No. S270723

In the Supreme Court of the State of California

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

v.

ANDRES QUINONEZ REYES,
Defendant and Appellant.

Fourth Appellate District, Division Three, Case No. G059251
Orange County Superior Court, Case No. 04CF2780
The Honorable Richard M. King, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

OTHER AUTHORITIES

ISSUES PRESENTED FOR REVIEW

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

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

INTRODUCTION

Petitioner Andres Reyes participated in a gang confrontation where one of his fellow gang members shot and killed an associate of their rival gang. Reyes was convicted of second degree murder in 2006. In 2019, after the Legislature passed Senate Bill No. 1437, Reyes filed a petition under Penal Code[1] section 1170.95 requesting vacatur of his murder conviction because it could have been premised on a natural and probable consequence theory. The superior court conducted an evidentiary hearing and independently reviewed the evidence. It concluded that Reyes was not entitled to relief, because the prosecution had proved beyond a reasonable doubt that he was guilty of murder with implied malice. The Court of Appeal affirmed, and Reyes petitioned this Court for review. This Court granted his petition and directed the parties to address whether substantial evidence supports the superior court's finding that Reyes is guilty of murder.

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

Substantial evidence supports the superior court's conclusion that Reyes acted with implied malice. At the evidentiary hearing, the only issue the superior court was required to resolve was whether Reyes harbored the subjective awareness that his actions posed a danger to human life and consciously disregarded that danger. The court correctly found that he did.

Reviewed under the familiar and well-established substantial evidence standard, the record supports the superior court's finding that Reyes had the subjective awareness required for implied malice murder. The evidence shows that after learning that his codefendant had acquired a handgun, Reyes—serving as "back up"—accompanied the codefendant and several other fellow gang members into contested gang territory. Once there, the group identified and targeted a car driven by an associate of the rival gang. They chased him, yelled at him to slow down and to stop, and Reyes's codefendant ultimately confronted the victim as he drove past the group. Then, the codefendant pulled out his firearm and fired a single shot through the victim's back windshield, striking him in the head and killing him. In response, Reyes rendered no aid, but instead fled with his fellow gang members. Approximately 30 minutes later, Reyes had possession of the murder weapon and used it to assault another victim by placing the revolver against the back of the victim's neck. The victim fought back and eventually forced Reyes to drop the gun and flee. In light of Reyes's gang background and his actions before, during, and after the murder,

the record demonstrates Reyes was aware that his actions posed a danger to human life, and he consciously disregarded that danger. Accordingly, substantial evidence shows Reyes acted with implied malice. Substantial evidence also supports a finding that Reyes was guilty of implied malice murder as an aider and abettor. Because substantial evidence supports the superior court's conclusion that Reyes committed murder with implied malice, this Court should affirm the judgment.

STATEMENT OF THE CASE AND FACTS

A. The murder of Pedro Rosario

In 2004, 15-year-old Reyes was an active member of F-Troop, a well-established criminal street gang in the city of Santa Ana, California. (2 TRT[2] 206, 399, 406, 434–435; see also 2 TCT 439–442 [jury verdicts].) West Myrtle was F-Troop's rival gang. (2 TRT 408.) Consistent with other Santa Ana criminal street gangs at the time, F-Troop and West Myrtle were "turf oriented,"

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[2] At the section 1170.95 hearing, the reporter's transcript from Reyes's jury trial was identified as People's Exhibit 1 and was provided to the superior court for its consideration, but the record is somewhat unclear regarding whether it was admitted as an exhibit or was the subject of judicial notice. (See RT 123–125, 127–128.) By separate motion, respondent has requested that this Court take judicial notice of the trial record. (See Cal. Rules of Court, rules 8.224, 8.520(g), and 8.252(a).) Out of an abundance of caution, respondent has also filed a request for the transmission of the reporter's transcript to the Court, assuming it was admitted as an exhibit. (See Cal. Rules of Court., rule 8.224.) Citations to "TCT" and "TRT" refer to the trial clerk's transcript, and trial reporter's transcript, respectively. Citations to the clerk's and reporter's transcripts from the section 1170.95 hearing are indicated with "CT" and "RT," respectively.

meaning their claimed turf was extremely important to the gangs and protecting that turf through violence was common because it was necessary for the gangs' survival. (2 TRT 388–389, 408.)

Reyes knew F-Troop engaged in a pattern of criminal gang activity that included murder and attempted voluntary manslaughter, and that its primary activities included assaults with firearms and murder. (2 TRT 411–413; 2 TCT 419–425 [instructions on active participation and gang enhancement], 440, 442 [verdicts].) Commission of violent crimes benefited the gang by enhancing its "reputation," meaning such crimes increased the level of fear the community had for the gang. (2 TRT 389, 391.) Fostering fear in the community ensured the gang could maintain control of the community and grow their criminal enterprise. (2 TRT 389–391, 393–394.) Because of the need to perpetuate violence, guns were considered a highly prized possession, and local gangs routinely used them both defensively (to protect themselves and the boundaries of their claimed territory), and offensively (to initiate violence that would instill the fear that enhanced the gang's reputation). (2 RT 389–391, 393–394, 401.) Gang members were motivated to participate in violent crimes because their participation, either as a direct perpetrator or in support of the direct perpetrator as "back up," increased their personal reputation as well as the gang's and improved the individual member's status in the gang. (2 TRT 392, 395, 400–401.) In general, gang members would only permit trusted fellow members or associates to participate in the gang's criminal conduct, and those participating as "back up" were

expected to support the direct perpetrators in whatever manner possible. (2 TRT 395, 400.)

On August 10, 2004, at a park in F-Troop's territory, Reyes gathered with fellow F-Troop members and an associate from an allied gang. (1 TRT 133; 2 TRT 357–359, 408–409, 435–439.) The group included Reyes's codefendant and fellow F-Troop member Frank Lopez. (*Ibid*.) While at the park, Lopez showed the group that he was carrying a .357 magnum revolver. (1 TRT 125; 2 TRT 358.) Sometime after seeing Lopez's gun, Reyes, Lopez, and the allied gang member left the park on their bicycles. (2 TRT 359–360.)

Around 6:30 p.m., Reyes, Lopez, the ally, and at least three other F-Troop members rode their bicycles northbound along the west sidewalk of Sullivan Street toward Willits Street, a high-density residential area. (1 TRT 103–104, 133, 136–139.) The gang expert described the area as being on the fringes of West Myrtle territory (2 TRT 452), but Reyes testified at the evidentiary hearing that it was the border of West Myrtle and F-Troop territories, and that both gangs claimed the area (RT 195, 199–200). Because it was August, it was still light outside, and the intersection was lined with cars and busy with pedestrian traffic. (1 TRT 170, 174–175.) The F-Troop members riding their bicycles noticed a blue Honda drive past them also travelling north. (1 TRT 139–140, 146.) They exchanged looks with one another and started yelling at the car to slow down and to stop. (1 TRT 139–140, 146.) A witness heard them yell, "Hey, Homey, stop. We want to talk to you[!]" (1 TRT 142, 149.) The car sped

up, and Reyes and the others continued chasing after it. (1 TRT 146.)

The blue Honda was driven by Pedro Rosario, who was associated with West Myrtle, although no direct evidence established whether Reyes and the others knew of Rosario's affiliation at the time he drove past them. (2 TRT 265–266, 443.) While pursuing Rosario, the gang members briefly separated into two groups, and the members at the front yelled to those in the back to "keep up." (1 TRT 143, 148, 163.) They all joined together at the northwest corner of the Sullivan/Willits intersection. (1 TRT 151–152.) In a rapid series of events, Rosario (in his blue Honda) made a U-turn at the same intersection and drove south back past the F-Troop members on their bicycles. (1 TRT 140, 146, 149, 158, 166.) As he did so, Lopez confronted Rosario, and said something to him. (RT 211.) Then, as Rosario began to drive away, Lopez pulled out the revolver and fired a single shot through the car's back window, striking Rosario in the back of the head and killing him. (1 TRT 111–112, 151–152, 157–158, 180–182, 185; 2 TRT 263–264, 382, 461.) After the shot was fired, the F-Troop gang members quickly separated and fled—riding off in different directions. (1 TRT 157–158, 166, 178–180.)

Approximately 30 minutes after the shooting, F.N., a young man unaffiliated with any criminal street gang, was walking in a neighborhood considered part of F–Troop territory, and not far from the intersection where Rosario had just been killed. (1 TRT 212–213; People's Exh. 1.) Reyes and two or three others

confronted F.N., something Reyes had done to F.N. on many prior occasions. (1 TRT 213–214, 217; 2 TRT 360, 408–409.) Reyes asked F.N. to reveal the "barrio" to which he belonged. (1 TRT 214–215.) F.N. told Reyes he did not belong to any gangs and did not want any problems. (1 TRT 217–218.) Reyes responded, "But I want some blows," and declared that he was from "La Tropa," meaning, "the Troop." (2 TRT 225, 237, 249.) Then, Reyes reached across his body to pull something from his waistband. (1 TRT 218; 2 TRT 227–228, 237.) F.N. took off running, and Reyes yelled at his codefendants to "get him[!]" (1 TRT 218, 237; 2 TRT 360.) Reyes and the other F-Troop gang members chased F.N. for two blocks before Reyes caught up to him. (1 TRT 212–213, 218; 2 TRT 228–229.)

Reyes pushed F.N. against a fence, and began punching him; Reyes's associates joined in and began hitting F.N. (2 TRT 229, 240, 360–361.) A short time after Reyes and the associates started attacking F.N., a car arrived on the scene, and additional people got out and joined Reyes in his attack of F.N. (2 TRT 229, 241.) As the assault unfolded, Reyes stood behind F.N. and pressed the barrel of the .357 magnum against the back of F.N.'s neck. (1 TRT 125; 2 TRT 229–231, 242, 263–264.) F.N. managed to hit Reyes, causing Reyes to drop the gun. (2 TRT 231, 243.) Reyes and F.N. struggled over the gun, but ultimately Reyes and the other F-Troop members fled the area. (2 TRT 231, 243–245.) Police later recovered the gun and identified it as the same handgun used to kill Rosario. (2 TRT 263–264.)

Two days after the shooting, police arrested Reyes. (2 TRT 205.) While he was being transported, Reyes asked the officers what the charges against him were, and one of the officers told him it appeared to be a probation violation. (1 TRT 208.) Reyes replied, "No, I'm going to be charged with murder, because me and five of my homies were down on Sullivan at a shooting. And I didn't shoot, but because I was there with my homies, I'm going to get charged with murder too." (1 TRT 208.)

B. Reyes's convictions and sentence

For his role in Rosario's death, Reyes was originally charged and tried for first degree murder and active gang participation. (1 TCT 250–251.) During deliberations, however, the jury announced it could not reach a unanimous verdict regarding premeditation, and the People agreed to withdraw the first degree murder allegation. (2 TCT 450–451; 3 TRT 595, 598–599.) The jury then convicted Reyes of second degree murder (§ 187, subd. (a); count 1) and active gang participation (§ 186.22, subd. (a); count 2). (2 TCT 439, 442, 451; 3 TRT 601–603.) As to the murder count, the jury found true the allegations that Reyes committed the murder for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist the criminal conduct of the gang's members (§ 186.22, subd. (b)(1)) and that a principal discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)). (2 TCT 440–441, 451; 3 TRT 602–603.) Reyes was sentenced to a total term of 40 years to life in prison. (2 TCT 484, 487–490; 3 TRT 616–617.)

C. The resentencing petition proceedings

In 2019, Reyes filed a petition under section 1170.95 seeking to vacate his murder conviction and to be resentenced. (1 CT 102–109.) The superior court appointed counsel, determined Reyes had made a prima facie showing, and issued an order to show cause. (1 CT 50–51, 56.) The court conducted an evidentiary hearing at which the People relied on the trial transcripts, and the defense presented live testimony from two witnesses—a developmental psychologist and Reyes himself. (1 CT 63–64; RT 123, 127–215.)

The psychologist, Dr. Elizabeth Cauffman, did not examine Reyes or opine about his brain development in particular. (RT 130–132.) Instead, she testified only about adolescent brain development in general. (RT 132.) She explained that research shows adolescent brains are less developed than adult brains, and on average, a 15-year-old is less mature, less responsible, less future-oriented, and more impulsive as compared to an adult. (RT 146.) By 16 years of age, adolescents are very similar to adults in terms of their cognitive ability, but the frontal lobe, which manages impulse control, long-term thinking, and emotional development, is not fully developed until about 25 years of age. (RT 148.) Dr. Cauffman discussed studies that showed adolescents are more likely than adults to make mistakes, to act impulsively in threatening situations, and to be more influenced by peers, especially older peers. (RT 166, 178–179.)

Reyes testified and admitted that, at the time of Rosario's murder, he was an active member of the F-Troop gang. (RT 194.)

Accordingly, he was familiar with the gang's territory, and he knew the gang considered West Myrtle a rival. (RT 194–195.) Reyes recounted the events of August 10, 2004, and in general, his version aligned with the evidence that had been presented at his trial. (RT 187–188, 192–203.) He admitted that Lopez had showed him and the others the gun while at the park, and that they later left on their bicycles. (RT 187, 192–193.) Reyes testified that they rode to the Monte Vista neighborhood (south of the park) to visit other F-Troop members. (RT 192–193.) They stayed there for less than an hour and then rode north back to the park. (RT 193.)

For the return trip, Reyes, Lopez, and the allied gang member were joined by at least three additional active F-Troop gang members. (RT 190–193, 196–198.) Reyes knew Lopez was armed, and he knew the others were all active F-Troop members. (RT 195–198.) He also acknowledged the group chose a route that went through turf claimed by West Myrtle even though a different route was available. (RT 195, 213.) Later, Reyes elaborated that the area was the border of F-Troop and West Myrtle, and F-Troop members claimed it as their territory as well. (RT 199–200.) At the Sullivan and Willits intersection, Reyes saw Lopez say something to Rosario, but could not make out specifically what he said. (RT 210–211.) Reyes claimed he did not know why Lopez had stopped Rosario. (RT 211.) Then, he watched Lopez pull out the gun and shoot Rosario through the back windshield. (RT 200, 206, 211–212.) He admitted that he knew Lopez's bullet had struck Rosario. (RT 206.) He also

admitted he did not stay to render help, but instead fled with his gang. (RT 206.)

Reyes further admitted that less than an hour later, he had possession of the murder weapon, and he had it tucked into the waistband of his pants when he confronted F.N. (RT 201, 203.) Reyes testified that he asked F.N. what neighborhood he was from, although he knew F.N. was not a member of F-Troop. (RT 202–203.) Reyes then announced his own allegiance to F-Troop. (RT 202–203.) According to Reyes, he and F.N. started fighting when the murder weapon fell out of his waistband and hit the ground. (RT 203.) Reyes then fled the area. (RT 204.)

At the section 1170.95 hearing, the People argued Reyes was guilty of murder under both express and implied malice theories. (RT 240–244, 251–254.) Defense counsel argued the express malice theory was inconsistent with the jury's failure to return a unanimous verdict regarding premeditation and deliberation for purposes of the first degree murder originally charged. (RT 219–221.) Relying on the implied malice theory, the superior court found Reyes guilty of murder beyond a reasonable doubt and denied his petition. (1 CT 64; RT 297–299.) The Court of Appeal held substantial evidence supported the superior court's finding that Reyes committed implied malice murder, and it affirmed the denial order. This Court granted Reyes's *pro se* petition for review and directed the parties to address whether the superior court's order is supported by substantial evidence.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE SUPERIOR COURT'S CONCLUSION THAT REYES IS GUILTY OF SECOND DEGREE MURDER UNDER AN IMPLIED MALICE THEORY

Substantial evidence shows Reyes is guilty of implied malice murder because the record demonstrates (1) he intentionally committed an act that was dangerous to human life, and (2) when he acted, he was aware of the danger, but consciously disregarded it. As to the first element, the jury instructions and verdict on the murder count showed the jury necessarily found Reyes had committed an act that was objectively dangerous to human life. And, as to the second element, Reyes's gang background, his participation in the events leading up to the murder, and his actions after the murder demonstrate his awareness of, and conscious disregard for, the danger his actions posed to human life.

Reyes's claims to the contrary should be rejected because all are premised on a misapplication of the appropriate standard of review. In direct contradiction of the substantial evidence standard, Reyes urges this Court to ignore the superior court's credibility determinations, to reweigh the evidence, and to draw inferences in his favor. (AOBM 27–28.) The Court should decline Reyes's invitation to conduct an independent review of the evidence and should instead extend to the superior court the deference the law requires. Because substantial evidence supports the superior court's finding that Reyes is guilty of murder with implied malice, the denial of his resentencing petition was proper and should be affirmed.

A. The substantial evidence standard of review

As Reyes acknowledges, a trier of fact's findings are reviewed on appeal for substantial evidence, including where the trier of fact is a court. (*In re Caden C.* (2021) 11 Cal.5th 614, 641; see *People v. Gregerson* (2011) 202 Cal.App.4th 306, 320; AOBM 27.) This familiar standard requires the reviewing court to " 'examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value that would support a rational trier of fact in finding [the relevant fact] beyond a reasonable doubt.' " (*People v. San Nicolas* (2004) 34 Cal.4th 614, 657–658.) The reviewing court "presume[s] in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence[;]" it does not reweigh the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919 (*Medina*); *People v. Barnes* (1986) 42 Cal.3d 284, 303 [trier of fact has exclusive authority to assess the credibility of witnesses and draw reasonable inferences from the evidence].) "[A]ppellate review is limited to considering whether the trial court's finding . . . is supportable in light of the evidence." (*People v. Perez* (2018) 4 Cal.5th 1055, 1066 (*Perez*); see also *People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045 (internal quotation marks omitted) ["the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court's factual findings"].)

The same standard applies where the finding being reviewed, such as the jury's guilty verdict, is based on

circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) For instance, a jury may infer a defendant's intent from all of the facts and circumstances shown by the evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) The appellate court accepts any and all logical inferences that can be drawn from the circumstantial evidence in support of the verdict and presumes the existence of every fact the fact finder could reasonably deduce from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Reyes briefly argues that this Court should independently review the evidence and draw its own factual conclusions because the superior court relied primarily on the record of conviction, i.e. documentary evidence, rather than live testimony. (AOBM 27–28.) His argument is without merit. First, the question presented in this case, as set forth by this Court, asks whether substantial evidence supports the superior court's finding. Framing the issue in that way was correct, as the Courts of Appeal have uniformly and correctly determined that a superior court's findings regarding a petitioner's eligibility for section 1170.95 resentencing relief after an evidentiary hearing are appropriately reviewed for substantial evidence. (*People v. Clements* (2022) 75 Cal.App.5th 276, 298 (*Clements*) [reviewing for substantial evidence superior court's factual finding that petitioner was ineligible for section 1170.95 relief], *People v.*

Ramirez (2021) 71 Cal.App.5th 970, 987–988 (*Ramirez*) [same]; *People v. Bascomb* (2020) 55 Cal.App.5th 1077, 1087 [same]; *People v. Williams* (2020) 57 Cal.App.5th 652, 663–664 [same].)

The circumstances of this case in particular show why it would make little sense to apply an independent review standard. Under section 1170.95, subdivision (d)(3), the superior court did not only consider the record from Reyes's trial but also heard from two new witnesses, including Reyes himself. Thus, the superior court necessarily made credibility determinations that are entitled to great deference. (See *In re Hardy* (2007) 41 Cal.4th 977, 993 [fact finder is afforded "special deference . . . on factual questions requiring resolution of testimonial conflicts and assessment of witnesses credibility, because the [fact finder] has the opportunity to observe the witnesses' demeanor and manner of testifying"]; *People v. Armstrong* (2016) 1 Cal.5th 432, 451 [trial court's credibility determinations afforded deference because they are based on "firsthand observations unavailable to [reviewing court] on appeal"].)

To the extent Reyes urges no deference to the trier of fact, *Perez*, *supra*, 4 Cal.5th 1055 is instructive. (*Clements*, *supra*, 75 Cal.App.5th at p. 302 [relying on *Perez* to reject the defendant's claim that the reviewing court should independently review the superior court's ruling on a section 1170.95 petition].) *Perez* concerned a Proposition 36 petition, an ameliorative resentencing procedure similar to the one at issue here. (*Id.* at pp. 1062, 1064.) There, the superior court was also required to make a factual determination regarding the petitioner's eligibility for the

relief requested. (*Id*. at p. 1062, citing § 1170.126, subds. (e), (f).) This Court held that the trial court's eligibility determination, "to the extent it was 'based on the evidence found in the record of conviction,' is a factual determination," and on appeal that determination was subject to review under the substantial evidence standard. (*Perez*, at p. 1066.) Rejecting an argument similar to the one Reyes advances here, this Court explained, "[E]ven if the trial court is bound by and relies solely on the record of conviction to determine eligibility, the question [regarding the defendant's eligibility] remains a question of fact, and we see no reason to withhold the deference generally afforded to such factual findings." (*Ibid*.) The same is true here, and Reyes has not offered any persuasive reason to deviate from the general rule which subjects factual findings to review for substantial evidence.

B. The elements of implied malice murder

Second degree murder is "the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder." (*People v. Knoller* (2007) 41 Cal.4th 139, 151 (*Knoller*).) Malice may be either express, i.e. when a defendant manifests an intention to kill, or implied. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87.) "Malice is implied when the killing is proximately caused by ' "an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with

conscious disregard for life." ' [Citation.]" (*Knoller*, at p. 143; see CALCRIM No. 520 [defining implied malice].)

More specifically, a defendant acts with implied malice where the evidence proves the following four elements: 1) the defendant intentionally committed an act; 2) the natural and probable consequences of the act were dangerous to human life (the "objective" component); 3) when the defendant committed the act, he knew it was dangerous to human life (the "subjective" component); and 4) the defendant deliberately acted with conscious disregard for human life. (*Knoller*, *supra*, 41 Cal.4th at p. 157; see CALCRIM No. 520.) This Court has explained that implied malice has "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with conscious disregard for life." (*People v. Soto* (2018) 4 Cal.5th 968, 974, internal citations and quotation marks omitted.)

C. The jury necessarily found that Reyes committed an act that was objectively dangerous to human life, and Penal Code section 1170.95 does not allow him to relitigate that element

At Reyes's trial, the jury was instructed on three possible theories of second degree murder—express malice, implied malice, and the natural and probable consequence doctrine. (3 TRT 497–505; 2 TCT 400–412.) Senate Bill No. 1437 eliminated the natural and probable consequence doctrine by amending section 188 such that it now requires all principals in a murder to have acted with malice. (*People v. Lewis* (2021) 11

Cal.5th 952, 957; *People v. Gentile* (2020) 10 Cal.5th 830, 844 (*Gentile*).) Implied malice, the theory on which the superior court relied below, remains a viable theory of murder. (*Gentile*, at p. 850.) The only question, therefore, is whether the superior court's finding that Reyes is guilty beyond a reasonable doubt of having the mental state of implied malice should be affirmed.[3]

The most important principle in this regard is that "in a section 1170.95 petition, the trial judge isn't charged with holding a whole new trial on all the elements of murder. Instead, the parties will focus on evidence made relevant by the amendments to the substantive definition of murder." (*Clements*, *supra*, 75 Cal.App.5th at p. 298.) This conclusion flows directly from the language of section 1170.95, subdivision (a)(3), which states that relief is available only if the petitioner is no longer liable for murder "*because* of changes to Section 188 or 189 made effective" by Senate Bill No. 1437. (§ 1170.95, subd. (a)(3), italics added.) Senate Bill No. 1437 did not amend the objective element (i.e., the actus reus requirements) of the crime of malice murder under section 188; rather, it only amended the mental state requirements. This alone confirms that only Reyes's mental state was at issue at the evidentiary hearing, and that remains the sole issue now.

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[3]The question of whether elements other than a defendant's mental state may be relitigated in section 1170.95 proceedings is currently before the Court in *People v. Curiel* (Nov. 4, 2021, No. G058604) 2021 WL 5119900 [unpubd. opn.] review granted Jan. 26, 2022, S272238.

Moreover, to the extent the record affirmatively demonstrates factual findings made by Reyes's original jury unrelated to Senate Bill No. 1437, those findings cannot be relitigated or contested at the evidentiary hearing. Section 1170.95 does not call for reconsideration of a murder conviction on any grounds which the original trier of fact definitively decided. (*People v. Allison* (2020) 55 Cal.App.5th 449, 461 (*Allison*) ["The purpose of section 1170.95 is to give defendants the benefit of amended sections 188 and 189 with respect to issues not previously determined, not to provide a do-over on factual disputes that have already been resolved"].) Accordingly, the affirmative factual findings necessarily made by Reyes's original jury are binding, and the superior court had no authority to reevaluate or reconsider factual disputes already resolved by the jury at the original trial.

Here, the jury already determined that Reyes committed the necessary acts required for the objective component of implied malice murder. As noted above, the objective component of implied malice required proof of an intentional act, the natural and probable consequences of which are dangerous to human life. (2 TCT 401; 3 RT 498; CALCRIM No. 520.) Echoing the objective component of implied malice, the now-invalid natural and probable consequence theory on which the jury was instructed also required proof that Reyes committed an intentional act (specifically, a criminal act known as the "target offense"), the natural and probable consequences of which included murder. (2 TCT 411–412; 3 RT 503–505.) Thus, under either theory, the

jury necessarily had to find that the natural and probable consequence of Reyes's conduct were dangerous to human life, thereby satisfying the objective component of implied malice. (See *Gentile*, *supra*, 10 Cal.5th at p. 850 ["the foreseeable result of a defendant's actions, though insufficient by itself to result in liability for murder, remains relevant to assessing whether the defendant acted with malice aforethought"].)

Thus, for purposes of the resentencing hearing, the superior court was only required to make factual findings regarding the subjective component of implied malice, meaning, "the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.' " (*People v. Cravens* (2012) 53 Cal.4th 500, 508 (*Cravens*), quoting *People v. Chun* (2009) 45 Cal.4th 1172, 1181; and see RT 289, 293 [superior court notes distinction between the two theories is that implied malice has a subjective component, while natural and probable consequences is limited to the objective component].)

Reyes nonetheless argues at length that there was insufficient evidence he engaged in conduct that objectively involved a high probability of death. (AOBM 30–53.) He claims his conduct was neither inherently dangerous in the abstract—something he concedes was by itself not essential to the conviction (AOBM 30–33, 40), nor inherently dangerous under the particular circumstances of his case. (AOBM 33–52.) However, for the reasons discussed above, the jury necessarily reached the opposite conclusion when it convicted Reyes of second

degree murder. Even if it had relied on the now-invalid natural and probable consequence theory, it determined that Reyes committed an intentional act, the foreseeable consequences of which included murder. Any such act must necessarily also qualify as one that is objectively dangerous to human life. (2 TCT 401, 411–412 [jury instructions]; 3 RT 498, 503–505 [jury instructions]; 439–442 [jury verdicts].) Because the verdicts confirm the jury necessarily found this element satisfied, it cannot be relitigated in the context of a section 1170.95 eligibility determination. As the court in *Allison* observed, "subdivision (a)(3) of section 1170.95 says nothing about erroneous prior findings or the possibility of proving contrary facts if given a second chance. Rather, it requires that the petitioner could not be convicted of murder *because of the changes* to sections 188 and 189, not because a prior fact finder got the facts wrong." (*Allison*, *supra*, 55 Cal.App.5th at p. 461, italics added.) Accordingly, Reyes's argument that the evidence is insufficient to establish the objective component of implied malice murder should be rejected.

D. Substantial evidence supports the superior court's finding that Reyes was aware his conduct was dangerous to human life, and that he consciously disregarded that danger

Substantial evidence supports the superior court's finding that Reyes was aware that he was committing an act that was dangerous to human life, but he consciously disregarded that risk when he accompanied Lopez—whom Reyes knew was armed—and other gang members into contested gang territory to pursue and confront potential rival gang members.

First, the jury made several underlying factual findings that may not be relitigated and strongly suggest that Reyes was subjectively aware of the danger to human life. In finding Reyes guilty of the substantive gang offense in count two, the jury concluded Reyes "actively participated" in F-Troop, knew F-Troop gang members "engaged in a pattern of criminal gang activity," and "willfully assisted, furthered, or promoted felonious criminal conduct" by F-Troop members, specifically, the commission or attempted commission of murder. (2 TCT 419–422, 442; 3 TRT 510–512, 603; CALCRIM No. 1400.) F-Troop's "pattern" of criminal gang activity (of which the jury necessarily found Reyes was aware) was comprised of murder and attempted voluntary manslaughter. (2 TCT 420, 442; 3 TRT 511, 603.) And, in finding true the separate gang allegation attached to the murder count, the jury necessarily concluded that Reyes committed the murder for the benefit of, at the direction of, or in association with F-Troop, and that Reyes intended to assist, further, or promote criminal conduct by F-Troop members. (2 TCT 423, 440; 3 TRT 514, 602.) As previously discussed, these the findings are binding, and cannot be relitigated in the context of an eligibility determination for section 1170.95 relief. Thus, Reyes's arguments that the evidence is insufficient to show the murder was gang related at all (AOBM 59–60) should be rejected.

As the jury concluded, Reyes knew that his gang's pattern of criminal activities included murder and attempted voluntary manslaughter. (2 TCT 420, 442; 3 TRT 511, 603.) As an active gang participant, Reyes also understood that his gang had a

reputation[4] to uphold and protect, and that it accomplished this purpose by committing violent crimes and instilling fear in the community. (2 TRT 388–389, 391; *Medina*, *supra*, 46 Cal.4th at p. 923 [evidence that "once a gang is no longer feared, its members lose respect, are ridiculed, and become vulnerable and subject to attack by other gangs" showed motive to confront rivals and defend gang's reputation].)

Reyes was personally motivated to participate in the gang's crimes because of the benefit he would receive in the form of increased status and respect in his gang. (2 TRT 391–392, 395; see *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370–1371 [gang expert testimony was "highly probative on the issues of intent and motive"].) He also necessarily knew that his fellow gang members were similarly motivated, and thus more likely to initiate or perpetuate violence. Reyes was aware that West Myrtle was a rival gang, and he was familiar with the territory West Myrtle claimed, as well as the area in dispute—i.e., claimed by both F-Troop and West Myrtle. (RT 194–195, 199–200.) Reyes knew that his gang intended to ride into the contested area before the murder (RT 199–200, 213), which increased the likelihood that the group of F-Troopers would encounter West Myrtle, and should they encounter a rival, Reyes understood that

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[4] Although the Legislature has provided that a reputational interest is insufficient to establish that an offense is gang related (AB 333), it has not altered the circumstances that a finder of fact may consider it in determining whether a defendant was subjectively aware of the danger posed by his or her conduct.

such an encounter would likely turn violent, especially since Lopez was carrying a loaded firearm. (RT 195, 200, 206, 211–212; 2 TRT 389.) Reyes would not have been included in the group of F-Troop members unless they trusted him, meaning unless the group members were confident that Reyes would support them. (2 TRT 400.) Reyes also would have known that when F-Troop members initiated violence or committed crimes with fellow members, all F-Troop members present would be expected to support each other and serve as "back up." (2 TRT 400.)

Placed in the context of Reyes's active participation in F-Troop, the record supports the superior court's finding that Reyes acted with conscious disregard for the known danger to human life. Given his gang background, Reyes was aware that six or seven F-Troop members riding their bicycles into contested gang turf and then pursuing and shouting at a passing car is something that would draw attention to the group in broad daylight and in a busy part of the neighborhood. (RT 196, 1 TRT 138–139, 146, 170, 174–175.) Reyes understood that his gang's disruptive but coordinated conduct amounted to a provocative act that was likely to bring about a confrontation with rival gang members, and such a confrontation was almost inevitably going to be violent, particularly because (as Reyes was aware) one of the F-Troop members was carrying a firearm. The fact that Reyes and Lopez gathered a larger group of F-Troop members before entering the contested territory further supports a finding that Reyes was aware of the likelihood that his gang would

commit a violent crime in the area. (RT 188, 195–197; 1 TRT 136; 2 TRT 359–360.)

When Rosario—who was affiliated with West Myrtle—drove by, Reyes and his fellow gang members looked at each other and then started chasing after Rosario's car, yelling at him to slow down and to stop so they could "talk to him," i.e. confront him. (1 TRT 139–140, 146, 158; 2 TRT 443.) Rosario initially sped up, and the F-Troopers continued to pursue him. (1 TRT 140, 146, 158.) It is reasonable to infer that Reyes knew his gang had identified and selected a target, and consistent with his role as "back up," and the expectation that he would provide support and assistance, Reyes and the others in his group worked as a unit to chase the car and track down Rosario.

F-Troop's yelling and chasing was successful and sparked the dangerous encounter that Reyes and the others anticipated. In response to F-Troop's actions, Rosario made a U-turn at the intersection of Sullivan Street and Willits Street, travelling back to the F-Troop members he had just passed. (1 TRT 140, 146, 149, 158, 166.) F-Troop had effectively provoked and initiated a confrontation with Rosario. The gang gathered at the northwest corner of the intersection where Lopez said something to Rosario. (RT 211; 1 TRT 151–152.) Then, as Rosario continued driving southbound, Lopez, with his fellow gang members by his side, took the .357 magnum from his waistband, aimed the gun at Rosario, and fired a single shot through the back window, striking Rosario in the head and killing him. (RT 200, 211–212; 1 TRT 151–152; 2 TRT 263–264.)

Reyes admitted he knew Lopez had fired at Rosario and that the bullet had struck its intended victim. (RT 206.) Reyes did not react with shock or surprise, nor did he render any aid to Rosario or disassociate from Lopez and the others. (*Cravens*, *supra*, 53 Cal.4th at p. 511 [fact that defendant failed to seek emergency assistance after punching victim unconscious, letting him fall on concrete, and audibly cracking his head, bolstered showing that defendant acted in conscious disregard for human life].) Instead, he quickly fled with his fellow gang members and took possession of the murder weapon. (RT 201, 206.)

Thirty minutes later, Reyes used the gun to perpetrate a second gang confrontation. (1 TRT 212–214.) Having just witnessed his fellow F-Troop member murder a man in broad daylight in a busy residential neighborhood, Reyes doubled down. He announced that he was from "La Troopa" and attacked F.N. to further F-Troop's reputation for unprovoked violence. (2 TRT 229, 240, 249 360–361.) He used the exact same weapon that killed Rosario with a shot to the head, and he pressed it against the back of F.N.'s neck. (2 TRT 229–231, 242, 263–264.) This conduct demonstrates Reyes's conscious disregard for the danger such actions posed to human life. To the extent Reyes argues F.N.'s description of how the gun was used during the assault conflicts with his own self-serving testimony and the statements of his gang associate (AOBM 65–66), this constitutes a quintessential conflict in the evidence that the fact finder—the superior court—had resolved and that may not be second-guessed by a reviewing court on appeal. (*People v. Brown* (2014) 59

Cal.4th 86, 106 (*Brown*) ["Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact."].)

E. Reyes's remaining challenges to the sufficiency of the evidence establishing implied malice are without merit

Reyes contends his conduct after the murder is not, as a matter of law, probative of his mental state at the time of the murder. (See AOBM 51–52.) He is mistaken. Courts, including this one (see *Cravens*, *supra*, 53 Cal.4th at p. 511), have acknowledged that a defendant's conduct after a homicide can be relevant and properly considered on the question of implied malice where that subsequent behavior indicates " 'a heartless and callous indifference' " toward the victim, because such a showing bolsters the inference that the defendant consciously disregarded the danger his actions posed to the victim's life. "In determining whether defendant's acts disclosed an abandoned and malignant heart, thus establishing implied malice, the jury was entitled [] to consider defendant's conduct following the fatal injury." (*People v. Ogg* (1958) 159 Cal.App.2d 38, 51 [evidence of implied malice included failure to seek medical aid even though defendant "knew that his wife was seriously injured"]; see also *People v. McCartney* (1963) 222 Cal.App.2d 461, 469 [evidence of implied malice included defendant's statement that she was glad she shot victim, and her failure to make any effort to render medical aid]; *People v. Burden* (1977) 72 Cal.App.3d 603, 620 [evidence of implied malice included defendant's statement after his child's death that he did nothing about the child's "deplorable

state [of 'terminal starvation'], though he could have if he 'had really wanted to,' because he 'just didn't care' "].)

Reyes also insists that the record is insufficient because of the "absence of any actual evidence as to what else the gang had in mind" when they left the friend's house to return to the park by way of the contested territory. (AOBM 36, 57–60.) But this Court has already held that, "in the gang context, it [is] not necessary for there to have been a prior discussion of or agreement to a shooting . . . ." (*Medina*, *supra*, 46 Cal.4th at p. 924.) And as noted above, "[e]vidence of a defendant's state of mind is almost inevitably circumstantial[,]" so direct evidence showing the gang discussed or otherwise announced their intentions to one another is not necessary. (*Bloom*, *supra*, 48 Cal.3d at p. 1208; see *People v. Miranda* (2011) 192 Cal.App.4th 398, 411–412 [when determining whether substantial evidence supports a finding that a particular crime was committed for a specified purpose, courts "routinely draw inferences about intent from the predictable results of action." Recognizing that courts "cannot look into people's minds directly to see their purposes[,]" they must instead "discover mental state only from how people act and what they say."].) Further, this Court has held that when assessing substantial evidence, a court "err[s] in focusing on evidence that did not exist rather than on the evidence that did exist." (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

In a similar vein, Reyes argues there is no evidence demonstrating his awareness that any of his acts were sufficiently dangerous so as to threaten human life. (AOBM 36–

45.) That argument is unpersuasive. The law does not require proof the defendant knew definitively that someone would be killed. (*Knoller*, *supra*, 41 Cal.4th at p. 157.) "[I]mplied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less." (*Id*. at p. 143.) Viewed through the gang context established by the evidence, Reyes was at least aware that travelling to contested or rival territory with at least five fellow active gang members—one of whom was armed with a loaded firearm—was conduct that was likely to endanger the life of another. Reyes was aware of F-Troop's violent history, and that awareness further and properly supported the finding that Reyes knew his conduct was dangerous. Given the "great potential for escalating violence during gang confrontations," the People were not required to prove Reyes knew of "the precise consequences" that unfolded (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1056), but instead had to prove he knew that his conduct endangered human life yet disregarded the risks. The People met their burden, and the superior court's finding on this element is supported by substantial evidence.

Citing the testimony provided by Dr. Cauffman, Reyes argues his youth negates the evidence showing he consciously disregarded the danger posed by his actions. (AOBM 69–75.) Respondent does not dispute that a defendant's youth is a relevant factor in determining whether he or she acted with conscious disregard to human life. (Cf. *People v. Ramirez* (2021) 71 Cal.App.5th 970, 784 (Ramirez), citing *In re Moore* (2021) 68

Cal.App.5th 434, 454 (*Moore*) [finding such evidence relevant to a court's analysis of whether the defendant acted with reckless indifference for purposes of § 189, subd. (e)].) But here, the superior court heard and expressly considered Dr. Cauffman's testimony (RT 128–182, 227), and as the fact finder, it had sole province to assign the testimony whatever weight it thought was warranted. (*Brown*, *supra*, 59 Cal.4th at p. 106 [trier of fact has exclusive province to determine appropriate weight to assign evidence].) In addition, the trier of fact generally may reject even uncontradicted testimony, whether by lay or expert witnesses, so long as the rejection is not arbitrary. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632.) To the extent Dr. Cauffman's testimony conflicted with the evidence showing Reyes acted with conscious disregard for human life, the superior court resolved that conflict against Reyes, and its resolution is binding for purposes of appellate review.

In support of his argument that his youth undermines the substantial evidence of his guilt, Reyes places special reliance on *Ramirez*, *supra*, 71 Cal.App.5th at p. 975.[5] (AOBM (69-70.) But

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[5] In addition to *Ramirez*, Reyes cites several additional cases that also involved evidence of youth and its relevance regarding the defendants' intent. (AOBM 69–71.) These cases, including *Ramirez*, involved the "reckless indifference" standard now applicable to *first degree* murder convictions premised on a felony-murder theory, not the *second degree* murder implied malice theory at issue here. (*Ibid.*, citing *Ramirez*, *supra*, 71 Cal.App.5th at p. 975, *Moore*, *supra*, 68 Cal.App.5th 434, and *People v. Harris* (2021) 60 Cal.App.5th 939, 959–961.) While the two standards are similar and youth may be relevant to both,

(continued…)

the circumstances here are readily distinguishable and demonstrate Reyes's higher degree of culpability than that of the defendant in *Ramirez*. The defendant in *Ramirez* was convicted of first degree murder based on a theory of felony murder with a carjacking of two non-gang members in gang territory as the underlying felony. In contrast to this case, the evidence showed the defendant was reluctant to participate in the underlying felony and only agreed to aid his co-participants because he feared being killed by his gang if he failed to do so. (*Ramirez*, at p. 979.) The evidence also supported a finding that the defendant had reason to expect that violence during the carjacking was unlikely, and he abandoned the shooter after the shooter " '[went] crazy' " and fired several shots at the victim. (*Id*. at pp. 988–990.) Here, however, Reyes's gang background and knowledge of F-Troop's pattern of criminal activities put him on notice that violence was likely, particularly where the targeted victim was associated with a rival gang. Reyes's actions following the murder demonstrate he was neither surprised nor frightened by the violence, and instead of disassociating from Lopez, Reyes fled with his gang, took Lopez's gun, and later mirrored Lopez's

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(…continued)

they are not identical, and the law is not yet clear that substantial evidence of one would necessarily suffice to meet the other. (See e.g., *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285 [rejecting the defendant's comparison of "reckless indifference to human life" to "conscious disregard for human life," and finding the former requires subjective awareness of a higher degree of risk of death than the latter].)

conduct when he assaulted F.N. with the very same gun. Reyes's actions before, during, and after the murder firmly establish his conscious disregard for human life.

Finally, Reyes cites to additional cases where the defendants were convicted of implied malice murder and argues that courts have required a greater showing of the requisite mental component. (AOBM 75–77.) But as this Court has explained, " 'When we decide issues of sufficiency of evidence, comparison with other cases is of limited utility, since each case necessarily depends on its own facts.' " (*People v. Casares* (2016) 62 Cal.4th 808, 828, citing *People v. Thomas* (1992) 2 Cal.4th 489, 516.) The particular circumstances of this case demonstrate Reyes had the requisite mental state for implied malice. The evidence shows that Reyes was aware that a half-dozen F-Troop gang members—one armed with a loaded .357 Magnum—riding into contested gang territory, creating a disturbance, and pursuing and confronting a rival gang member was dangerous to human life. Reyes consciously disregarded that danger by actively participating in the events leading up to the murder. Reyes's implied malice was further demonstrated by the facts that after Lopez shot Rosario in the head, Reyes and the others left him to die, and Reyes went on to use the same handgun to assault a second victim less than an hour after Rosario's murder.

In sum, substantial evidence establishes both the objective and subjective components of implied malice murder. Accordingly, the superior court's finding that Reyes was guilty of murder based on a theory of implied malice should be affirmed.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE CONCLUSION THAT REYES IS GUILTY OF MURDER AS AN AIDER AND ABETTOR

In response to the second issue presented, Reyes argues that the evidence was insufficient to establish his guilt under any theory of direct or vicarious liability. (AOBM 78-89.) With regard to aiding and abetting liability, he argues the evidence was insufficient to establish implied malice for three reasons. First, he incorporates his earlier claim that there was insufficient evidence of his own implied malice. (AOBM 88.) Second, he claims there was no evidence that he shared Lopez's intent to shoot at Rosario's car. (AOBM 89.) Finally, he claims that he did nothing to help Lopez commit the shooting. (AOBM 89.)

His first claim fails for the same reasons discussed above. His remaining claims are unconvincing because the objectively dangerous act that Lopez committed was carrying out an armed gang confrontation in contested territory. The record shows Reyes shared Lopez's intent to commit this life-endangering act, Reyes had knowledge of, and conscious disregard for, the danger to human life it posed, and he aided Lopez before, during, and after the deadly confrontation. Accordingly, substantial evidence also supports a finding that Reyes was guilty of implied malice murder as an aider and abettor.

A. The elements of aiding and abetting implied malice murder

To convict someone of a crime as a direct aider and abettor, the prosecution must show "a crime committed by the direct perpetrator," the aider and abettor's "knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving

those unlawful ends," and "conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117; see CALCRIM No. 401 [defining direct aiding and abetting].) Where the definition of the offense "includes the intent to do some act or achieve some consequence beyond the actus reus of the crime [citation], the aider and abettor must share the specific intent of the perpetrator." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) " 'Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. . . . [¶] . . . [¶] Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' [Citation.]" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) In addition, in this context " 'flight is one of the factors which is relevant in determining consciousness of guilt.' " (*In re Gary F.* (2014) 226 Cal.App.4th 1076, 1080.)

Unlike express malice murder, murder committed with implied malice is not a specific intent crime. (§ 188; *People v. Smith* (2005) 37 Cal.4th 733, 739.) Because of this, to be guilty of implied malice murder as a direct aider and abettor, the aider need not intend death, but only the commission of an act naturally dangerous to human life. (See *Beeman*, *supra*, 35 Cal.3d at p. 560 [requirement of shared intent applies where the offense, as defined, "includes the intent to *do some act* or achieve some consequence beyond the *actus reus* of the crime"], first italics added.)

Accordingly, a person is guilty of implied malice murder as a direct aider and abettor if he or she (1) by words or conduct intentionally aids, facilitates, or encourages the perpetrator in committing an act naturally dangerous to human life, (2) with knowledge of the perpetrator's intent to commit the act, and with knowledge of and conscious disregard for the danger to human life it poses, and (3) the act proximately causes another person's death. (*Gentile*, *supra*, 10 Cal.5th at p. 850 ["an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life"]; see, e.g., *Chun*, *supra*, 45 Cal.4th at p. 1205 [finding erroneous felony murder instruction harmless where the court also instructed the jury on implied malice murder, and "[n]o juror could have found that defendant participated in this shooting, either *as a shooter or as an aider and abettor*, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice"], italics added; *People v. Powell* (2021) 63 Cal.App.5th 689, 713, [discussing the actus rea and mens rea required for aiding and abetting an implied malice murder]; *People v. Superior Court of San Diego County (Valenzuela)* (2021) 73 Cal.App.5th 485, 501–502 (*Valenzuela*) [same].)

B. Substantial evidence shows Reyes aided and abetted an implied malice murder

Substantial evidence shows Reyes intentionally aided, facilitated, or encouraged Lopez to commit an act that was

naturally dangerous to human life. Reyes concedes that the evidence shows Lopez acted with implied malice (AOBM 88), but he argues there was no evidence demonstrating he did anything to aid Lopez (AOBM 89). Reyes focuses on Lopez's shooting at Rosario's car as the act that was dangerous to human life (AOBM 88–89), but even before that, Lopez's act of entering contested gang territory armed, with at least five other fellow gang members, and then confronting Rosario constituted conduct that was dangerous to human life. (See, e.g., *Valenzuela*, *supra*, 73 Cal.App.5th at p. 502 [evidence that that defendant arranged a fight and brought a gang member who was armed with a knife was conduct that carried a significant risk of death for implied malice murder].)

Reyes aided Lopez in committing the gang confrontation by going with him to gather several other gang members as "back up" and then riding with Lopez and the other gang members into contested territory. (RT 188, 193, 195–197, 199–200; 2 TRT 359–360.) Once there, Reyes helped Lopez pursue Rosario and get his attention. (1 TRT 139-140, 146.) When Rosario turned his car around and drove past the F-Toopers, Reyes saw Lopez confront Rosario. (RT 211; 1 TRT 146, 149, 166.) As Rosario drove away, Reyes stood by Lopez as Lopez pulled out his gun, aimed it at Rosario's car, and fired it. (1 TRT 151–152, 166.) After the shooting, Reyes fled with his gang and took possession of the murder weapon. (RT 201, 206.) The evidence therefore shows that Reyes aided Lopez in committing an act that was objectively dangerous to human life.

Substantial evidence also shows Reyes had knowledge of Lopez's intent to commit a life-endangering act, Reyes was aware that the act posed a danger to human life, and he consciously disregarded that danger. For the same reasons that Reyes was subjectively aware of the risk to human life posed by his and his gang's actions, so too must Lopez have been. Reyes was aware that Lopez had armed himself and knew that Lopez intended to ride into contested gang territory with several other gang members. (RT 187, 195, 199–200.) After Rosario drove past the gang on Sullivan Street, Reyes knew Lopez wanted to confront Rosario, as the gang members all looked at each other and then all chased after Rosario and called for him to slow down and to stop. (1 TRT 139–140, 146, 162.) Reyes admitted he saw Lopez confront Rosario and then pull out his gun and shoot Rosario. (2 RT 200, 211.) Upon seeing this, Reyes registered no surprised. Instead, he fled with his gang and then committed a second gang confrontation 30 minutes later with the same gun Lopez used to kill Rosario. (RT 201–203, 206; 1 TRT 212–214.) This evidence supports a finding that Reyes knew Lopez intended to commit an armed gang confrontation in the contested area. As discussed above in Argument I-D, Reyes's gang background and his actions surrounding the murder show he was aware that his gang's confrontation of Rosario was dangerous to human life, and he consciously disregarded that danger.

Finally, substantial evidence shows the dangerous conduct that Reyes aided and abetted proximately caused Rosario's death. "Proximate cause," in the context of direct aider and abettor

liability, is identical to causation for purposes of the natural and probable consequences doctrine; it refers to "an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [death] and without which the [death] would not occur." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 49; compare *People v. Chiu* (2014) 59 Cal.4th 155, 164, superseded by statute on other grounds as stated in *Lewis*, *supra*, 11 Cal.5th at p. 959, fn. 3 [natural and probable consequences theory of liability seeks to hold aiders and abettors liable for "criminal harms they have naturally, probably and foreseeably put in motion"].) And where the death is foreseeable, even a claim of superseding cause will not absolve the direct aider and abettor of liability, particularly where, as in cases involving implied malice, the aider and abettor personally acted with a conscious disregard that death may result. (*Schmies*, at p. 49 [an intervening cause that is a normal and reasonably foreseeable result of defendant's original act is not superseding and will not relieve defendant of liability].)

Reyes maintains that he did nothing, and he argues that doing nothing when he had no duty to act cannot proximately cause a murder. (AOBM 86.) Reyes fails to acknowledge that he actively participated in the events that led up to and enabled Lopez to shoot and kill Rosario. Reyes knew that Lopez was armed and wanted to confront Rosario. It was foreseeable that Lopez might use his gun to shoot at Rosario's car to stop him from getting away. Thus, Reyes's actions proximately caused Rosario's death. Accordingly, substantial evidence supports a

finding that Reyes is guilty of implied malice murder as a direct aider and abettor.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the superior court's denial of Reyes's petition for section 1170.95 resentencing relief.

Respectfully submitted,

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April 6, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON MERITS uses a 13-point Century Schoolbook font and contains 9,769 words.

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April 6, 2022

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Reyes**
Case No.: **S270723**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On April 6, 2022, I electronically served the attached **RESPONDENT'S ANSWER BRIEF ON MERITS** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 6, 2022, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

County of Orange Central Justice Center Superior Court of California 700 Civic Center Drive West Santa Ana, CA 92701	Fourth Appellate District Division Three Court of Appeal of the State of CA 601 West Santa Ana Blvd. Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 6, 2022, at San Diego, California.

Liza Nickolas	/s/ Liza Nickolas
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

Case Name: **PEOPLE v. REYES**
Case Number: **S270723**
Lower Court Case Number: **G059251**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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EXHIBITS	Exhibit A_Part2
EXHIBITS	Exhibit B_Part1
EXHIBITS	Exhibit B_Part2
EXHIBITS	Exhibit B_Part3
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4/6/2022

Date

/s/Liza Nickolas

Signature

Truong, Jennifer (285868)

Last Name, First Name (PNum)

Department of Justice, Office of the Attorney General-San Diego

Law Firm