(a)) related to the Bedlow Drive incident on November 9, 2003. (5th SRB at pp. 8–9.) While recognizing that the judgement on those counts must be reversed, Respondent requests remand with an opportunity to retry appellant under the "valid theory of direct aiding and abetting" attempted murder. (5th SRB at pp. 20–21.)

Appellant submits that retrial of Counts 5–9 would violate the state and federal prohibitions against double jeopardy (U.S. Const., Amend. V.; Cal. Const,, art. I, § 15) because, in additional to the instructional error, there was insufficient evidence that appellant directly aided and abetted with an intent to kill. (See Section II.A.1., below.)

As to appellant's conviction for the attempted premediated murder of Debra Pizano in American Legion Park on October 10, 2003, (Count 3; Pen. Code, §§ 187(a)/664(a)), Respondent contends that the instructional error was harmless beyond a reasonable doubt. (5th SRB at p. 9.) However, Respondent has misapplied the standard of review for prejudicial error as required by *Chapman v. California* (1967) 386 U.S. 18 *(Chapman)* [87 S.Ct. 824; 17 L.Ed.2d 705] and the judgement for Count 3 must be reversed. Although the evidence is doubtful that appellant directly aided and abetted the attempted murder of Pizano, appellant accepts that the law does not bar Respondent from requesting a remand for a retrial of Count 3.

II. ARGUMENT

A. The Prohibition Of Double Jeopardy Bars Retrial Of The Charge That Appellant Directly Aided And Abetted Attempted Murder At Bedlow Drive (Counts 5–9) Because Of Insufficient Evidence In Addition to Instructional Error.

Respondent concedes that the State is unable to establish beyond a reasonable doubt that the jury properly convicted appellant of attempted, willful, deliberate and premeditated at

Bedlow Drive. (Pen. Code, §§ 187(a)/664(a); Counts 5–9; 5th SRB at pp. 8–9.) Respondent recognizes that, as a matter of double jeopardy (U.S. Const., Amend. V.; Cal. Const,, art. I, § 15), a defendant may not be retried for a crime upon an appellate determination of insufficient evidence. (*Burks v. United States* (1978) 437 U.S. 1, 10–11 *(Burks)* [98 S.Ct. 2141; 57 L.Ed.2d 1]). However, Respondent asserts that appellant has not claimed insufficient evidence and that the record provides substantial evidence that he personally intended a premediated attempt to kill five persons at Bedlow Drive. (5th SRB 21–22.) Respondent is mistaken on both points.

1. Appellant's opening brief presented a claim of insufficient evidence that he aided and abetted attempted murder at Bedlow Drive and the record cited by respondent does not provide substantial evidence of this.

Appellant's opening brief presented the claim, as captioned, that "Due Process Requires Reversal Of Appellant's Convictions For Aiding And Abetting The Crimes At Bedlow Drive Because Of Insufficient Evidence He Acted With The Necessary Knowledge And Intent." (AOB, Vol. 2, Argument IV., at p. 143; U.S. Const., 14th Amend..; Cal. Const., art. I, § 7, subd. (a), 15).)

In particular, appellant argued that "there is insufficient evidence to find that appellant intended to kill the five alleged attempted murder victims at Bedlow Drive" (*id*. at pp. 146–154); that, "for related reasons, there is insufficient evidence that appellant aided and abetted the target crimes necessary to find him culpable of attempted murder or shooting at an inhabited

dwelling or occupied vehicle based on the natural and probable consequence doctrine" (*id.* at p. 155); and that "appellant's convictions for the attempted murder of the two persons inside the dwellings [at Bedlow Drive (Counts 5 & 8)] must also be reversed because there is no substantial evidence that appellant or [co-defendant] Kak knew that the persons were inside and intended to shoot them" (*id.* at p. 156).

Accordingly, the question of whether retrial is permitted depends on whether Respondent has rebutted appellant's claim of insufficient evidence. Respondent contends that "there is substantial evidence supporting appellant's conviction upon a direct aiding and abetting theory" of attempted murder. (5th SRB at p. 18.) Respondent's entire discussion of the evidence proceeds as follows:

> "With respect to the Bedlow Drive shootings, approximately one dozen people were standing in a carport surrounded by three homes. (9 RT 2554–2559, 10 RT 2775.) A van drove by slowly, at not more than 10 miles per hour, and a passenger fired 9 to 15 shots into the carport. (9 RT 2562–2565, 2587–2588, 2616–2618, 10 RT 2789.) The van drove by a second time, and an occupant fired a second volley of approximately 15 or 16 shots. (9 RT 2592-2595, 2619.)" (5th SRB at pp. 17–18.)

The proffer of evidence of these facts does not withstand scrutiny as substantial evidence that appellant committed an act with the intent to kill necessary for directly aiding and abetting attempted murder.

In considering a claim of insufficient evidence, "the appellate court 'must … presume in support of the judgment the existence

of every fact the trier could reasonably deduce from the evidence.' [Citations.] The court does not, however, limit its review to the evidence favorable to the respondent. … 'Our task …is twofold. First, we must resolve the issue in the light of the whole record -- i.e., the entire picture of the defendant put before the jury -- and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements … is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding, for 'not every surface conflict of evidence remains substantial in the light of other facts.' [Citation.]" (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577.) Thus, "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction.' [Citation.]" (*Id.* at p. 578.) Stated differently, a "mere modicum of evidence … could not … by itself rationally support a conviction beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 320 [99 S.Ct. 2781; 61 L.Ed.2d 560].)

Respondent recognizes that its burden is to identify substantial evidence of acts by appellant which "'clearly indicate a certain, unambiguous intent to kill." (5th SRB at pp. 13–14, quoting CALJIC No. 8.66; 4 CT 1038; 17 RT 4793–4794; *see also People v. Dillon* (1983) 34 Cal.3d 441, 452 ["an attempt to commit a crime requires proof of a specific intent to commit the crime and of 'a direct but ineffectual act done toward its commission'; and that … the acts will be sufficient when they 'clearly indicate a certain, unambiguous intent to commit that specific crime, and, in themselves, are an immediate step in the present execution of the criminal design'"], quoting CALJIC No. 6.00.)

The evidence as summarized and argued by Respondent fails to meet this standard. When interrogated, appellant admitted that he was the driver of the van at the time of the shooting. (12 RT 3457–59; 5 CT 311–13.) Respondent's claim of substantial evidence of an unambiguous intent to kill reduces to evidence that appellant: drove at not more than 10 miles per hour during which "a passenger" fired 9 to 15 shots; and that appellant allegedly drove by a second time "and an occupant fired a second volley of approximately 15 or 16 shots." (5th SRB at pp. 17–18.)

There are multiple problems with Respondent's proffer of this as substantial evidence. Co-defendant Rattanak Kak admitted that he was the shooter. (12 RT 3456 ["'I already told them I was the shooter.'"].) No witness testified that appellant knew Kak would shoot, intended or encouraged him to shoot, or that appellant had any prior hostile interaction with or animus against people at Bedlow Drive. Moreover, there was no substantial evidence of a second drive-by shooting.

Without naming them, Respondent cites to the testimony of Krisna Khan and Sokhon Hing as evidence that appellant drove by a second time during which an additional 15 shots were fired. (5th SRB at p. 16, citing 9 RT 2592–2595, 2619.) However, neither witness testified as Respondent claims.

Krisna Khan stood in front of 619 Bedlow Drive when the shooting started. (9 RT 2580–81.) The car came from the east on Bedlow Drive, travelling at about 10 m.p.h., and continued westbound. (9 RT 2587–88; Prosecution Exh. No. 255 [map of Bedlow Drive area].) When the van passed, Khan heard a total of

about 16 gunshots, which sounded like they all came from one gun. (9 RT 2594.) He did not say that the van returned a second time when additional shots were fired. (*Ibid.*)

Respondent's reliance on Sokkhon Hing's testimony is also mistaken because Hing did not see the shooting: he testified that he was inside the residence at 619 Bedlow Drive at the time. (9 RT 2612, 2616, 2618.) He heard two groups of gun shots that sounded like they all came from the same gun. (9 RT 2616–17.) He initially said that he heard 10–15 shots and the firing stopped "[f]or a minute" before he heard a second groups of shots. (9 RT 2616.) However, when asked specifically about the time between the two sets of gunshots, Hing said "like 20, 30 second." (9 RT 2616–17 ["like 20 something" seconds].) There were "[p]robably like 15" shots in the second group, but he was "[j]ust guessing." (9 RT 2619.) He was also guessing about the number of shots in the first group. (*Ibid.*) All of the shots sounded like they came from the "[s]ame place probably." (9 RT 2620.)

Thus, Sokkhon Hing's testimony indicates that the entire shooting lasted less than a minute, all of the shots came from the same place, and he was just guessing about the number of shots fired. This is not substantial evidence, "that is, evidence which is reasonable, credible and of solid value" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126), that appellant drove down the block, turned around, and returned to the scene so that a second volley of shooting could occur.

The forensic evidence also rebuts Respondent's claim that a total of 30 or 31 shots were fired. The prosecution's firearm expert (Duane Lovaas) found no evidence that a firearm other than Kak's Beretta was used at Bedlow Drive. (13 RT 3687,

3685.) The Beretta could hold a maximum of 16 rounds (15 in the magazine and 1 in the chamber), not 30 rounds. (13 RT 3567, 3684.) The prosecution presented no evidence that Kak (or appellant) at the time of the shooting or at any other time had a second magazine for the Beretta. In addition, the police found a total of at most 12 bullet strikes at the scene: 9–10 on a blue van parked in the driveway in front of the carport (9 RT 2522–25, 2550; 11 RT 2926–40, 2975, 2933–35, 2938, 2940–44, 2960–69, 2973, 2975–76); one in a window at 615 Bedlow Drive (9 RT 2483); and one in a window at 619 Bedlow Drive. (9 RT 2618, 2620, 2545; 10 RT 2732, 2792.)

Moreover, none of the other percipient witnesses from Bedlow Drive (Ream Voeuth, Nath Sok, Khan, Veasna Hou, Sobin Pen, and Sokkhoeun Khim) testified that the van passed by twice or described a period of time sufficient to permit it to drive past, turn around, and return, shooting a second time.

When the shooting occurred, Veasna Hou was sitting in his car parked under the carport playing music with the car doors open. (9 RT 2557; 10 RT 2755–58, 2763–64.) "All of a sudden, there was just shots, you know, there was one shot and then like two seconds later, just rapid fire and I was ducking." (10 RT 2760–61.) The pause between the two sets of shots was "[l]ike two seconds" and they all sounded like they were coming from the "[s]ame gun." (10 RT 2761, 2770.) Hou heard a total of 10–16 shots, but it all happened "real quick." (10 RT 2762.) The total time of the shooting was "[f]ive seconds. It was so fast." (*Ibid.*) Then the "shooter left." (10 RT 2763.)

When the shooting started, Sokkhoeun Khim dropped to the ground in front of 619 Bedlow Drive. (10 RT 2778–79, 2785–86.)

After the shooting stopped, Khim put his head up and saw a van take off. (10 RT 2787–88.) He did not say that the van came back a second time or that additional shots were fired. (*Ibid*.)

Ream Voeuth stood under the carport at the time of the shooting. (10 RT 2744–45.) He heard a couple of gunshots did not describe more than one period of gunshots. (10 RT 2747–48.)

Officer Garelick took a statement from Nath Sok. (9 RT 2475, 2494–95, 2501.) Sok said he stood in the center of the carport at the time of the shooting and received a gunshot wound to his left ring finger. (9 RT 2495–96.) However, Officer Garelick did not report Sok as describing two periods when a van drove by shooting. (*Ibid*.)

Sobin Pen was inside 615 Bedlow Drive watching television when he heard gunshots. (9 RT 2648–2649; 10 RT 2679.) The shots all "sound like they were coming from the street … from the same place." (10 RT 2684–85, 2696–97.) "I hear like the first gun sound, like boom …. And then after – like not even a second and hear a lot of gun, boom, boom, boom, boom, boom, boom, boom. So – like that." (10 RT 2691.) The gap between the first and the second group of shots was not more than a couple of seconds. (10 RT 2691, 2693.)

The only substantial evidence of appellant's intent prior to and during the shooting derives from his two interrogations by Detectives Stanton and Gall in the early morning hours of November 9, 2003.[1]

During the first, unrecorded interrogation, appellant described the sequence of events on the evening of November 8, 2003. Early

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[1] At trial, Detective Stanton testified under her married name of Detective Nance. (12 RT 3449-50.)

that evening, appellant picked up Kak to go to a party. (12 RT 3456–57.) On the way, he stopped to get gas. When they came out of the store at the gas station, they were confronted by some Asian males in cars. (*Ibid.*)

The guys in the other cars started yelling things like, "'What's up, cuz?' And 'Cuz this.' And 'Cuz that'" and throwing up their arms. (12 RT 3457.) Kak put up his arms in response. (*Ibid.*) The other cars took off and they decided to follow them to see where they "kick it" at. (*Ibid.*) When they got onto Bedlow Drive, appellant heard gunshots. (12 RT 3457.) Kak pulled out a gun and started shooting at a group of people. (12 RT 3457–58.) Appellant did not know that Kak had a gun or that Kak was going to shoot until he started shooting. (12 RT 3458–59.) Kak just pulled a gun out of his waistband area under his jacket and started shooting. (*Ibid.*) Afterwards, they left and went to the party. (12 RT 3460.)

In the second, videotaped interrogation, appellant gave a similar statement. They had driven to a gas station to buy cigarettes where some guys in another car started "muggin" and "doggin" them. (5 CT 1309–1310 [transcript of interrogation].) Appellant drove away with Kak in the passenger seat. (5 CT 1311–12.) Appellant "didn't know he had a gun on him. I didn't know that." (5 CT 1307.)

They decided to follow the other car because they wanted to see who they were and where they "kick it" at. (*Ibid.*) Appellant drove slowly because it was "[r]aining real hard" and he couldn't see anything. (*Ibid.*) As he slowed at a spot where the street was

flooded, appellant heard four or five shots fired at them.[2] (5 CT 1313–14.) "I couldn't really see and I heard thum, thum, thum, thum." (5 CT 1313.) "It was like … they was ready for us, you know?" (*Ibid*.) Kak (who appellant referred to as "Boy") "shot back." (5 CT 1314.) "I panicked and I was gonna mash in reverse. I didn't know what to do. And then I heard shots back from my car. I heard shots from my car back." (5 CT 1308.) Afterwards, appellant drove back to the party with Kak. (*Ibid*.; 5 CT 1314.)

Appellant also explained that he previously lived in an apartment on the corner of Bedlow Drive and had no problems with guys from that neighborhood. (5 CT 1317 ["I got no enemies."].) He used to visit people living on Bedlow Drive, most recently a couple of months before the shooting. (*Ibid*.)

Moreover, *none* of the civilian witnesses from Bedlow Drive (Ream Voeuth, Nath Sok, Krisna Khan, Veasna Hou, Sokkhoeun Khim, Sarum Shrey, Sokkhon Hing, Sokhan Khim, Sokkhoeun Khim, Sobin Pen, Saroeup Phon, and Jack Savonn) and *none* of the investigating police officers (Couvillion, Gall, Garelick, Gatto, Graviette, Gutierrez, Ingersoll, Morris, Nance/Stanton, Ridenour, Thurman, and Williams) provided any evidence that appellant personally had any animus towards the people at Bedlow Drive, or that he had any prior, hostile encounters with them as individuals or as gang members. (9 RT 2475–2653; 10 RT 2660–2805, 2828–2839, 2857–2888, 2899–2925; 11 RT 2978–3081.)

In light of all this evidence, Respondent errs in arguing that there is evidence "which is of reasonable, credible and of solid

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[2] Police officers confirmed that it was "pouring rain" and the streets were very wet. (9 RT 2476; 10 RT 2725, 2922.)

value" (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1126) that appellant committed an act at Bedlow Drive reflecting an "unambiguous" (*People v. Dillon*, *supra*, 34 Cal.3d at p. 452) intent to kill.

2. Case law supports appellant's claim of insufficient evidence.

The cases finding sufficient evidence that an alleged accomplice directly aided and abetted murder or attempted murder differ from this one. They provide substantial evidence that the accomplice engaged in assaultive conduct with the direct perpetrator of the crime and/or knew in advance that the direct perpetrator would commit a murderous assault. (*See, e.g., People v. Medina* (2009) 46 Cal.4th 913, 917–922 [Before the fatal shooting by Medina, codefendant Vallejo "punched" the victim and "Medina and Marron joined in the fight."]; *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1444–45 [defendant drove and stopped the car from which a masked fellow gang member exited to shot a perceived gang rival]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 6 ["Steven intended to fight the two because he felt they had disrespected the pregnant Molina by throwing gang signs."]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1053 [defendant assaulted a rival gang member with a three-foot chain before the direct perpetrator shot the victim]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1366–67 [defendant punched victim and yelled gang challenges before codefendant shot victim];

People v. Montano (1979) 96 Cal.App.3d 221, 224 [defendant with two codefendants drove a rival gang member to a vacant lot where a codefendant shot him].)

In contrast, this Court has found insufficient evidence of aiding and abetting murder where an alleged accomplice drove a perpetrator to and from the scene of a crime without substantial evidence that the driver knew of and encouraged the commission of murder. For example, in *People v. Sully* (1991) 53 Cal.3d 1195, a jury in pertinent part convicted defendant of the murder of a drug-dealer (Kathryn Barrett). (*Id.* at pp. 1214–15.) The prosecution entered into a plea agreement with one witness (Tina Livingston) to being an accessory after the fact to the murder (Pen. Code, § 32) and Livingston testified against the defendant. (*Id.* at pp. 1215–16.)

On appeal, defendant argued that the trial court erred in failing to instruct the jury to decide that it should view with mistrust Livingston's testimony that he had killed the victim because of substantial evidence that she was an accomplice to the charged murder. (*People v. Sully*, *supra*, 53 Cal.3d at p. 1227.) This Court concluded that the "evidence does not support an inference of accomplice liability on Livingston's part. The facts that she was at the scene or drove the victim there do not make her an accomplice. Defendant's theory, that Livingston knew Barrett was to be robbed and that her death (at defendant's hands) was clearly foreseeable, is at best highly speculative." (*Id.* at p. 1228.)

Here, Respondent's claim that appellant drove Kak to Bedlow Drive, knowing that Kak would attempt to kill, is also speculative and, therefore, not substantial evidence. (*People v. Johnson*,

supra, 26 Cal.3d at p. 578; *People v. Perez* (1992) 2 Cal.4th 1117, 1133 ["By definition, `substantial evidence' requires *evidence* and not mere speculation.' Citation]."]; *People v. Berryman* (1993) 6 Cal.4th 1048, 1081 ["speculation is not evidence, less still substantial evidence"], overruled on another point by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

In *People v. Williams* (1997) 16 Cal.4th 635 *(Williams)*, a jury convicted the defendant of the murder of four people because he believed that one of them owed him money. (*Id.* at pp. 647–48.) On appeal, he argued that the trial court erred by failing to instruct the jury that Ida Moore and Lisa Brown were accomplices as a matter of law based on evidence comparable to that relied on Respondent in this case. (*Id.* at p. 679.)

Williams found that the "trial court correctly declined to instruct the jury that Moore and Brown were accomplices. There was evidence that both women provided assistance to defendant and his two cohorts--Moore by driving the van to and from the scene of the murders, and Brown by helping [codefendant] Cox dispose of the murder weapon. But this evidence of Moore's and Brown's criminal culpability was not so clear and undisputed that a single inference could be drawn that either one would be liable for the '*identical offense*[*s*]' charged against defendant, namely, four counts of special circumstance murder." (*Williams*, *supra*, 16 Cal.4th at pp. 679–80, original italics.) For analogous reasons, the evidence of appellant's driving with Kak is insufficient to support the inference that he acted with an intent to kill.

In sum, the factual record, when measured against the the pertinent legal standards, does not support Respondent's claim of

substantial evidence. It also shows why the jury asked multiple questions about how to apply the natural and probable consequence doctrine before returning its verdicts: the jury was not convinced beyond a reasonable doubt that appellant personally acted with the intent to kill and so relied on evidence of the intent for the lesser, target crimes not requiring an intent to kill (shooting at an occupied dwelling, shooting at an occupied motor vehicle, or discharging a firearm from a motor vehicle) to convict him of attempted murder. (4 CT 976, CALJIC No. 3.02; 5th SAOB at pp. 19–21.)

3. Permitting The Prosecution To Retry The Case Would Violate The State And Federal Prohibitions Against Double Jeopardy.

The Fifth Amendment of the United States Constitution provides "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb..." and applies to the states by means of the Due Process Clause of the Fourteenth Amendment. (*Benton v. Maryland* (1969) 395 U.S. 784 [89 S.Ct. 2056; 23 L.Ed.2d 707].) Article I, section 15, of the California Constitution also provides that "[p]ersons may not twice be put in jeopardy for the same offense."

The same protections are implemented by statute and bar retrial "of an attempt to commit the same" offense and any lesser included offense.[3] (Pen. Code, § 1023; *In re Dennis B.* (1976) 18

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[3] Penal Code section 1023 provides: "When the defendant is convicted or acquitted or has been once placed in jeopardy upon the accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such

Cal.3d 687, 691 [The proscription against double jeopardy further "protects persons from being consecutively charged with violation of the same law or violation of laws so related that conduct prohibited by one statute is necessarily included within conduct prohibited by the other."]; *Brown v. Ohio* (1977) 432 U.S. 161, 168–169 [97 S.Ct. 2221; 53 L.Ed.2d 187] ["Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."].)

Respondent's request for retrial violates the central objective of the bar against double jeopardy: "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials. The Clause does not allow 'the State . . . to make repeated attempts to convict an individual for an alleged offense,' since '[t]he constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" (*Burks*, *supra*, 437 U.S. at p. 1, quoting *Green v. United States* (1957) 355 U.S. 184, 187 [78 S.Ct. 221; 2 L.Ed.2d 199].)

In a footnote, the high court emphasized, "that under the terms of the remand in this case the District Court might very well conclude, after 'a balancing of the equities,' that a second trial should not be held. Nonetheless, where the Double Jeopardy

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accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." (*Burks*, *supra*, 437 U.S. at p. 11, fn. 6.)

"An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." (*Brown v. Ohio*, *supra*, 432 U.S. at p. 169, fn. 7, citations omitted.) Another "commonly recognized exception is when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun." (*Jeffers v. United States* (1977) 432 U.S. 137, 151 [97 S.Ct. 2207; 53 L.Ed.2d 168], citations omitted; *see, e.g., In re Saul S.* (1985) 167 Cal.App.3d 1061 [juvenile may be tried for murder after judgement of attempted murder where death of the victim was a new fact that did not exist at time of first proceeding].)

However, Respondent makes no such claims in this case. The only justification for remand is a request for an opportunity to retry the case under the "valid theory of direct aiding and abetting." (5th SRB at pp. 20–21.) However, the prosecution already presented that theory to the jury at trial in 2005 and, as cited above in Section A.2., called 12 percipient witnesses, 12 investigating police officers, and two experts (Stanton/Nance and Lovaas) to testify in support of that theory.

This factual record the repeated questions from the jury about the natural and probable consequences doctrine show that the theory of directly aiding and abetting attempted murder was not and is not supported by the record. Therefore, there is no

justification for “affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” (*Burks*, *supra*, 437 U.S. at p. 1.) Accordingly, the judgement for attempted murder at Bedlow Drive (Counts 5–9), should be reversed without an opportunity for retrial.

B. The Instructional Error On The Natural And Probable Consequence Doctrine Was Prejudicial To Appellant’s Conviction For The Attempted, Willful, Deliberate And Premeditated Murder Of Debra Pizano (Count 3).

Respondent concedes that under the amendments enacted by S.B. 1437 and S.B. 775 the trial court erred in instructing the jury that it could convict appellant of aiding and abetting the attempted premediated murder of Debra Pizano (Count 3) under the natural and probable consequence doctrine based on the intent to commit that target crimes of robbery or kidnapping. (4 CT 976, CALJIC No. 3.02; 5th SRB 18.) However, citing only evidence favorable to the prosecution, Respondent argues that “any error was harmless beyond a reasonable doubt.” (*Ibid*.) Respondent further argues that the absence of prejudice is supported by the jury finding true the special circumstance allegation that appellant committed the murder of Alphonso Martinez “while participating in, and for the benefit of a criminal gang pursuant to section 190.2, subdivision (a)(22). (4 CT 1108–1114.)” (5th SRB at p. 19.)

Respondent errs by treating the standard of prejudice for instructional error as a matter of reviewing the sufficiency of the

evidence for a conviction, by conflating the verdicts of Martinez and Pizano, and by overlooking multiple prejudicial errors in the gang-murder special circumstance verdict.

1. Respondent errs in its application of the *Chapman* standard of prejudice by addressing only evidence favorable to the prosecution.

Respondent tacitly recognizes that the *Chapman* standard of prejudice applies to the review of whether the instructional error affected the verdict for the attempted murder of Pizano. (5th SRB at pp. 16–17, citing *Chapman*, *supra*, 386 U.S. at p. 24.) Nevertheless, in arguing against prejudice, Respondent cites only evidence favorable to the prosecution (5th SRB 18–19), as discussed further below.

Respondent has misapplied the *Chapman* standard. Assessing prejudice under *Chapman* is much different from assessing the sufficiency of the evidence to support the verdict. *Chapman* standard required Respondent to demonstrate "beyond a reasonable doubt" that the instructional error did not contribute to the verdict and requires reversal if there is "'reasonable possibility"' that the error "'might have contributed to the conviction.' [Citation]." (*Chapman*, *supra*, 386 U.S. at p. 24.)

If "the defendant contested" the element to which the instructional error relates "and raised evidence sufficient *to support a contrary finding* – [a reviewing court] should not find the error harmless." (*Neder v. United States* (1999) 527 U.S. 1, 19 *(Neder)* [119 S. Ct. 1827; 144 L. Ed. 2d 35], emphasis added.) "There is, as former Chief Justice Roger Traynor has observed, 'a

striking difference between appellate review to determine whether an error affected a judgment and the usual appellate review to determine whether there is substantial evidence to support a judgment.'" (*People v. Arcega* (1982) 32 Cal.3d 504, 524, quoting Traynor, *The Riddle of Harmless Error* (1970) pp. 26–27.)

2. Prejudice is present because appellant contested the issue of intent and there wss evidence supporting a contrary finding.

Turning to the evidence, Respondent's salient claim is that the record shows that appellant intended from the outset ("right out of the gate") for Kak to shoot Pizano and, therefore, instruction on the natural and probable consequence doctrine was harmless beyond a reasonable doubt. (5th SRB at p. 19.) Respondent ignores the fact that there is conflicting evidence on precisely this point. Appellant told the detectives, "I didn't thought that he [*i.e..,* Kak] was going to shoot them. … I thought it was going to be a robbery and just take it and just run. … And when I heard the shot and scream, I got scared, I dropped everything. … I don't want it no more." (5 CT 1358.)

Justin Rippey, who was in the park that night, provided testimony supporting appellant's statement. Rippey saw two guys approach the couple on the path in the park and later heard gunshots after which the two guys ran west out of the park. (7 RT 2035–37, 2066–67.) One of the guys dropped objects on the ground, including the jacket, hat and shirt taken from Martinez, which Rippey picked up and later sold. (7 RT 2066, 2039, 2041; 13 RT 3778–83.) This supports appellant's statement that he dropped the property because he got scared and did not want it

after Kak unexpectedly shot at the couple. (5 CT 1358.) This is not the mindset of someone intending to kill Pizano from the outset of the robbery.

Respondent notes that Pizano's statement that, after taking the last of their property, appellant walked away and said something about it being dangerous to be in the park at night.[4] (13 RT 3784.) However, she also testified that appellant said this "in a laughing way" rather than a threatening way. (13 RT 3818.) After that, Pizano looked away and heard gunshots. (13 RT 3784, 3786–87.) She did not claim that appellant encouraged Kak to shoot after appellant took their property. (13 RT 3786–87.)

An instructional error on the intent element for attempted murder may be harmless under *Chapman* when the "jury heard uncontroverted evidence that [defendant] personally premeditated and deliberated the attempted murder of [the victim]." (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) However, the evidence in this case, as a whole, shows that appellant contested the issue of whether he acted with an intent to kill Pizano and the record contains "evidence sufficient to support a contrary finding" and this Court, therefore, "should not find the error harmless." (*Neder*, *supra*, 527 U.S. at p. 9.)

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[4] The only substantial evidence that appellant was the person who took the property derives from his statement during interrogation admitted in evidence over appellant's objection, which is a critical issue on appeal. (*See* Vol. 1 AOB 63.) Pizano testified only that appellant looked "familiar" after a detective repeatedly showed her photos of appellant and the prosecutor coached her to say appellant looked familiar. (13 RT 3805; Vol. 1 AOB 111-113.)

3. Case law supports a finding of prejudice.

Cases distinguishing the substantial evidence test from application of the *Chapman* test for prejudice from instructional error support a finding of prejudice in this case.

For example, in *People v. Haley* (2004) 34 Cal.4th 283, during the period when an intent to kill was an element of the felony-murder special circumstance under *Carlos v. Superior Court* (1985) 35 Cal.3d 131, this Court found the trial court's "failure to instruct the jury on the intent-to-kill requirement was not harmless beyond a reasonable doubt" to the special circumstance finding for robbery-murder (Pen. Code, § 190.2, subd. (a)(17)(A). (*Id.* at p. 287.) "Certainly, if the jury had considered whether defendant intended to kill Clement and returned a finding of guilt, that verdict would have been supported by substantial evidence. [Citation.] But the evidence that defendant intended to kill Clement was not overwhelming. Rather, the jury might have believed defendant's claim that he did not intend to kill the victim and that she was alive when he fled the scene of the crime." (*Id.* at p. 310.) Accordingly, the special circumstance verdict was reversed under the "beyond a reasonable doubt standard of *Chapman*[.]" (*Ibid.*, internal citation and quotation omitted) As explained above, the evidence in this case from appellant's interrogation, Justin Rippey, and Pizano herself also provided a basis for the jury to believe that appellant might not have intended to kill Pizano.

In *People v. McDonald* (2015) 238 Cal.App.4th 16, the court found prejudicial error under *Chapman* and reversed the defendant's conviction for aiding and abetting felony murder

because the trial court erroneously instructed the jury that it was sufficient to find that the defendant's acts "precede [the victim's death], and not the act that caused her death." (*Id.* at p. 29, footnote omitted.) Prejudice was present even though there was evidence sufficient to support the verdict.

As explained in *McDonald*:

> "While there would have been sufficient evidence to support a finding defendant aided and abetted before or during commission of the act causing death, jurors could have believed defendant's claim he only realized Patterson might have committed a crime, and decided to help Patterson, during the asportation phase of the robbery. [Citation.] Stated another way, 'the evidence and the inferences that may reasonably be drawn from the evidence ... do not prove [defendant aided and abetted before or during the act that caused death] so overwhelmingly that the jury could not have had a reasonable doubt on the matter. [Citations.]'"

(*Id.* at pp. 29–30, quoting *People v. Marshall* (1997) 15 Cal.4th 1, 44; brackets inserted by Court of Appeal.) The evidence in this case also reasonably supported an inference that appellant did not commit an act with the intent of causing Kak to shoot Pizano.

4. Repeated questions from the jury about the natural and probable consequence doctrine establish a reasonable possibility of prejudice from the instructional error.

Respondent agrees that, for several days before returning its verdicts on the attempted murder counts, the jury asked the trial judge questions about application of the natural and probable

consequence doctrine. (5th SRB at p. 17 [“as noted by appellant, the jury asked several questions regarding aiding and abetting and the theory of natural and probable consequences”], citation omitted.) However, Respondent fails to recognize the significance of those questions in assessing prejudice, even if there may have been disputed evidence in favor of the prosecution.

In *Chiu,* the question was whether there was prejudice from jury instructions permitting a finding an accomplice culpability for premediated murder under the natural and probable consequence doctrine where there was some evidence of premeditation. (*People v. Chiu* (2014) 59 Cal.4th 155, 167.) The prosecution had presented evidence that defendant Chiu told the perpetrator (“Che”) to “‘[g]rab the gun’” and when Che “hesitated rather than shoot, defendant and Hoong yelled ‘shoot him, shoot him.’ Che shot Treadway dead. Che, defendant, and Hoong then fled together in a car.” (*Id.* at p. 160.) In contrast Chiu testified and “denied calling for anyone to get a gun, and claimed that he did not want or expect Che to shoot Treadway.” (*Ibid.*)

Despite evidence supporting the prosecution’s theory, this Court found prejudice because a note from the jury and discussion between the trial judge and jurors showed “that the jury may have been focusing on the natural and probable consequence theory of aiding and abetting and that the holdout juror prevented a unanimous verdict on first degree premeditated murder based on that theory. Thus, we cannot conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on a different theory, i.e., the legally valid theory that defendant directly aided and abetted the murder.” (*People v. Chiu*, *supra*, 59 Cal.4th at p. 168.)

In this case, the jury's repeated questions about the natural and probable consequence doctrine and re-instruction on that doctrine before the verdict also establish that the jury may have focused on the invalid theory of conviction. (5th SAOB at pp. 19–21)

In *People v. Beeman* (1984) 35 Cal.3d 547 *(Beeman)*, where the defendant was convicted as an aider and abettor of robbery, burglary, false imprisonment, destruction of telephone equipment, and assault with intent to commit a felony, this Court found that the trial court erred by failing to "adequately inform the jury of the criminal intent required to convict a defendant as an aider and abettor of the crime." (*Id.* at pp. 550–551.)

The State argued in *Beeman* that "any instructional error was harmless whether the standard for normal (*People v. Watson* (1956) 46 Cal.2d 818 [299 P.2d 243]) or for constitutional error [(*Chapman,* 386 U.S. at p. 24]) is applied. Respondent argues that the jury clearly found that appellant knew his accomplices' purpose was to rob his sister-in-law and rejected his testimony that he did not in fact assist them. Thus, the only reasonable inference from the evidence was that appellant intentionally aided the actual perpetrators." (*Beeman*, *supra*, 35 Cal.3d at p. 561.)

This Court disagreed: "We do not agree with respondent's assessment of the effect of the error. Correct instruction on the element of intent was particularly important in this case because appellant's defense focused on the question of his intent more than on the nature of his acts." (*Beeman*, *supra*, 35 Cal.3d at p. 562.) The direct perpetrators (Burk and Gray) testified that Beeman "had been extensively involved in planning the crime."

(*Id.* at p. 551.) In contrast, Beeman "testified that he did not participate in the robbery or its planning" while admitting "that he had given information to Burk and Gray which aided their criminal enterprise, but he claimed his purposes in doing so were innocent." (*Id.* at pp. 552–553, 562.) "Thus, the essential point of his defense was that although he acted in ways which in fact aided the criminal enterprise, he did not act with the intent of encouraging or facilitating the planning or commission of the offenses." (*Id.* at p. 562.)

"The jury certainly could have believed Burk and Gray while disbelieving appellant, and thus found that appellant intentionally aided and encouraged his friends in their crimes. However, *the fact that the jury interrupted its deliberations to seek further instruction regarding accomplice liability indicates that the jurors did not dismiss appellant's testimony out of hand*. Rather, the questions asked indicate the jury's deliberations were focused on the very issue upon which the defense rested and upon which the court's instructions were inadequate: the elements -- including the mental element -- of aiding and abetting." (*Beeman*, *supra*, 35 Cal.3d at p. 562, emphasis added.)

"Under these circumstances, where the defense centered on the very element as to which the jury was inadequately instructed and the jurors' communication to the court indicated confusion on the same point, we cannot find the error harmless. Even applying the most lenient *Watson* standard, we find that in this case it is reasonably probable that the jury would have reached a result more favorable to appellant had it been correctly instructed upon the mental element of aiding and abetting. (*People v. Watson* (1956) 46 Cal.2d 818.) Because we reverse

under *Watson*, we do not in this case decide whether failure to correctly instruct on the element of criminal intent should as a general rule be reviewed under a stricter rule of harmless error." (*Beeman*, *supra*, 35 Cal.3d at pp. 562–63.)

In this case, appellant's defense also focused on the question of his intent. In particular, defense counsel emphasized appellant's statement, "'I didn't thought he was going to shoot them. … I thought it was just going to be a robbery and just take it and run. … And when I heard the shot and scream, I got scared. I dropped everything. … I don't want it no more. … I wasn't laughing.'" (16 RT 4672–4673.) As in *Beeman*, the jury in this case interrupted its deliberations to seek further instruction on accomplice liability thereby showing that it did not dismiss out of hand appellant's denial of an intent to kill. Accordingly, prejudice is present in this case even as a matter of state law under the *Watson* standard.

Respondent claims that there is no reasonable possibility of prejudice to because the jury found true the gang-murder special circumstance for Alphonso Martinez (Pen. Code, § 190.2, subd. (a)(22); 5th SRB at pp. 20–21.)

5. The special circumstance verdict relating to the murder of Martinez does not establish the absence of prejudice from the instructional error relating to the alleged attempted murder of Pizano.

Respondent further argues that the jury's true finding of the gang-murder special circumstance for Alphonso Martinez (Pen. Code, § 190.2, subd. (a)(22)) establishes beyond a reasonable

doubt the absence of prejudice with respect to the verdict for the attempted murder of Pizano. (5th SRB at pp. 20–21.) This argument is flawed for several reasons.

First, the gang-murder special circumstance was pled solely against Martinez. (3 CT 698–699.) The instruction provided for that special circumstance (CALJIC No. 8.81.22) made no mention of Pizano and required no jury determination relating to Pizano.[5] The verdict form for the charge of the attempted murder of Pizano did not require a finding that appellant intended to kill her, and the jury made no such finding. (4 CT 1116–1117.)

Second, the record evidence discussed above shows that appellant closely contested the question of whether he acted with the intent to kill and there is evidence sufficient to support a finding that he did not act with the necessary intent. Under *Chapman,* this demonstrates the presence of prejudice from an instructional error. (*Neder, supra*, 527 U.S. at p. 19.)

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[5] CALJIC No. 8.81.22 as given here stated in full: "To find that the special circumstance "intentional killing by an active street gang member" is true, it must be proved: [¶] 1. The defendant intentionally killed the victim, or with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists the actual killer; [¶] 2. At the time of the killing, the defendant was an active participant in a criminal street gang; [¶] 3. The members of that gang engaged in or have engaged in a pattern of criminal gang activity; [¶] 4. The defendant knew that the gang members engaged in or have engaged in a pattern of criminal gang activity; and [¶] 5. The murder was carried out to further the activities of the criminal street gang. The definitions of criminal street gang, primary activities, pattern of criminal gang activity and active participation has already been given elsewhere in these instructions." (4 CT 971.)

Third, the jury's repeated questions about the natural and probable consequence doctrine before returning its verdict shows that it questioned whether appellant in fact personally acted with the intent to kill rather than with the mental state for the alleged target crimes of robbery or kidnapping. (5th SAOB at pp. 19–21.) Under the case law discussed above, this demonstrates prejudicial error from an instructional error on accomplice culpability, under either a state or a federal standard. (*People v. Beeman, supra,* 35 Cal. 3d. at pp. 562-563; *People v. Chiu*, *supra*, 59 Cal.4th at p. 168.)

Although the evidence is doubtful that appellant personally committed an act with an intent to kill Pizano, appellant accepts that the Respondent may, as a matter of law, request retrial on remand. (*Burks*, *supra*, 437 U.S. at p. 11.) But why, as a matter of fact, Respondent should want to do so is unclear given the weakness of the evidence of the necessary intent to kill.

Appellant does not condone any of the crimes committed in American Legion Park. However, the State's interest in pursuing justice has been vindicated by appellant's conviction for the robbery of Pizano (Count 4, Pen. Code, § 211) and co-defendant Kak's conviction and life sentence as the direct perpetrator of a premediated attempt to murder her. (*People v. Rattanak Kak* (2008) 2008 Cal. App. Unpub. LEXIS 9366.)

III. CONCLUSION

For the foregoing reasons, the judgement for Counts 5, 6, 7, 8, and 9 should be reversed and remanded for resentencing on any

remaining counts without an opportunity for retrial, and Count 3 should be reversed with an opportunity for resentencing or for retrial.

Respectfully submitted,

Dated: December 24, 2021 By: /s/ Donald R. Tickle

Attorney for Defendant and Appellant
Mao Hin

CERTIFICATE OF COMPLIANCE

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Dated: December 24, 2021 By: /s/ Donald R. Tickle

Attorney for Defendant and
Appellant Mao Hin

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The Hon. Bernard J. Garber
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Department 23, 2nd Floor
222 E. Weber Ave.
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The Hon. Antonio Agbayani
San Joaquin County Superior Court
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Neoma Kenwood, Supervising Attorney
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 24, 2021 By: /s/ Carl R. Castro

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 12/27/2021 by Larry Blake, Jr., Deputy Clerk

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Supreme Court of California

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