No. S284751

In the Supreme Court of the State of California

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

v.

RICHARD CURTIS MORRIS, JR.,
Defendant and Appellant.

Fourth Appellate District, Division Three, Case No. G061916
Orange County Superior Court, Case No. 08CF1591
The Honorable Lewis W. Clapp, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the trial court correctly deny defendant's Penal Code section 1172.6 resentencing petition at the prima facie stage on the ground that the actus reus of first degree felony murder requires that a defendant who is not the actual killer but possesses the intent to kill need only aid in the underlying felony and not in the killing itself (Pen. Code, § 189, subd. (e)(2))?

INTRODUCTION

At issue in this case is the meaning of one of the current forms of felony murder, as amended by Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), in which the defendant "was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree." (Pen. Code, § 189, subd. (e)(2).)[1] Morris claims that by using the phrase, "in the commission of murder in the first degree," the Legislature intended to change the previously established actus reus requirement for this form of felony-murder liability so that the defendant must now aid and abet the killing itself, rather than the underlying felony. On that reading, he claims, the superior court below erred in dismissing his section 1172.6 resentencing petition because his trial jury made no finding that corresponds to this purported new actus reus requirement.

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

The text, structure, and legislative history of the amended statute belie Morris's reading. The plain language of subdivision (e)(2) imposes felony-murder liability on an aider and abettor who "assisted the actual killer in the commission of murder in the first degree." The statute further defines "murder of the first degree" as all murder "that is committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies. (§ 189, subd. (a).) And at the time of SB 1437's enactment, existing law required that the aider and abettor and the killer be jointly engaged in the felonious enterprise and that the killing be logically and transactionally related to the underlying felony. Consequently, the plain language of the statute establishes, consistent with the historical application of felony murder, that aiding and abetting the underlying felony in which the actual killer is a joint participant, and in which the killing is logically related to the commission of the felony, necessarily constitutes aiding and abetting murder in the first degree.

The Legislature's use of the particular phrase "commission of murder in the first degree" in the amended felony-murder statute is further support for this interpretation because that phrase has an established legal meaning. In *People v. Dickey* (2005) 35 Cal.4th 884, this Court held, as to the felony-murder special-circumstance statute that employed the same phrase, that "[a]ll persons aiding or abetting the commission of burglary or robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." (*Id.* at p. 900.) The Legislature's decision to employ the precise phrase

that this Court previously interpreted shows its intent that the statute be understood consistent with *Dickey*: that a nonkiller aider and abettor acting with intent to kill is guilty of felony murder if he assists the actual killer in the underlying felony.

This interpretation is also supported by section 189, subdivision (e)'s overall structure. As most naturally read, the statute evinces a logical design that decreases the required actus reus as the required mens rea increases. But under Morris's reading, the statute would require both a greater mens rea and a greater actus reus under subdivision (e)(2) than are required under subdivision (e)(3), the provision imposing felony-murder liability on a major participant in the underlying felony who acts with reckless indifference. Not only is Morris's reading logically awkward, but it would make subdivision (e)(2) entirely superfluous because liability under that subdivision would necessarily duplicate or supersede liability under two other murder theories: felony murder under subdivision (e)(3) and direct aiding and abetting.

Legislative history further confirms that SB 1437 did not change the actus reus for aiding and abetting a felony murder, but instead added an increased mens rea requirement to the existing theory. Comments by the principal author of SB 1437, and the legislative findings and declarations accompanying the law, demonstrate that the Legislature's focus was to proscribe the imputation of malice; the Legislature was not concerned with modifying the existing actus reus.

LEGAL BACKGROUND

In 2019, the Legislature amended sections 188 and 189 in an effort "'to more equitably sentence offenders in accordance with their involvement in homicides.'" (*People v. Gentile* (2020) 10 Cal.5th 830, 838-839, superseded on other grounds by § 1172.6, subd. (g); Stats. 2018, ch. 1015 (SB 1437); see also Stats. 2021, ch. 551 (Senate Bill No. 775).) In effect, these amendments eliminated the natural and probable consequences theory of aiding and abetting liability for murder and circumscribed the scope of the felony-murder rule. (*People v. Delgadillo* (2022) 14 Cal.5th 216, 223; *Gentile*, at pp. 842-851.)

SB 1437 also enacted what is now section 1172.6, which in its current form (applicable to Morris's case) permits those previously convicted of murder or attempted murder to petition for resentencing on the basis that they could not presently be convicted of the same offenses in light of the changes to sections 188 and 189. As relevant here, a petitioner seeking relief under this section must make an initial prima facie showing to proceed to an evidentiary hearing at which the prosecution would be obligated to prove beyond a reasonable doubt the petitioner's guilt under a currently valid theory of murder liability. (See § 1172.6, subds. (c), (d).) Dismissal is appropriate at the prima facie stage "[i]f the petition and record in the case establish conclusively that the defendant is ineligible for relief." (*People v. Strong* (2022) 13 Cal.5th 698, 708; accord, *People v. Curiel* (2023) 15 Cal.5th 433, 450; see also *People v. Lewis* (2021) 11 Cal.5th 952, 971 [purpose of prima facie inquiry is to "distinguish

petitions with potential merit from those that are clearly meritless"].)

STATEMENT OF THE CASE

A. Morris's convictions and sentence

James Stockwell was an owner of the Mustang Theater topless bar. (2TRT 119, 204.)[2] Upon returning to the condominium he shared with his girlfriend, S.F., around 11:00 p.m. on January 1, 1987, they were accosted by a man holding a gun. (2TRT 120, 124-125, 131-132.) After the man forced them to lie down on the dining room floor, S.F. noticed the presence of a second man helping to put handcuffs on Stockwell. (2TRT 134, 136-138.) Stockwell gave the men money and jewelry and told the men he would take them to his club to obtain more money. (2TRT 140-143.)

One man forced Stockwell upstairs, and later one of the men took S.F. upstairs into a bedroom. (2TRT 146-147.) When she passed the top of the stairs, she saw Stockwell face down on the floor, still handcuffed, and he was talking to the man that was with him. (2TRT 147-149.) Both men raped S.F. (2TRT 152-159.) One of the men then tied up S.F. and told her they were taking Stockwell to the club. (2TRT 160-161.)

After she heard the men leave, S.F. got up from the bed and saw Stockwell on the floor; he had been shot. (2TRT 163-165.) She went to the condo of Stockwell's business partner, who lived in the same complex, to get help. (2TRT 165-166, 209-210.)

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[2] "TRT" refers to the reporter's transcript in the appeal from Morris's original trial (No. G048926).

When they returned to the condominium, they discovered Stockwell was dead from a gunshot to the head. (2TRT 166-167, 209-212; 4TRT 564-566.)

A forensic sexual assault examination was performed on S.F. at the hospital, which included the collection of samples from S.F.'s body and clothes. (2TRT 170-171; 3TRT 244-254.) Although a type of genetic testing was performed on the samples, DNA analysis was not available at the time. (3TRT 358, 372-374.) When the samples were tested for DNA in 2009 and 2012, Morris's DNA matched the DNA from the samples. (4TRT 466-469, 490-492, 496-497.)

In 2013, the Orange County District Attorney filed an information charging Morris with murder (§ 187). (CT 87.) It was further alleged that the murder was committed while Morris was engaged in the commission of a robbery (§ 190.2, subd. (a)(17)(i)) and rape (§ 190.2, subd. (a)(17)(iii)), and that the murder was committed for financial gain (§ 190.2, subd. (a)(1)). (CT 87-88.) It was also alleged that Morris had a prior serious felony conviction (§ 667, subd. (a)). (CT 88.)

A jury convicted Morris of first degree murder, and the jury found each of the special circumstance allegations to be true. (CT 89-94; 6TRT 854-855.) In returning those special circumstance findings, the jury found that, if not the actual killer, Morris acted with the intent to kill. (CT 233, 237, 271-272.) In a separate proceeding, the trial court found the prior serious felony conviction allegation to be true. (CT 93; 6TRT 867.)

The trial court sentenced Morris to prison for a term of life without the possibility of parole for first degree, special-circumstance murder, plus a consecutive determinate term of five years for the prior serious felony conviction. (CT 93-94; 6TRT 879-880.)

B. Morris's section 1172.6 petition

In 2022, Morris filed a petition for resentencing under section 1172.6. (CT 95-96.) Morris argued that he was entitled to an evidentiary hearing because his jury had been instructed on felony murder and it was unclear which theory of murder the jury had relied on in convicting him. (CT 269-270.) The district attorney countered that the jury's special-circumstance findings meant that it necessarily determined Morris was either the actual killer or an aider and abettor who acted with intent to kill; as a result, the district attorney argued, Morris remained guilty of murder under current law, making him ineligible for resentencing relief. (CT 107-108; RT 8-12.)

Following a hearing, the trial court determined that Morris was ineligible for relief because the special-circumstance instructions given at his trial showed that the jury found he acted with the intent to kill. (CT 271-272; RT 14-15.) The court reasoned that this conclusively established Morris would still be guilty of murder under current section 189, subdivision (e)(2), which provides that a person who participates in a designated felony resulting in death is guilty of murder if the person "was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted

the actual killer in the commission of murder in the first degree." (CT 271-272.) The court therefore dismissed Morris's petition for failure to make a prima facie case. (CT 272.)

C. The Court of Appeal's decision

On appeal, Morris argued that, in addition to a new intent-to-kill mens rea requirement, section 189, subdivision (e)(2), as amended, also imposes a new actus reus requirement for felony murder, different from the one his trial jury found. (Opn. 2, 8.) In his view, the language in subdivision (e)(2) requiring that the defendant aid the actual killer "in the commission of murder in the first degree" means that the defendant must aid in the killing itself, and not merely in the underlying felony. (Opn. 2, 8.) Thus, according to Morris, his trial jury's intent to kill finding was, without more, insufficient to preclude relief under section 1172.6. (Opn. 3.)

The Court of Appeal affirmed. It reasoned that the phrase, "in the commission of murder in the first degree," is a "legal term of art" that "is not limited to assisting the killing itself." (Opn. 9.) It explained that "[s]omeone who personally commits what turns out to be the homicidal act while acting in furtherance of the common design of an enumerated felony, would also be guilty of first degree murder as an actual killer under the amended statutes." (Opn. 9.) And thus, "all others who are engaged in the commission of the felony—i.e., acting in furtherance of the common design—would necessarily be aiding the killer in the commission of murder in the first degree." (Opn. 10.) As a result, "the actus reus required for those possessing an intent to kill is

simply aiding the underlying felony in which a qualifying death occurs." (Opn. 10.)

The Court of Appeal found support for this interpretation in *Curiel*, *supra*, 15 Cal.5th 433, which in the course of its analysis adverted to "the jury findings that would ordinarily preclude a nonkiller felony-murder defendant from resentencing eligibility." (Opn. 10.) Speaking hypothetically, this Court in *Curiel* observed that jury findings of "intent to kill," "the commission or attempted commission of a felony enumerated in the statute," and "the death of a person during the commission or attempted commission of the enumerated felony" "would conclusively establish all of the elements of felony murder under current law" and thus would "completely refute a petitioner's allegations" under section 1172.6. (Opn. 10, quoting *Curiel*, at p. 464.) The Court of Appeal relied on these statements as "clarify[ing] that the actus reus embodied in section 189, subdivision (e)(2) is simply aiding the enumerated felony (or attempted enumerated felony)." (Opn. 10.)

The court found further support for its reading in *Dickey*, *supra*, 35 Cal.4th 884. (Opn. 11.) This Court in *Dickey* interpreted the meaning of language from the former felony-murder special-circumstance statute (§ 190.2, former subdivision (b)), which applied to "[e]very person whether or not the actual killer found guilty of intentionally *aiding, abetting . . . or assisting* any actor *in the commission of murder in the first degree*." (Opn. 11, internal quotation marks omitted.) Rejecting the defendant's argument that the prosecution was required to

prove he "assisted in the killings themselves" and not just the underlying felonies, the Court in *Dickey* explained that "assisting the underlying felony satisfies the actus reus embodied by the phrase 'assisting someone in the commission of murder in the first degree.'" (Opn. 11.) Recognizing that the Court in *Dickey* interpreted a statute that used the phrase "any actor," whereas the statute here uses the term "actual killer," the Court of Appeal held the distinction to be "of no import to the issue before us." (Opn. 11.) Instead, the court noted that, both before and since the statutory amendments, "the person who kills while acting in furtherance of the common design of the underlying felony is the actual killer and is guilty of first degree murder" without regard to his or her mental state. (Opn. 11.)

The court further reasoned that its interpretation was "consistent with the legislative history of Senate Bill 1437." (Opn. 11.) Citing the "Legislature's expressed purposes" for the statutory amendments—ensuring murder liability is imposed only on a person who was the actual killer, acted with the intent to kill, or was a major participant in the underlying felony who acted with reckless indifference to human life—the court noted that the "second category" focused only on mens rea and not actus reus. (Opn. 11-12.) The Court of Appeal also reasoned that its conclusion was supported by the final Senate report, which noted that the Legislature did not intend to eliminate the felony-murder rule. (Opn. 12.) Instead, the Legislature's intent was to "'merely revise the felony-murder rule to prohibit a participant in the commission or attempted commission of a felony that has

been determined as inherently dangerous to human life to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act.'" (Opn. 12.)

In addition, the Court of Appeal reasoned that Morris's interpretation "runs contrary to express legislative intent" to "'more equitably sentence offenders in accordance with their involvement in homicides.'" (Opn. 12.) The court observed that, under his interpretation, a person who acted with the heightened mental state of express malice would be required to engage in the more significant act of assisting with the actual killing, while a person harboring the less culpable mental state of reckless indifference to human life would need only have acted as a major participant in the underlying felony (§ 189, subd. (e)(3)). (Opn. 12.)

The Court of Appeal also distinguished the decision in *People v. Ervin* (2021) 72 Cal.App.5th 90, on the basis that it involved "peculiarities" not present here. (Opn. 12-14.) It observed that the instructions in *Ervin*, combined with the argument and jury findings, suggested the jury might have found the special-circumstance allegations true without a finding of intent to kill. (Opn. 13-14.) The court explained that, in contrast to the instructions in *Ervin*, "the special circumstance instruction given in this case clearly required a finding of intent to kill." (Opn. 14.) It reasoned that Morris's jury also "necessarily found defendant was engaged in committing the underlying felonies with 'the killer' at the time the homicidal act took place" and that this finding was sufficient to establish that Morris aided, abetted or

assisted "the actual killer in the commission of murder of the first degree" as it had interpreted that component of section 189, subdivision (e)(2). (Opn. 15.) Thus, the court concluded, "[b]ecause the jury's verdicts embody findings that could lead to defendant being convicted under amended section 189, the record of conviction demonstrates as a matter of law defendant is not eligible for resentencing under section 1172.6." (Opn. 15.)

One justice dissented. The dissent reasoned that the plain language of subdivision (e)(2) unambiguously requires assistance in the killing itself. (Dis. Opn. 2-3.) In the dissent's view, the language interpreted in *Dickey* was materially different from the language of the amended felony-murder statute, and therefore "*Dickey* does not apply to California's current felony-murder rule." (Dis. Opn. 4-5.) Accordingly, the dissent would have reversed the trial court's decision because Morris's record of conviction did not show that his trial jury made any finding consistent with a new actus reus requirement. (Dis. Opn. 6-7.)

ARGUMENT

I. AMENDED SECTION 189, SUBDIVISION (E)(2), DOES NOT REQUIRE THE FELONY-MURDER AIDER AND ABETTOR TO ASSIST IN THE KILLING ITSELF

Morris's challenge to the Court of Appeal's decision rests on his contention that, in amending section 189, the Legislature changed the actus reus required for felony-murder liability as a nonkiller aider and abettor so that subdivision (e)(2) now requires aiding, abetting, or otherwise assisting in the killing itself rather than the underlying felony. (OBM 18-51.) But section 189, subdivision (e)(2)'s language, structure, and relationship to the

other felony-murder provisions, together with its legislative history, establish that the Legislature intended to modify only the mens rea requirement for this theory of liability by requiring that the nonkiller aider and abettor act with the intent to kill; it did not modify, or intend to modify, the necessary actus reus, which requires only aiding and abetting in the underlying felony.

A. SB 1437's changes to the felony-murder rule

The felony-murder rule in California has a long history, tracing its origins to the California Penal Code of 1872 and dating as far back as 1850. (See *People v. Dillon* (1983) 34 Cal.3d 441, 465-467, fn. 14 [discussing history of California's felony-murder rule]; *People v. Garcia* (2022) 82 Cal.App.5th 956, 962.) The traditional contours of the rule are well known: "The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state." (*People v. Chun* (2009) 45 Cal.4th 1172, 1182.) In this regard, the felony-murder rule has operated (and it still operates, as applied to actual killers) as an exception to the general requirement in California that a person act with express or implied malice to be guilty of murder. (§ 187, subd. (a); § 188, subd. (a); § 189, subds. (a), (e)(1)); see, e.g., *People v. Robertson* (2004) 34 Cal.4th 156, 165.)

The historical rationale for the felony-murder rule was to "deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Washington* (1965) 62 Cal.2d 777, 781.) Accordingly, the only mental state required for felony murder at the time was the

specific intent to commit the underlying felony. (*People v. Cavitt* (2004) 33 Cal.4th 187, 197.) That intent, in turn, served to "impute[] the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life." (*People v. Baker* (2021) 10 Cal.5th 1044, 1105, internal quotation marks and citation omitted; see also *Washington*, at p. 780.) Accordingly, a death resulting from the commission of one of the felonies listed in section 189 was first degree murder, regardless of intent or foreseeability. (*People v. Burton* (1971) 6 Cal.3d 375, 387-388, disapproved on other grounds in *People v. Lessie* (2010) 47 Cal.4th 1152, 1165-1168; *Dillon*, *supra*, 34 Cal.3d at p. 477.)

Historically, the imputation of malice in felony murder extended to both the killer and the nonkiller aider and abettor. For the actual killer, malice was (and still is) imputed based upon his or her intent to commit the underlying, inherently dangerous felony; no additional mental state need be shown. (*Baker*, *supra*, 10 Cal.5th at p. 1105; *Washington*, *supra*, 62 Cal.2d at p. 780; see § 189, subd. (e)(1).) For the nonkiller aider and abettor, however, the "complicity aspect" of the felony-murder rule also required, for imputation, that the killing be logically and transactionally related to the underlying felony aided and abetted. (*Cavitt*, *supra*, 33 Cal.4th at p. 193.) Where those circumstances were met, the felony-murder rule allowed for murder liability to be imposed on even a nonkiller aider and abettor who acted without malice, under the rationale that the malice otherwise required for murder would be imputed to him or her by virtue of his or her

participation in the underlying felony. (*Baker*, at p. 1105; *Cavitt*, at p. 193.)

Senate Bill No. 1437 brought about a marked change to these principles. It sought to more equitably punish offenders in accordance with their involvement in homicides by barring the imputation of malice based solely on a person's involvement in a lesser crime. (See § 188, subd. (a)(3) ["Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime"]; *Gentile*, *supra*, 10 Cal.5th at pp. 838-839, 846; Stats. 2018, ch. 1015; see also Stats. 2021, ch. 551.)

Pertinent here, section 189, as amended by SB 1437, defines the current scope of felony murder. Subdivision (a) of that section provides that first degree murder is all murder "committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287, 288, or 289." (§ 189, subd. (a).) Subdivision (e) then delineates the specific applications of felony-murder liability. It states:

> (e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
>
> (1) The person was the actual killer.
>
> (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted

> the actual killer in the commission of murder in the first degree.
>
> (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(§ 189, subd. (e).)

Thus, in the felony-murder context, no longer may one's intentional participation in an underlying felony as an aider and abettor serve as a substitute for malice; rather, he or she must have possessed the intent to kill (§ 189, subd. (e)(2)) or been a major participant acting with reckless indifference to human life (§ 189, subd. (e)(3)).

B. The text of section 189, subdivision (e)(2), requires that the aider and abettor acting with intent to kill only assist in the underlying felony

In construing a statute, the reviewing court's fundamental task is "'to determine the Legislature's intent so as to effectuate the law's purpose.'" (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) "'We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent.'" (*Ibid.*) Section 189, subdivision (e)(2)'s text establishes that SB 1437 did not change the actus reus for felony-murder aiding and abetting committed with the intent to kill. The actus reus remains that the aider and abettor must assist in the underlying felony in which the death occurs.

Section 189, subdivision (e)(2), now provides that a participant in the perpetration or attempted perpetration of an enumerated felony in which a death occurs is liable for murder if "[t]he person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree." (§ 189, subd. (e)(2).) And "murder of the first degree" in the context of felony murder, is defined as all murder "that is committed in the perpetration of, or attempt to perpetrate" certain enumerated felonies. (§ 189, subd. (a).)

Under these statutory provisions, first degree felony murder is composed not only of the killing itself, but also the perpetration of the underlying, statutorily enumerated felony from which the death results. (§ 189, subd. (a); *People v. Wilkins* (2013) 56 Cal.4th 333, 346-347 [felony murder is a killing that occurs as part of the same "continuous transaction" as the underlying felony].) By aiding and abetting the felony that is a prerequisite to felony murder, the aider and abettor has committed the actus reus of aiding and abetting "the commission of murder in the first degree," as section 189, subdivision (e)(2) requires. (See *People v. Lopez* (2023) 88 Cal.App.5th 566, 578 [plain language of section 189 shows that "assisting a qualifying felony in which a death occurs is the same as assisting the actual killer in committing first degree murder"].) As noted by the Court of Appeal below, because felony murder requires, as it always has, that one of the participants kill "while acting in furtherance of the common design" (*Washington*, *supra*, 62 Cal.2d at pp. 777, 782), "all others

who are engaged in the commission of the felony—i.e., acting in furtherance of the common design—would necessarily be aiding the killer in the commission of murder in the first degree. Thus, the actus reus required for those possessing an intent to kill is simply aiding the underlying felony in which a qualifying death occurs." (Opn. 9-10.)

That reading of the text is reinforced by the Legislature's choice to employ a phrase already ascribed a particularized meaning by this Court in the context of felony murder: "in the commission of murder in the first degree." In *Dickey*, *supra*, 35 Cal.4th 884, this Court addressed the defendant's claim that the felony-murder special circumstance required proof that he not only aided and abetted the underlying burglaries but that he also assisted in the killings. (*Id*. at p. 900.) In support of his contention, the defendant relied upon the following italicized language in the former special-circumstance statute: "'Every person whether or not the actual killer found guilty of intentionally *aiding*, *abetting* . . . *or assisting* any actor *in the commission of murder in the first degree* shall suffer death or confinement in state prison for a term of life without the possibility of parole.'" (*Ibid*., citing § 190.2, former subd. (b).) Rejecting the defendant's claim, this Court held that "[a]ll persons aiding or abetting the commission of burglary or robbery are guilty of first degree murder when one of them kills while acting in furtherance of the common design." (*Ibid*.) Thus, this Court held, section 190.2, former subdivision (b), "is not helpful to defendant because, under the felony-murder doctrine, he *was*

found guilty of aiding or abetting first degree murders." (*Ibid.*, original italics.)

The operative language interpreted by this Court in *Dickey* ("aiding, abetting . . . or assisting . . . in the commission of murder in the first degree") is nearly identical to the language used in section 189, subdivision (e)(2) ("aided, abetted . . . or assisted . . . in the commission of murder in the first degree"). That the Legislature imported this language from the special-circumstance statute into the felony-murder statute indicates an intent that it be interpreted consistent with *Dickey*. (See *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [where Legislature amends statute without changing provisions previously construed by courts, Legislature is presumed to have acquiesced in judicial construction]; see also *Lopez*, *supra*, 88 Cal.App.5th at p. 578 ["because the Legislature used the same phrase interpreted in *Dickey* when amending section 189 to state the new felony-murder rule, we assume they intended it to have the same meaning"].)

The Legislature's intent to import the *Dickey* interpretation into section 189, subdivision (e)(2), is also apparent from the fact that the new felony-murder statute, more broadly, "repurposes preexisting law governing felony-murder special-circumstance findings" by incorporating them into section 189, subdivision (e). (*Strong*, *supra*, 13 Cal.5th at p. 703; see *People v. Vang* (2022) 82 Cal.App.5th 64, 83 ["Senate Bill 1437 made the crime of felony murder subject to the same elements of proof required for a felony-murder special-circumstance finding under section

190.2"].) That is, the three categories that now define the reach of felony-murder liability are the same three categories traditionally used for the felony-murder special circumstance: the actual killer, who need not have the intent to kill (§§ 189, subd. (e)(1), 190.2, subd. (b)); the aider and abettor who does not kill but with the intent to kill aids and abets "the commission of murder in the first degree" (§§ 189, subd. (e)(2), 190.2, subd. (c)); and the aider and abettor who neither kills nor possesses the intent to kill but is a major participant who acts with reckless indifference to human life (§§ 189, subd. (e)(3); 190.2, subd. (d)). There is no indication that the Legislature sought to import "as-is" the provisions concerning actual killers or major participants with reckless indifference, but not the provision governing those who do not kill but possess the intent to kill, particularly considering that the Legislature chose to use the same language addressed in *Dickey*: "the commission of murder in the first degree."

Morris's attempts to distinguish *Dickey* are unavailing. He first contends that the Legislature's use of the phrase "actual killer," rather than "any actor" as used in section 190.2, subdivision (c), means that "it is no longer sufficient for a non-killer participant to simply aid *any* participant in the underlying felony; rather, in order to be liable for murder under the felony-murder doctrine, a non-killer participant must aid the actual killer." (OBM 42.) But this Court in *Dickey* did not rely upon the "any actor" language in its interpretation of the role an aider and abettor must fulfill to be guilty under the special circumstance.

(See *People v. Lopez* (2024) 104 Cal.App.5th 616, 622 [the "any actor" language "made no difference at all to the arguments made in *Dickey*"].) Instead, this Court focused on the meaning of the italicized portion of the phrase, "*aiding, abetting, or assisting* any actor *in the commission of murder in the first degree*." (*Dickey*, at p. 900, original italics.)

Moreover, Morris's reliance on the phrase "actual killer" as opposed to "any actor" overlooks that, notwithstanding the difference in wording, their import is the same with respect to the relevant issue here. Both apply to one who, acting with the intent to kill, aids and abets the joint felonious enterprise in which the actual killer participated and which results in a death. The "actual killer" language accurately reflects the relationship between the perpetrator of the murder and his or her aiders and abettors in the commission of the felony that the felony-murder rule already required when the Legislature amended section 189. At that time, it was well established that the aider and abettor had to assist the actual killer in the commission of the underlying felony during which the killing is committed—and, hence, in the commission of first degree murder. (See *Dickey*, *supra*, 35 Cal.4th at pp. 900-904.) Existing law required not only that the aiding and abetting occur "while the killer was acting in furtherance of a criminal purpose common to himself and the accomplice, or while the killer and the accomplice were jointly engaged in the felonious enterprise" (*People v. Thompson* (2010) 49 Cal.4th 79, 117), but also that the killing itself be logically and transactionally related to the underlying felony (*Cavitt*, *supra*, 33

Cal.4th at pp. 193, 196). Thus, by aiding and abetting the underlying felony in which the actual killer is a joint participant and the killing logically related to the commission of the felony, the aider and abettor has necessarily assisted the actual killer in its commission.[3]

Accordingly, the actus reus required to commit felony murder as an aider and abettor with intent to kill is the same now as it was before SB 1437, regardless of section 189(e)(2)'s use of the term "actual killer" in place of "any actor." That is, the aider and abettor must by word or conduct aid, abet, counsel, command, induce, solicit, request, or assist the commission of the underlying felony in which the actual killer is a joint participant,

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[3] A long line of decisional law makes clear the historical requirement that the aider and abettor work in concert with (i.e., aid and abet) the actual killer in committing the underlying felony. (See, e.g., *People v. Vasquez* (1875) 49 Cal. 560, 562-563 [aider and abettor is guilty of first degree murder where associate kills in furtherance of common purpose of felony]; *People v. Olsen* (1889) 80 Cal. 122, 124 [approving instruction ascribing felony-murder liability to aiders and abettors where killing occurred in "prosecution of the common design"], overruled on other grounds in *People v. Green* (1956) 47 Cal.2d 209, 227, 232; *People v. Perry* (1925) 195 Cal. 623, 637-638 [affirming principle that all persons jointly engaged in perpetration of felony at time of killing guilty of first degree murder]; *People v. Martin* (1938) 12 Cal.2d 466, 472 [same]; see also *People v. Pulido* (1997) 15 Cal.4th 713, 721 [felony-murder liability "does not extend to a homicide completed before the accomplice's participation in the robbery began, because the killer and accomplice were not 'jointly engaged at the time of such killing'"].)

and the killing must be logically and transactionally related to that underlying felony and hence "committed in the perpetration of" it. (§ 189, subd. (a); *Thompson*, *supra*, 49 Cal.4th at pp. 116-117; *Cavitt*, *supra*, 33 Cal.4th at p. 196; *Pulido*, *supra*, 15 Cal.4th at pp. 716, 720.) But while this alone was sufficient to make the aider and abettor culpable for felony murder prior to SB 1437, current law also requires that the aider and abettor act with the intent to kill to be guilty of felony murder under current section 189, subdivision (e)(2). In this regard, SB 1437 affected only the mens rea, and not the actus reus, of felony murder for aiders and abettors acting with the intent to kill.

Morris also claims that the rationale of *Dickey* does not apply here because of the changes effectuated by the enactment of SB 1437. He argues that *Dickey*'s "fundamental premise" is no longer apt because that decision relied upon the "broad liability" under the felony-murder rule that the Legislature eliminated by its amendments to section 189. (OBM 46.) This argument, which echoes the dissenting opinion in *Lopez*, *supra*, 88 Cal.App.5th at pages 586-587, as well as the dissent below (Dis. Opn. 4), is flawed. There is no question that in this case, as in *Dickey*, a first degree felony murder was committed by the actual killer himself. The pertinent question, both here and in *Dickey*, is (and was): what act or acts did the aider and abettor have to commit in the assistance of *that* murder, either to be eligible for the section 190.2, subdivision (c), special circumstance (*Dickey*), or to be convicted of felony murder (the instant case). The answer to both is the same: the aider and abettor must have assisted in the

underlying felony, though not necessarily the killing itself. Again, the Legislature's use of the same phrase interpreted in *Dickey*—"commission of murder in the first degree"—is a strong indication that it intended the phrase to carry the same meaning when it later amended section 189. (See *People v. Wells* (1996) 12 Cal.4th 979, 986.)

Ervin, *supra*, 72 Cal.App.5th 90, which Morris cites, does not assist him. As Morris acknowledges, the *Ervin* court did not analyze the question presented here: whether section 189, subdivision (e)(2), requires assisting the killing itself or only assisting in the underlying felony. (OBM 43-44.) Indeed, there was no need for any such analysis in *Ervin* because, as the court noted, it was possible the jury rendered its true findings on the felony-murder special circumstances (which the prosecution had argued established an intent to kill) based on the mistaken understanding that an intent to kill was *not* required. (*Ervin*, at pp. 108-110.) Unsurprisingly, there is no discussion in *Ervin* of section 189, subdivision (e)(2)'s use of the phrase "in the commission of first degree murder," of *Dickey*'s interpretation of that phrase, or of the longstanding requirement that the aider and abettor work in concert with the actual killer in committing the underlying felony. "Cases are not authority, of course, for issues not raised and resolved." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 943.)

The exceptional circumstances in *Ervin*, moreover, easily distinguish that case. As *Ervin* explained, not only were the special-circumstance instructions in that case confusing, but the

prosecutor misstated the law concerning the special circumstances during closing argument by suggesting that an intent to kill was not required. (*Ervin*, *supra*, 72 Cal.App.5th at pp. 107-110.) Compounding this was the fact that the jury returned seemingly inconsistent verdicts by finding true the special-circumstance allegations while simultaneously finding not true the allegation that Ervin had personally used a firearm in the commission of the murder, despite the prosecution's theory at trial that Ervin was the shooter. (*Ervin*, at pp. 104, 108, 110-111.) As the Court of Appeal below noted, "Those exceptional circumstances are not present here." (Opn. 14.)

Morris further claims that reading subdivision (e)(2) to require assistance only in the underlying felony would make superfluous the concluding portion of that provision: "aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree." (OBM 30.) And he argues that the Legislature could instead have used language similar to that found in subdivision (e)(3), which references participation in the "underlying felony," had that been the intended meaning with respect to subdivision (e)(2). (OBM 28.) But the Legislature's choice of language in subdivision (e)(2), and any resulting surplusage, is readily explained by its adoption of the existing felony-murder special-circumstance language. (See *Strong*, *supra*, 13 Cal.5th at p. 703.) As this Court has observed, in crafting section 189, subdivision (e), the Legislature "repurposed" the felony-murder special-circumstance statute to define the new theories of non-special

circumstance felony murder. (*Ibid.*) In doing so, the Legislature imported some language that, without affecting the meaning of section 189, subdivision (e)(2), was not in its original form specifically tailored for the non-special circumstance felony-murder context.

As relevant to Morris's argument, the major-participant-with-reckless-indifference special circumstance—section 190.2, subdivision (d)—applies to felony murder only. (See § 190.2, subd. (d) ["every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or *assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons*, and who is found guilty of murder in the first degree therefor," italics added]; see also *Tison v. Arizona* (1987) 481 U.S. 137.) Section 190.2, subdivision (c), however, is not so limited. It applies more broadly to those who aid and abet *any* first degree murder specified in section 189, subdivision (a), so long as any special circumstance listed in section 190.2, subdivision (a), is found to be true. (See § 190.2, subd. (c) ["Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree"]; § 189, subd. (a) [listing various forms of first degree murder].) To capture its more extensive application, section 190.2, subdivision (c), uses the term "commission of murder in the first degree" rather than limiting its language to the felony-murder special circumstance

only. But in the specific context of felony murder, "commission of murder in the first degree" has a narrower meaning: it requires aiding and abetting the underlying felony rather than the killing itself. (*Dickey*, *supra*, 35 Cal.4th at p. 900.) It was that meaning that the Legislature sought to import into section 189, subdivision (e)(2), by the use of that particular phrase.[4]

In a similar vein, Morris argues that a reading of section 189, subdivision (e)(2), requiring only assistance in the underlying felony would make unnecessary element 5B of CALCRIM No. 540B, the jury instruction governing nonkiller felony-murder liability. (OBM 31-32.) This is so, Morris asserts, because the instruction states that the aider and abettor, with the intent to do so, must have aided and abetted an enumerated felony (CALCRIM No. 540B, elements 1, 2), and it also states that the aider and abettor must have aided and abetted the perpetrator "in the commission of first degree murder" (CALCRIM No. 540B, element 5B). (OBM 31-32.) Though perhaps imperfectly designed, this instruction does not reflect any new or additional element of aiding in the actual killing, but rather overlapping statements of the same element of aiding in the underlying felony.

CALCRIM No. 540B addresses liability for nonkiller felony murderers under both subdivision (e)(2) and subdivision (e)(3) of

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[4] And in contrast to the partial redundancy that Morris claims would result from the Court of Appeal's reading, Morris's interpretation would render section 189, subdivision (e)(2), surplusage *in its entirety*, by making it wholly redundant to other, existing theories of murder liability. (See section C, *post*.)

section 189. (CALCRIM No. 540A is the felony-murder instruction for the actual killer.) CALCRIM No. 540B first describes generally that the defendant under either theory must have intentionally aided and abetted the underlying felony (elements 1, 2) and that the actual killer must have also participated in the underlying felony and caused a death during its commission (elements 3, 4). The instruction then adds additional language pertaining specifically to each theory, to be read depending on which theory is at issue in the trial. As for the subdivision (e)(2) theory, that additional language reflects the principles imported from section 190.2, subdivision (c): that the defendant must have intended to kill and must have aided the actual killer in the commission of first degree murder (elements 5A, 5B). (See Judicial Council of Cal. Crim. Jury Instructions (2024 edition), Introduction to Felony-Murder Series, at p. 275 [as a result of changes enacted by SB 1437, "the committee has modified CALCRIM Nos. 540B and 540C to incorporate the additional statutory elements for accomplice liability"].) It is evident that this structure results in some duplication, since, as explained, aiding and abetting in the underlying felony is legally equivalent in this context to aiding and abetting the actual killer in first degree murder. But the redundancy has no bearing on Morris's legal claim. As he acknowledges, a jury instruction is not the law. (OBM 32, fn. 7; see *People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7.) Even if the instruction's design might be improved to more closely align with the statutory elements of

each individual theory, that does not affect the proper legal interpretation of section 189, subdivision (e).

C. Morris's contrary interpretation makes subdivision (e)(2) superfluous and the overall structure of the felony-murder statute illogical

In addition to the plain text of the statute, another interpretive consideration strongly counsels against Morris's reading of section 189, subdivision (e): requiring the aider and abettor to aid in the commission of the killing itself would make subdivision (e)(2) superfluous to other theories of murder liability. (See *People v. Arias* (2008) 45 Cal.4th 169, 180 [courts obligated to avoid statutory interpretation that renders provision superfluous].) If section 189, subdivision (e)(2), requires aiding and abetting the killing itself with the intent to kill, then guilt under that subdivision necessarily equates to guilt as a direct aider and abettor to murder. (See *Curiel*, *supra*, 15 Cal.5th at p. 467 [defining direct aider and abettor liability]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1142 [noting former section 190.2, subd. (b) uses language that traditionally describes aider and abettor]; CALCRIM No. 540B [bench notes directing court to "[g]ive all appropriate instructions on aiding and abetting and/or conspiracy with this instruction"]; CALCRIM No. 401 [Aiding and Abetting: Intended Crimes].)[5]

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[5] *People v. Kelly* (2024) 105 Cal.App.5th 162 held that a finding under section 189, subdivision (e)(2), would not equate to direct aiding and abetting because the statute does not include all of the necessary elements of accomplice liability. (*Id.* at p. 176.) But as the *Kelly* court acknowledged, the statute uses

(continued…)

Similarly, such a finding would equate to guilt of felony murder as a major participant acting with reckless indifference to human life. (§ 189, subd. (e)(3).) This is because an intent to kill subsumes the lesser mens rea of reckless indifference, and one who directly aids and abets the actual killer in a killing committed in the course of a felony is necessarily a major participant in it. (See *People v. Clark* (2016) 63 Cal.4th 522, 611 [ultimate question as to major participation is whether involvement in criminal activity known to carry grave risk of death is sufficiently significant to be considered "major"].)

In addition, Morris's interpretation makes "little sense" in light of the overall design of section 189, subdivision (e). (*Lopez*, *supra*, 104 Cal.App.5th at pp. 622-623.) As correctly observed by the Court of Appeal below, section 189, subdivision (e)'s structure is most logically understood as increasing the actus reus requirement for felony murder as the mens rea decreases. (See

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"language that is commonly associated with direct aiding and abetting." (*Ibid.*) And the pattern instruction for felony murder (CALCRIM No. 540B) directs the trial court to instruct separately on the elements of aiding and abetting when the prosecutor relies on that theory of liability. That section 189, subdivision (e)(2), does not itself encompass all the requirements of aiding and abetting is neither unusual nor legally significant. The statute generally establishing accomplice liability does not do so either. (See § 31 ["All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed"].) The full legal requirements are to be conveyed through the instructions as appropriate in a particular case. (See CALCRIM No. 540B, bench notes.)

People v. Banks (2015) 61 Cal.4th 788, 800 [identifying "spectrum" of participation for felony murderers as "'minor actor in an armed robbery, not on the scene,'" with no "'culpable mental state'" to the "other extreme" of "actual killers and those who attempted or intended to kill" with "gray area" in between of "major participation" acting with "reckless indifference to human life"]; see also *Tison*, *supra*, 481 U.S. at p. 155 [describing cases with major participation and culpable mens rea of less than intent to kill as "midrange felony-murder cases"]; *People v. Navarro* (2021) 12 Cal.5th 285, 308 ["Section 190.2, subdivision (d), however, applies *only* to defendants who lacked the intent to kill and did not actually kill"].) But interpreting subdivision (e)(2) to require assistance in the killing itself would mean that the actor with the greater mental state of an intent to kill would also be required to have engaged in the greater actus reus of assisting the actual killing, while under section 189, subdivision (e)(3), an aider and abettor who acted with the lesser mental state of reckless indifference to human life would be required to have engaged only in the lesser actus reus of major participation in the underlying felony. (See Opn. 12; *Lopez*, *supra*, 104 Cal.App.5th at pp. 622-623 [rejecting claim identical to that presented by Morris on the basis that, inter alia, under that view, "section 189, subdivision (e)(2) becomes incongruous with subdivision (e)(3)"].)

Morris argues that this concern is "unfounded" since "it is entirely possible" that the interpretation of the Court of Appeal below would capture situations at odds with the proportionality

design it highlighted. (OBM 36.) He observes that a person who is a minor participant in the felony but acts with intent to kill—who would be guilty under the Court of Appeal's interpretation—could be "less culpable" than a major participant who acted with reckless indifference to human life. (OBM 36-37, citing *Kelly*, *supra*, 105 Cal.App.5th at p. 175.) But even if that assessment is accurate, the hypothetical misses the point. The Legislature's design of section 189, subdivision (e), does not reflect decreasing overall "culpability"—after all, any form of felony-murder liability under subdivision (e) equates to guilt for the crime of murder. Rather, the statutory design reflects an inversely proportional relationship between actus reus and mens rea requirements. Morris's hypothetical is consistent, rather than inconsistent, with that design.[6]

Requiring proof that a defendant aided and abetted the killing itself would also lead to the anomalous result that a higher level of culpability would be necessary to sustain a conviction of the substantive crime of first degree felony murder than for the corresponding special circumstance that establishes death penalty eligibility. (See *Dickey*, *supra*, 35 Cal.4th at pp. 900-904 [in felony-murder context, aiding and abetting "the commission of first degree murder" requires aiding and abetting of the underlying felony only].) Notably, the special

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[6] Even on its own terms, moreover, Morris's argument is unpersuasive. That there "could be situations" (*Kelly*, at p. 175) that would be anomalous under a statutory structure generally reflecting decreasing levels of overall culpability would simply be the exception that proves the rule.

circumstances were designed to narrow the class of death-eligible murderers, as required by the Eighth and Fourteenth Amendments. (*People v. Johnson* (2016) 62 Cal.4th 600, 654-655.) In other words, death penalty eligibility determinations were meant to create a subset of murder defendants generally. (See *People v. Arias* (1996) 13 Cal.4th 92, 187.)

It is true that a scheme creating identical categories of liability for the substantive charge and the associated special circumstance would not be constitutionally proscribed because it would continue to adequately narrow the class of death-eligible defendants to first degree felony murderers from all potential murder defendants. (See *Johnson*, *supra*, 62 Cal.4th at p. 636; *People v. Wilkins* (2021) 68 Cal.App.5th 153, 165.) But that scheme would nevertheless contravene the Legislature's intent in establishing a capital sentencing regime and would turn the constitutionally-mandated narrowing process on its head. (*People v. Mendoza* (2000) 23 Cal.4th 896, 908 [court must construe text in context, keeping in mind the nature and obvious purpose of the statute, and must harmonize various parts of statute].)

D. Legislative history also shows that SB 1437 did not change the actus reus for felony-murder liability as an aider and abettor with intent to kill

The legislative history of SB 1437 confirms the foregoing textual and structural analyses. (See *Cornett*, *supra*, 53 Cal.4th at p. 1265 [if statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be

remedied, the legislative history, public policy, and the statutory scheme encompassing the statute].)

SB 1437's primary purpose was to bar the imputation of malice to aiders and abettors to murder. (See Stats. 2018, ch. 1015, § 1, subds. (f), (g); Sen. Comm. On Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.) Feb. 16, 2018, at p. 2.) In 2017, following this Court's abolishment of the natural and probable consequences doctrine as a basis for first degree murder liability in *People v. Chiu* (2014) 59 Cal.4th 155, the Legislature adopted Senate Concurrent Resolution No. 48 to address the reform it perceived was needed "to limit convictions and subsequent sentencing in both felony murder cases and aider and abettor matters prosecuted under 'natural and probable consequences.'" (Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.) (SCR 48).) Regarding felony murder, SCR 48 expressed concern about the "disproportionality of sentencing individuals who had no malice or intent to kill the same as perpetrators of the fatal act." (SCR 48.) That is, felony-murder defendants "are not judged based on their level of intention or culpability but are sentenced as if they had the intent to kill," even where "the defendant did not do the killing, and even if the killing was unintentional, accidental, or negligent." (SCR 48.) In the Legislature's view, the felony-murder rule circumvented important due process principles insofar as it allowed a defendant who neither intended to kill nor committed the homicidal act to be convicted and sentenced "the same as for

those who committed a murder with malice aforethought." (SCR 48.)

In its findings and declarations accompanying SB 1437, the Legislature noted that the concerns it had expressed in SCR 48—that the felony-murder rule and the natural and probable consequences doctrine unfairly allowed nonkiller aiders and abettors who had acted without malice to be convicted and sentenced as if they had the intent to kill—was the genesis for SB 1437 itself. (See Stats. 2018, ch. 1015, § 1, subd. (c) [SCR 48 "outlines the need for the statutory changes contained in this measure"].) Consistent with this purpose, the Legislature declared in enacting SB 1437 that a change to the law of murder in California was necessary "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subds. (b), (d), (f), § 2; *Gentile*, *supra*, 10 Cal.5th at p. 842; *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)

Separate reports by the Senate and Assembly committees on public safety include a statement by SB 1437's principal author, Senator Nancy Skinner, criticizing the felony-murder rule's imputation of malice to those who never intended to kill:

> In criminal justice, a person's intent is a critical element to determine punishment for a criminal offense, with one glaring exception. Under current California law, prosecutors are able to replace the intent to commit murder with the intent to commit a felony if the felony results in a death. Thus, a person

> can be found guilty of murder if a death occurs while a felony is committed. It does not matter whether the death was intended or whether a person had knowledge that the death had even occurred.

(Sen. Comm. on Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.) Feb. 16, 2018, at p. 3; Assem. Comm. On Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.), as amended May 25, 2018, at p. 4; see Assembly Floor Analysis, Aug. 21, 2018, SB 1437 (2017-2018) Reg. Sess., as amended Aug. 20, 2018, at p. 5; see also Assem. Comm. On Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.), as amended May 25, 2018, at p. 6 [felony-murder rule "broadly criticized" because "it does not require a defendant to have that state of mind which is generally required to establish culpability for a murder"].) Those reports explained that, to remedy this deficiency, SB 1437 would change the law so that "prosecutors would no longer be able to substitute the intent to commit a felony for the intent to commit murder." (Sen. Comm. on Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.) Feb. 16, 2018, at p. 4.) Instead, "a person may only be convicted of murder if the individual willingly participated in an act that results in a homicide or that was clearly intended to result in a homicide." (Sen. Comm. on Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.) Feb. 16, 2018, at p. 4; Assem. Comm. On Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.), as amended May 25, 2018, at p. 5.)

Thus, SB 1437's overarching purpose was to proscribe the imputation of malice that permitted nonkiller aiders and abettors to be convicted of and sentenced for murder without a culpable

mens rea related to the killing. The Senate Public Safety Committee report explained that SB 1437 would "not eliminate the felony murder rule" but its purpose was instead "to merely revise the felony murder rule to prohibit a participant in the commission or attempted commission of [an inherently dangerous felony] to be imputed to have acted with implied malice, unless he or she personally committed the homicidal act." (Sen. Comm. on Public Safety Report on SB 1437 (2017-2018 Reg. Sess.) Feb. 16, 2018, at p. 8.) This statement of purpose was consistently repeated as SB 1437 proceeded through the legislative process. (See Sen. Rules Comm., Off. Of Sen. Floor Analyses, 3rd reading, Analysis of SB 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, at p. 6; Sen. Rules Comm., Off. Of Sen. Floor Analyses, Unfinished Business, Analysis of SB 1437 (2017-2018 Reg. Sess.) as amended August 20, 2018, at p. 7.)

In identifying aspects of the felony-murder rule that were deficient and in need of amendment, the principal author of the bill focused on the aider and abettor's mental state. Citing *Dillon*, *supra*, 34 Cal.3d at p. 463, the author noted that this Court had "called the use of the felony-murder rule to charge those who did not commit a murder, *or had no knowledge or involvement in the planning of the murder*, 'barbaric'." (Sen. Comm. on Public Safety, Analysis of SB 1437 (2017-2018 Reg. Sess.) as introduced Feb. 16, 2018, at p. 4, italics added.) Noting how other states had "narrowed the scope" of the felony-murder rule, the author pointed to Ohio's requirement that a "killing that

occurs during a felony must be an intentional killing in order to receive a first-degree murder conviction." (*Id.* at p. 4.)

In sharp contrast, in considering and then enacting SB 1437, the Legislature did not express any interest in modifying the actus reus necessary for felony-murder liability as an aider and abettor who acted with intent to kill. As the Court of Appeal below recognized, the focus for the category of persons described in section 189, subdivision (e)(2) "was the mens rea, not the actus reus." (Opn. 12; see also *Lopez*, *supra*, 104 Cal.App.5th at p. 623 ["we are not aware of any legislative history suggesting that the Legislature intended to add a new actus reus element to section 189, subdivision (e)(2)"].) Nor did the Legislature express concern about the actus reus necessary for the intent-to-kill special circumstance which, as applied to felony murder, similarly requires only that the defendant aid and abet the underlying felony resulting in the killing. (*Dickey*, *supra*, 35 Cal.4th at pp. 900-904.)

Relying on *Curiel* and *Gentile*, Morris argues that "while Senate Bill 1437 had a primary focus on intent, that was not its *only* focus." (OBM 34-35.) According to Morris, "the amendments wrought by SB 1437 encompass more than just a defendant's mental state," and as a result, the conclusion that section 189, subdivision (e)(2), requires an intent to kill, but no additional actus reus, is wrong. (OBM 35.) Morris's reliance on *Curiel* and *Gentile* is misplaced. Neither case addressed felony murder. (*Gentile*, *supra*, 10 Cal.5th at p. 848 ["Section 189, subdivision (e) does not apply to this case; that provision addresses liability

under the felony-murder rule"]; *Curiel*, *supra*, 15 Cal.5th at p. 461 ["The amendments to section 189, concerning the felony-murder rule, are inapplicable here"].) And their holdings are otherwise inapplicable here.

In *Gentile*, this Court held that SB 1437 eliminated the doctrine of natural and probable consequences for second degree murder. (*Gentile*, *supra*, 10 Cal.5th at p. 851.) It rejected the argument, raised by the San Diego County District Attorney, that instead of eliminating the doctrine, the Legislature intended simply to amend it by superimposing on top of it an intent-to-kill requirement. (*Id*. at p. 849.) This Court held, instead, that the "most natural reading" of SB 1437's operative language limiting murder liability to those who personally acted with malice aforethought was that it eliminated altogether the natural and probable consequences doctrine. (*Ibid.)*

In *Curiel*, this Court held that a finding of intent to kill, standing alone, did not preclude resentencing relief for a defendant who had been convicted of murder based on the natural and probable consequences doctrine. (*Curiel*, *supra*, 15 Cal.5th at pp. 460-463.) This was so, the Court held, because the Legislature in enacting SB 1437 "sought to limit murder liability to established theories that incorporated the requisite intent; it did not intend to impose an intent requirement untethered from existing theories of liability." (*Id*. at pp. 462-463.) The Court observed that the specific mental state necessary for direct aiding and abetting liability is "aid[ing] the commission of that offense with knowledge of the direct perpetrator's unlawful intent and

with an intent to assist in achieving those unlawful ends," or "aid[ing] in the commission of a life-endangering act, with knowledge that the perpetrator intended to commit the act, intent to aid the perpetrator in the commission of the act, knowledge that the act is dangerous to human life, and acting in conscious disregard for human life." (*Id.* at p. 463, citations, internal quotation marks and brackets omitted.) Because an intent to kill, standing alone, did not necessarily establish that required mental state, this Court in *Curiel* held that the jury's intent-to-kill finding did not by itself bar resentencing relief. (*Ibid.*)

SB 1437 did not eliminate the felony-murder rule as it did the natural and probable consequences doctrine. And the "intent to kill" requirement for felony murder under amended section 189 is not "untethered from existing theories of liability." (*Curiel*, *supra*, 15 Cal.5th at p. 463.) Instead, the Legislature added the element of an intent to kill to the *existing* theory of felony murder. In its analysis, the Court of Appeal below determined that SB 1437 added only a mens rea requirement for nonkiller aiding and abetting felony-murder liability. (Opn. 8-9.) It did not hold that proving "intent to kill" by itself was sufficient to defeat a petition under section 1172.6 at the prima facie stage. Thus, *Curiel* and *Gentile* do not support Morris's contentions because they are not applicable to the determination whether SB 1437

affected the actus reus for felony-murder liability for nonkiller aiders and abettors.[7]

Beyond the legislative history of SB 1437 itself, the history of the enactment of the felony-murder special-circumstance statute is also relevant in light of the Legislature's decision to adopt specific language from that provision. (See *Villanueva v. Fidelity National Title Co.* (2021) 11 Cal.5th 104, 118-123 [analyzing legislative intent and rationale for earlier legislation in determining meaning of identical language in current statute]; see also *People v. Morales* (2016) 63 Cal.4th 399, 406 [when analyzing voter intent in enacting proposition, it is assumed voters were aware of earlier legislation and purpose behind it]; *People v. Butler* (1996) 43 Cal.App.4th 1224, 1244 [when analyzing legislative intent, it is assumed Legislature considered both the words of the federal statute it referenced and its legislative history].) Subdivisions (b) through (d) of section 190.2—on which the Legislature based the current version of section 189, subdivision (e)—were enacted by the voters through Proposition 115, codifying the decisions of *Anderson*, *supra*, 43 Cal.3d at p. 1147 and *Tison*, and a prior decision that is central to the rationale in *Tison*, *Enmund v. Florida* (1982) 458 U.S. 782. (Voter Information Guide for 1990, Primary (June 5, 1990)

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[7] Morris is thus mistaken in contending that the Court of Appeal's reading of section 189, subdivision (e)(2), creates "the only theory of guilt" under subdivision (e) that does not have an actus reus provision. (OBM 30-31.) The actus reus is, as it was prior to the enactment of SB 1437, aiding and abetting the underlying felony.

pp. 32-33, 66; *Banks*, *supra*, 61 Cal.4th at p. 794; *id*. at p. 806 [noting that "The facts and holding of *Enmund* are thus essential to an understanding" of the *Tison* "spectrum of culpable felony-murderer behavior"]; *People v. Mil* (2012) 53 Cal.4th 400, 408-409 [Proposition 115 added section 190.2, subdivisions (c) and (d) to expand aider and abettor felony-murder liability to person who intended to kill or was a major participant who acted with reckless indifference to human life]; *People v. Proby* (1998) 60 Cal.App.4th 922, 927-928 [section 190.2, subdivision (d) added by Proposition 115 to bring death penalty into conformity with *Tison*]; CALCRIM No. 703 [bench notes indicating that Proposition 115 codified decisions in *Anderson* and *Tison*].)

When the Legislature chose to import language from the special-circumstance statute, it also adopted the underlying rationale for those provisions. (*Villanueva, supra,* 11 Cal.5th at pp. 118-123; *Morales*, *supra*, 63 Cal.4th at p. 406.) *Tison*, in establishing constitutional limits on death penalty eligibility for felony murderers, established the major participant with reckless indifference to human life standard and was the basis for the provision adopted in section 190.2, subdivision (d), and later repurposed as section 189, subdivision (e)(3). (*Banks*, *supra*, 61 Cal.4th at p. 794 ["Section 190.2(d) was designed to codify the holding in *Tison*"].) Pertinent here, this Court in *Anderson*, *supra*, 43 Cal.3d 1104 held that "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved." (*Anderson*, at p. 1147.) The holding in *Anderson* thus

inspired the creation of section 190.2, subdivisions (b) and (c), in Proposition 115 and ultimately the importation of those provisions into section 189, subdivisions (e)(1) and (e)(2), as part of SB 1437. (*People v. Bonilla* (2007) 41 Cal.4th 313, 331, fn. 5 [principle from former section 190.2, subdivision (b) is "carried forward today in section 190.2, subdivision (c)"].)

As relevant to sections 190.2, subdivision (c) and 189, subdivision (e)(2), *Anderson*'s focus was the necessary mens rea for an aider and abettor in the underlying felony (*Anderson, supra*, 43 Cal.3d at p. 1147); it did not address the required actus reus for felony-murder liability for an aider and abettor (*Dickey*, *supra*, 35 Cal.4th at p. 901 ["The proposition advanced by defendant—for a felony-murder special circumstance, the aiding or abetting has to relate to the act of killing itself, rather than just the underlying felony—was not considered by the court in *Anderson*"]). Thus, the Legislature's enactment of SB 1437—modeling section 189, subdivision (e)(2), on section 190.2, subdivision (c), against the backdrop of the history of the special circumstance "intent to kill" provision—is further evidence that the Legislature intended to pair the mens rea of intent to kill with the actus reus traditionally required of the felony-murder aider and abettor: aiding and abetting the underlying felony. (*Navarro*, *supra*, 12 Cal.5th at p. 308 ["Section 190.2, subdivisions (b) and (c) subject defendants who were either the actual killer or possessed the intent to kill, respectively, to a felony-murder special circumstance *without* the finding of further elements," original italics].)

Morris claims that the procedural differences between a jury's finding of guilt under the felony-murder rule as contrasted with a finding on a felony-murder special circumstance make any comparison inapt. (OBM 44.) This is a distinction without a difference. Contrary to his premise, there is no "presumption of guilt" applied in the fact-finder's determination of a special circumstance. (OBM 45.) Instead, the procedure set forth in section 190.4 requires an independent decision beyond a reasonable doubt after "the trier of fact finds the defendant guilty of first degree murder." (§ 190.4, subd. (a); *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467 [after first phase to determine guilt or innocence of first degree murder, determination is made as to existence of special circumstance]; CALCRIM No. 700 ["The People have the burden of proving (the/each) special circumstance beyond a reasonable doubt"].) Section 190.4, subdivision (a), further requires the trier of fact to "make a special finding on the truth of each alleged special circumstance" based on "the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1." The statute states, "In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true." (§ 190.4, subd. (a).) That this beyond-a-reasonable-doubt finding is made after a determination of guilt does not affect the meaning of the applicable legal elements and therefore does not undermine the comparison to section 189 subdivision (e).

II. THE SUPERIOR COURT PROPERLY DENIED MORRIS'S PETITION FOR SECTION 1172.6 RELIEF AT THE PRIMA FACIE STAGE

On a proper reading of section 189, subdivision (e)(2), the findings made by Morris's jury that he acted with an intent to kill and that he aided and abetted the underlying felonies of rape and robbery were sufficient to preclude section 1172.6 relief at the prima facie stage. (See *Strong*, *supra*, 13 Cal.5th at p. 708 [dismissal appropriate at prima facie stage when "the petition and record in the case establish conclusively that the defendant is ineligible for relief"].)

At Morris's trial, the jury was instructed on two theories of first degree murder liability: premeditated and deliberate murder and felony murder. (6TRT 820-822, 822-824; CT 223-225; CALJIC Nos. 8.20, 8.21.) The jury was also instructed on direct aiding and abetting (6TRT 810-811; CT 218; CALJIC No. 3.01) and aiding and abetting an underlying felony (6TRT 823-824; CT 228; CALJIC No. 8.27). And the jury was instructed on the special circumstances of murder for financial gain (6TRT 827; CT 234; CALJIC No. 8.81.1), murder in the commission of a rape (6TRT 827; CT 235; CALJIC No. 8.81.17), and murder in the commission of a robbery (6TRT 828; CT 236; CALJIC No. 8.81.17).

The jury was further instructed that, to find any of the special circumstances true, it was required to find that Morris was either the actual killer or that he had acted as an aider and abettor with the intent to kill:

> If you find beyond a reasonable doubt that the defendant was either the actual killer or an aider or

> abettor but you are unable to decide which, then you must also find beyond a reasonable doubt the defendant with an intent to kill aided and abetted an actor in the commission of the murder in the first degree, in order to find the special circumstance to be true. On the other hand, if you find beyond a reasonable doubt that the defendant was the actual killer, you need not find the defendant intended to kill a human being in order to find the special circumstance true.

(6TRT 826; CT 233; CALJIC No. 8.80.)

As to the special-circumstance intent requirement for an accomplice, the trial court instructed:

> If you decide that the defendant is guilty of first degree murder but are unable to decide whether the defendant was the actual killer, then, when you consider the special circumstances, you must also decide whether the defendant acted with the intent to kill.
>
> In order to find the special circumstances true for a defendant who is not the actual killer, or when you cannot decide whether he is the actual killer or an aider and abettor, the People must prove beyond a reasonable doubt that the defendant acted with the intent to kill. If the People have not met this burden, you must find these special circumstances have not been proved true.

(6TRT 828-829; CT 237.)

The jury convicted Morris of first degree murder and found the rape and robbery felony-murder and the financial gain special circumstances to be true. (CT 89-93.)

Based on its findings as to the felony-murder special circumstances, the jury necessarily concluded, as Morris acknowledges (OBM 50), that he acted with intent to kill. And the jury further concluded that Morris aided and abetted the

commission of the underlying felonies of robbery and rape. The jury thus found that Morris assisted in the commission of murder in the first degree while acting with intent to kill. (§ 189, subd. (e)(2); *Curiel*, *supra*, 15 Cal.5th at p. 464 [jury findings can be considered to refute petition under section 1172.6 by establishing all of the elements of felony murder under current law].)

Morris's section 1172.6 petition was properly rejected at the prima facie stage for an additional reason as well, which satisfies even his own interpretation of subdivision (e)(2): the jury's true finding as to the financial gain special circumstance under section 190.2, subdivision (a)(1), established that Morris aided and abetted the killing itself with intent to kill. (CT 92 [verdict form].) "Under section 190.2, subdivision (a)(1), a defendant is subject to the [financial gain] special circumstance if the 'murder was intentional and carried out for financial gain.' Even if the defendant is 'not the actual killer,' if that defendant 'with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree,' he or she is also subject to this special circumstance. (§ 190.2, subd. (c).) 'Reading the two provisions together it is clear that one who intentionally aids or encourages a person in the deliberate killing of another for the killer's own financial gain is subject to the special circumstance punishment.'" (*People v. Fayed* (2020) 9 Cal.5th 147, 201-202.)

Morris's jury was instructed that the prosecution was required to prove: (1) the murder was intentional; (2) the murder was carried out for financial gain; and (3) the defendant believed

the death of the victim would result in the desired financial gain. (CT 234; CALJIC 8.81.1.) The trial court further instructed that, as to an aider and abettor, the jury was required to find "beyond a reasonable doubt the defendant with an intent to kill aided and abetted an actor in the commission of the murder in the first degree." (CT 233; CALJIC 8.80.)

Thus, the jury's true finding on the financial gain special circumstance necessarily established that the killing was intentional, the murder was carried out for financial gain, and that Morris (1) was the actual killer and intended to kill the victim, or (2) intentionally aided and abetted a person in the deliberate killing of another with the intent to kill. In other words, the jury's finding conclusively demonstrates that Morris aided and abetted the killing itself with intent to kill and is thus guilty of murder even under the interpretation of section 189, subdivision (e)(2), that Morris advances.

And in addition to felony murder, the jury's true finding as to the financial gain special circumstance encompassed all the elements of direct aiding and abetting. (*Curiel*, *supra*, 15 Cal.5th at p. 462 [petition under section 1172.6 "puts at issue all elements of the offense under a valid theory"]; *ibid.* [direct aiding and abetting remains valid theory of murder liability after enactment of SB 1437].) Direct aider and abettor liability requires proof in three distinct areas: the direct perpetrator's act of committing a crime, the aider and abettor's knowledge that the direct perpetrator intends to commit the crime or life-endangering act, and the aider and abettor's conduct that assists

the achievement of the crime. (*Id.* at p. 467.) In finding Morris guilty of the financial gain special circumstance here, the jury necessarily concluded that the direct perpetrator committed an intentional killing, that Morris acted with knowledge of the perpetrator's intent to commit a murder for financial gain and possessed the intent to kill, and that Morris aided and abetted the deliberate killing.

CONCLUSION

The judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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March 26, 2025

CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13-point Century Schoolbook font and contains 12,169 words.

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March 26, 2025

SD2024802545

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Case Name: ***People v. Morris***
No.: **S284751**

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Clerk of the Court
Honorable Lewis Clapp, Judge
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California Court of Appeal
Fourth Appellate District, Division Three
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Kimberly Wickenhagen	s/ Kimberly Wickenhagen
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

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