Supreme Court No. S272238

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED WITH PERMISSION

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

FREDDY ALFREDO CURIEL,
Defendant and Appellant

(Fourth District Court of Appeal - Division Three No. G058604)

APPELLANT'S ANSWER BRIEF ON THE MERITS

Appeal From Final Order Denying Penal Code Section 1170.95 Petition
Orange County Superior Court No. 02CF2160
The Honorable Julian Bailey, Presiding Judge

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INTRODUCTION AND OVERVIEW

I. Why this appeal centers around the People's effort to apply Issue Preclusion (without their saying so).

A. Summary of issue presented.

The People framed their issue in the petition for review:

> Whether a jury's special-circumstance finding under section 190.2, subdivision (a)(22) that "the defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang" **precludes** the defendant from making a prima facie showing of eligibility for relief under [Penal Code] section [1172.6]? (PFR 6 [bold added])

We agree that **preclusion** is the key legal doctrine here, as it is in every legal context where a party contends a prior verdict decided issues in a way that precludes litigating them in a current proceeding. Here, the People contend the issue of intent to kill that they assert was decided against Mr. Curiel in the special circumstance verdict should be transplanted into this proceeding to preclude his section 1172.6 petition. (ROBM 33-34)

B. The issue of Issue *Preclusion* (unstated by the People).

By that contention, the People seek issue preclusion. True, their brief doesn't say so; neither issue preclusion, nor its synonyms collateral or direct estoppel, are mentioned in their brief. That may be understandable, for the law of issue preclusion is far more restrictive than their claim of, effectively, "the verdicts end this case, full stop." (*See, e.g., People v. Strong* (2022) 13 Cal.5th 698, 716-717 (*Strong*).) But without giving their effort a name, the People seek to *preclude* Mr. Curiel's petition, on a claim that the jury's verdicts decided the *issue* of whether the current elements of murder were found true beyond a reasonable doubt – as the People acknowledge at ROBM 40. That is an invocation of

issue preclusion. (*Strong,* at pp. 715-716; *see also People v. Perez* (2018) 4 Cal.5th 1055, 1070 (conc. opn. of Corrigan, J.).)

This Court's recent *Strong* opinion makes clear that the law allows Mr. Curiel to refute the People's *issue preclusion* effort within his section 1172.6 case. He isn't required to file a separate habeas petition to the special circumstance, to oppose the People's effort to *preclude* him from the remedy the Legislature granted for his murder conviction. (*Strong,* at p. 713.)[1]

Preclusion law not only is far more restrictive than "the verdict is preclusive, end of discussion," it should be, since barring a party from a statutory remedy implicates the right to one's day in court which is the core of due process (*Truax v. Corrigan* (1921) 257 U.S. 312, 332). Thus, preclusion caselaw has been honed over decades, to ensure the finality principles that underlie preclusion do not unfairly impinge on due process. "The problem involves a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute." (Restatement (2d) of Judgments (1982), § 27, cmt. c, p. 252 (Restatement).)

Since Mr. Curiel's defense to the People's effort to block consideration of his petition is based on settled preclusion law, the People should be called upon to address issue preclusion head-on. If they do, their contentions must fail for the reasons herein. If they don't, they will fail to address the body of law that governs whether a prior verdict precludes a current proceeding.

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[1] The People's attempt to make him go to habeas (ROBM 42-43) was written before *Strong*, so they couldn't have known this Court would reject that contention in *Strong*.

STATEMENT OF THE CASE

I. Jury trial and appeal.

An information charged Freddy Curiel and co-defendant Abraham Hernandez with two counts of murder (Pen.Code, § 187) on August 4, 2002. Count 1 involved the murder of Andres Cisneros, and count 2 involved the murder of Cesar Tejada; both counts alleged firearm enhancements under section 12022.53, subdivisions (d) and (e), and gang enhancements under section 186.22, subdivision (b). A third count alleged gang participation (§ 186.22, subd. (a)). For counts 1 and 2, special circumstances were alleged under section 190.2, subdivisions (a)(3) (multiple murder) and (a)(22) (gang). (Vol. 2, Trial CT [2TCT] 386-388)

Hernandez was tried first, and was convicted of both murders. There was no dispute that Hernandez was the killer in both. (*See, e.g.,* 7TRT 956-957, 984, 1009, 1078)

Mr. Curiel's jury was given instructions that permitted him to be convicted of murder on "natural and probable consequences" theories of aiding and abetting lesser offenses (CALCRIM No. 403) and uncharged conspiracy to commit a lesser offense (CALCRIM Nos. 416, 417). The target offenses for both were disturbing the peace and carrying a concealed firearm by a gang member (7TRT 1130-1139). The parties stipulated Freddy was a member of O.T.H. which was a criminal street gang. (4TRT 516)

The jury deadlocked 6-6 on count 1, and a mistrial was declared. (7TRT 1185-1186.) The jury found Mr. Curiel guilty on counts 2 and 3, and found all enhancements and the gang special circumstance true. (7TRT 1187-1190)

On June 9, 2006, Mr. Curiel was sentenced to LWOP plus 25 years-life. (7TRT 1206-1207)

Mr. Curiel appealed (G037359). On February 21, 2008, the Court of Appeal affirmed the judgment. (CT [current appeal] 224) This Court denied review (S162367).

II. Proceeding under section 1172.6 (formerly 1170.95).

Mr. Curiel's section 1172.6 petition was filed on April 2, 2019. (CT 116) The trial court denied the petition, on the basis that the special circumstance verdict included a finding that Mr. Curiel had intent to kill. (CT 222) Mr. Curiel appealed. (CT 249)

On November 4, 2021, the Court of Appeal reversed the denial order, and remanded with directions to issue an order to show cause. It held that for Mr. Curiel to be ineligible for section 1172.6 relief, the jury had to have found all of the elements of murder under current law. While the Court construed the special circumstance verdict to include a finding of intent to kill, it held that aiding and abetting murder also required an *actus reus* of aiding or encouraging the murder, and the special circumstance verdict did not include an *actus reus* finding because the jury did not receive such an instruction. (*People v. Curiel* (G058604, unpub.), reprinted at 2021 WL 5119900, p. 3.)

This Court granted the People's petition for review.

STATEMENT OF EVIDENCE

The People's "Statement of the Case" (ROBM 11-12) cites only selected evidence favorable to the People. That violates this Court's section 1172.6 prima facie case standard, which requires taking the evidence most favorably to the petition. (*People v. Lewis* (2021) 11 Cal.5th 952, 971-972 (*Lewis*).)

I. Prosecution evidence.

A. Lupe

The most complete version of the events of August 3-4, 2002 was given by Lupe Olivares to detectives hours later. (*See* 3 TCT 804, 806; Exhibit 18, played at 4TRT 453-455)

Lupe, then 17 (3TCT 805), lived across from the apartment complex at 2101 S. Pacific Ave. in Santa Ana. (3TCT 802; 2TRT 124). She was talking and drinking with her friend Griselda and a group that included the eventual victim Cesar Tejada, Cesar's friend Greg, Raul Ramirez, and Jeff (last name unknown). (3TCT 808-811) Cesar's friend Greg ("Snoops") was a gang member; Cesar, Jeff and Raul were not (3TCT 809, 813-814).

Shortly after 1:00 a.m. (3TRT 349), Lupe saw Freddy Curiel and a person she didn't recognize (Hernandez) walking from a nearby 7-11. (3TCT 816) Lupe recognized Freddy (but couldn't remember his name in her detective interview) because he hung around almost every day at the residence of someone she knew as Felix, who lived nearby on S. Rene Dr. (3TCT 829, 831). Felix used to spend time with Lupe's older brother, who had been with a gang called Li'l Hood, and Lupe's brother and his gang were often at Felix's house. (3TCT 826, 829-830) When Lupe's brother was locked up, Felix started his own gang which he called O.T.H. (3TCT 830-831) – the gang of which Freddy was a member (*post*).

Lupe had known Freddy since she was a little girl, and he occasionally hung around with her and her friends. (3TRT 367, 372) He had no problems with anyone in the neighborhood, and Lupe had never seen him do a "hit-up" or gang challenge before that evening. (3TRT 372-373) She had never seen Hernandez and didn't know his name. (3TCT 815-816, 827, 838)

As Freddy and Hernandez walked from the 7-11, they encountered Lupe's group. They said to Cesar things like "what the fuck are you looking at" and "where are you from" (3TCT 816-817); Hernandez was the one who started the argument. (3TRT 379-380) Cesar's English wasn't good, but he said "we are just trying to hang around here, this is our house, try to have fun for a while." (3TCT 817)

Cesar told Hernandez "Just go home." Hernandez got mad, replied "You don't tell me to go home," and began pushing Cesar. (3TCT 817-818) Raul defended Cesar. (3TCT 818, 841)[2]

Freddy started arguing with Raul and said "This is my neighborhood." (3TCT 818, 828, 840) Lupe answered "It's not your neighborhood." (3TCT 818) Freddy yelled back that it was his neighborhood and "O.T.H." (3TCT 819-820, 824-825)

In the meantime, after Hernandez pushed Cesar, Cesar pushed back. He grabbed Hernandez's shirt, and threw him down over a shopping cart that happened to be there. (3TCT 840-841)

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[2] The 2021 Court of Appeal opinion said Freddy Curiel, not Abraham Hernandez, pushed Cesar. (2021 WL 5119900, p. *1.) We aren't aware of such evidence; from our review, the only evidence is that it was Hernandez who pushed Cesar. (2TRT 320-321 [Raul]; 3TCT 817-818 [Lupe]; 1TCT 83, 109-119 [Griselda]; 5TRT 693 [Freddy].) We are also unaware of evidence that Freddy pushed anyone else. In any event, for a prima facie case, the evidence must be taken favorably to the petition under *Lewis*.

When Hernandez got up, he pulled a gun and fired. (3TCT 820, 842) Cesar fell; Freddy and Hernandez ran. (3TCT 821-822)

B. Raul

Raul Ramirez, a resident of the complex in his mid-30s (3TRT 362-363), had seen the male in the checkered shirt (Hernandez) and the one in the dark beanie (Curiel) repeatedly looking at Raul and his group in an angry manner as they walked from the 7-11. (2TRT 209, 233-234, 252-254)

Raul then saw the two males in an apparent argument with Cesar and the group. (2TRT 213-214, 233-235; 6RT 862-863, 867, 874-875, 884) One of the two males asked Cesar "Where are you from?" and Cesar said "I am from nowhere." (2TRT 215-216)

Raul told the two males to stop arguing in front of his complex, and that they needed to leave. (6TRT 863, 875, 884) Hernandez replied "Shut the fuck up." (6TRT 884) Freddy said "We don't have a problem with you, old man [Raul], our problem is with this guy [Cesar]." (2TRT 292; 6TRT 885) Lupe and Freddy traded insults with each other. (2TRT 220)

Hernandez pulled a gun from his waistband, and pointed it at the group. (2TRT 292) Cesar grabbed Jeff and tried to use him as a shield. (2TRT 294-295; 6TRT 878) Raul ran into the complex, and as he ran, he heard one gunshot. (6TRT 863, 879)

C. Det. Lodge

Prosecution gang expert Det. Lodge agreed that Freddy Curiel was well known in that neighborhood, and police had no other information about his being in gang "hit-ups." (5TRT 616)

Det. Lodge agreed there were documents that strongly indicated or stated that Abraham Hernandez was a heroin addict, and drug addicts follow the drugs. (4TRT 590-591) Hernandez

had previous arrests for weapons and marijuana possession in areas "claimed" by other gangs, not O.T.H. (4TRT 580-582, 588-589). Another time, Hernandez was found with graffiti "taggers" who also were unrelated to O.T.H. (4TRT 583-585)

Det. Lodge's opinion testimony will be discussed in Arguments that relate to it, primarily Argument III.

II. Prosecution preliminary hearing evidence.

A. Griselda

Lupe's friend Griselda Alfaro was not presented by the prosecution at trial. According to her preliminary hearing testimony, Hernandez was the only person who "hit up" Cesar Tejada. (1TCT 85, 102) He demanded to know Cesar's gang affiliation and yelled words to the effect of "Why the fuck are you staring at me, you fucking pussy." She didn't hear Freddy Curiel say anything. (1TCT 86-88, 102-105)

Griselda saw as that Hernandez and Cesar argued, Hernandez stepped close to Cesar and 'got in his face.' Cesar then pushed Hernandez backward. (1TCT 86-88, 102-103, 105, 108-109) Griselda walked toward her apartment, and moments later, she heard a gunshot. (1TCT 109)

III. Defense evidence.

A. Mrs. Jimenez

A former neighborhood resident, Elda Jimenez, testified her son Eric was friends with Freddy Curiel when they were teenagers. Freddy and Eric would play in the pool, play records, and breakdance together. (5TRT 656-661)

B. Freddy

Freddy Curiel had known Felix Robles, his friend on S. Rene Dr., when he lived in the neighborhood as a child. (5TRT

665-666) As a teenager, he was often in the neighborhood to spend time with Elda Jimenez's son Eric, with whom he listened to hip-hop music and breakdanced in Eric's garage. (5TRT 666-667) Felix's cousins often came by Eric's house; later, Freddy and Felix reconnected. (5TRT 670-672) Freddy knew Lupe Olivares and Griselda Alfaro from the neighborhood, and he recognized Raul Ramirez as a local. (5TRT 683-684)

In early evening, Freddy went to the Robles house on S. Rene Dr. to fix his bike, since Felix's uncle Armando had a toolshed. (5TRT 673-675) Freddy was a frequent overnight guest at the Robles home, so this was nothing unusual. (5TRT 678) Also there were Felix's cousin Andy Escutia, his uncle Armando, and his grandmother and her granddaughters. (5TRT 675-676)

Later that evening, Felix and Freddy hung out together on folding chairs in front of the house. (5TRT 678-679) At some point, Abraham Hernandez arrived. (5TRT 678-679) Freddy had never met him, and had only seen him a couple of times. (5TRT 684) Felix got up and talked with Hernandez for several minutes, then returned. (5TRT 680-681)

Felix and Freddy had smoked marijuana, so Freddy decided to walk to the 7-11 for his "munchies." (5TRT 680-682) Hernandez asked if he could go too, and Freddy said yes. (5TRT 681)

As Freddy and Hernandez walked back from the 7-11, they encountered the group with Lupe, Griselda, Cesar and Jeff. (5TRT 690) There was an argument in which Cesar told Hernandez "You can't come around here, you are making the area hot," and Hernandez replied "Who the hell are you? You don't live here. We kick it here every weekend." (5TRT 691)

Lupe told Hernandez "You know what, you don't live here either. This is Little Hood's neighborhood." (5TRT 690-691) "Little Hood" was Lupe's older brother's gang, which included Felix Robles until Lupe's brother was incarcerated (*see ante*, p. 19).

Raul Ramirez arrived, as Hernandez told Lupe "Shut the fuck up, bitch." (5TRT 692) Raul replied "Yeah, you guys don't live here, get the hell out." (5TRT 692) Freddy said he tried to be a peacemaker, by telling Hernandez "Chill out," and telling Raul "I know you seen me around, so hey man ... [Spanish] ... chill out." (5TRT 692)

Cesar pushed Hernandez, and Hernandez fell backward over a shopping cart or a bicycle. (5TRT 693) Hernandez popped up and quickly fired one shot at Cesar. (5TRT 693) Everybody was shocked, and Freddy yelled at Hernandez "Man, you shot him, you killed this guy!" (5TRT 694-695)

C. Neighbors who heard "You killed him!"

Neighbor Felix Barbera testified that after he heard a shot, two males ran away, and one yelled "You killed him!" in an excited or surprised voice. (5TRT 827-828, 831-832) Mr. Barbera's wife, Nancy Reyes, testified that after hearing the shot, she heard someone say "You killed him, you killed him!" but didn't think it sounded surprised. (5TRT 834-835, 854)

LEGAL STANDARDS

I. There is a prima facie case.

Section 1172.6, subdivision (c) provides that an order to show cause must issue if the defendant makes a prima facie case. Under *People v. Lewis, supra,* 11 Cal.5th 952, " ' "the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." ' [Citations.] '[A] court should not reject the petitioner's factual allegations on credibility grounds without first conducting an evidentiary hearing.' [Citations.]" (*Id*. at p. 971.) "[A] trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion. [Citation.] As the People emphasize, the 'prima facie bar was intentionally and correctly set very low.' " (*Id*. at p. 972.)

Under the *Lewis* standard, Mr. Curiel has made a prima facie case on all elements of section 1172.6, subdivision (a):

(a)(1) The information permitted the prosecution to proceed on a theory of murder under the natural and probable consequences doctrine and other imputed malice theories. (CT 80.)

(a)(2) Mr. Curiel was convicted of murder.

(a)(3) There is an ample prima facie case that Mr. Curiel could not presently be convicted of murder because of changes to Penal Code section 188 effective January 1, 2019, as defined in *Strong*, 13 Cal.5th 698, 711-712. Taking the evidence favorably to the petition under *Lewis,* Lupe Olivares's account, corroborated by Raul Ramirez, showed there was nothing to suggest Freddy intended Cesar Tejada's death, and Hernandez's murderous decision was an immediate reaction to Cesar shoving him over a

shopping cart while Freddy was busy arguing with Lupe and Raul. In that setting, Freddy wouldn't have known the chain of events leading to Cesar's murder would occur, or done anything with intent to further such a chain. However, the evidence that Freddy was in a gang-related confrontation with people in the Lupe/Raul/Cesar group, which supported Hernandez's hostile attitude toward Cesar that led to the pushing exchange that ended with Hernandez killing Cesar, supported a verdict of first-degree murder (under the law then) as a natural and probable consequence of Freddy disturbing the peace with Hernandez.

II. Issue preclusion: Generally.

"In general, whether a prior finding will be given conclusive effect in a later proceeding is governed by the doctrine of issue preclusion, also known as collateral estoppel. [Citations.]" (*Strong*, 13 Cal.5th 698, 715; *accord* Restatement, § 27, p. 250.)

Issue preclusion, like its finality cousin claim preclusion, is of common-law vintage. (*Caperton v. Schmidt* (1864) 26 Cal. 479, 493-494.) In California, it draws force from Civil Code section 22.2, and is also codified in Code of Civil Procedure section 1911. (*Smith v. Smith* (1981) 127 Cal.App.3d 203, 208.)

Contrary to the theme of the People's brief (*see, e.g.,* ROBM 10-11, 19, 26-27, 32-33), issue preclusion is not merely a mantra of "The prior verdict included X issue, ergo, preclusion." Its elements and exceptions ensure it is a bar against *repetitive* litigation, not merely *subsequent* litigation. "Giving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct." (Restatement, § 29, cmt. f, p. 295.) "Fundamental to the

theory of [issue preclusion] is the notion that the earlier decision is reliable .... The premise is that properly retried, the outcome should be the same. [Citations, including the Restatement, and *Parklane Hosiery v. Shore* (1979) 439 U.S. 322 (*Parklane Hosisery*).]" (*Kortenhaus v. Eli Lilly* & Co. (1988) 228 N.J.Super. 162, 166 [549 A.2d 437, 439].) Conversely, if *subsequent* litigation is not *repetitive*, the party is entitled to its day in court; issue preclusion's elements and exceptions draw that balance.

This Court set forth issue preclusion's five elements, and some of its exceptions, in its recent *Strong* opinion which quoted from its seminal opinion in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*). The first three issue preclusion elements from *Lucido* and *Strong* are the ones relevant here:

First *Lucido*/*Strong* element: "[T]he issue sought to be precluded from relitigation must be identical to that decided in a former proceeding."

Second *Lucido*/*Strong* element: "[T]his issue must have been actually litigated in the former proceeding."

Third *Lucido*/*Strong* element: "[I]t must have been necessarily decided in the former proceeding."

(*Lucido*, at p. 341; *Strong*, at p. 716 [emphasis added]):

While issue preclusion's five elements are *necessary*, they aren't always *sufficient*. " 'Even if the[] threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles' of promoting efficiency while ensuring fairness to the parties. [Citations.]" (*Strong*, 13 Cal.5th 698, 716 [citing *Lucido*, at p. 341, and *Gikas v. Zolin* (1993) 6 Cal.4th 841, 849].) Hence, issue

preclusion will not be applied when there is a "well-settled equitable exception to the general rule." (*Strong*, at p. 716.)

III. Since the People's brief asserts Issue Preclusion, this Answer Brief presents refutations of that contention.

The People state their Issue Presented thus:

> Does a jury's true finding on a gang-murder special circumstance (Pen.Code, § 190.2, subd. (a)(22)) **preclude** a defendant from making a prima facie showing of eligibility for resentencing under Penal Code section [1172.6]?

(ROBM 9 [emphasis added]) Similar is their Argument caption:

> A TRUE FINDING OF A GANG-MURDER SPECIAL CIRCUMSTANCE REQUIRES AN INTENT TO KILL, WHICH NECESSARILY **PRECLUDES** RELIEF UNDER PENAL CODE SECTION [1172.6]

(ROBM 19 [emphasis added])

Granted, the People never mention issue preclusion, or its synonyms direct or collateral estoppel; none of those terms are anywhere in their brief. But, their attempt to use a prior special circumstance verdict to preclude Mr. Curiel from his section 1172.6 petition is indeed a contention of issue preclusion. (*Strong,* 13 Cal.5th 698, 715-716; *accord People v. Eloy Gonzalez* (2021) 65 Cal.App.5th 420, 434 (*Eloy Gonzalez*) (rvw. dism. Sept. 28, 2022, S269792).

Unless every element of issue preclusion is met and no exceptions apply, there is no issue preclusion. Thus, every basis on which an element of issue preclusion is missing, or an exception applies, properly answers the People's effort to use the 2006 special circumstance verdict as issue-preclusive.

Moreover, this Court may affirm on any basis supported by the record. (*People v. Chavez* (2018) 4 Cal.5th 771, 779; *Williams v. Superior Court* (2017) 3 Cal.5th 531, 554.) We offer several, as issue preclusion exceptions, and as failures of one of its elements.

ARGUMENT

I. Since counsel in the first proceeding did not litigate the issue of current-law murder *mens rea* within the 2006 special circumstance, and lacked incentive to do so in light of the minimal real-life difference between sentences of LWOP and 50 years-life as well as his inability to foresee this second proceeding, the special circumstance verdict is not Issue Preclusive.

A. Introduction to Argument I.

The gang special circumstance verdict in count 2 is the basis of the People's effort to issue-preclude Mr. Curiel's current petition. However, in the 2006 trial, counsel made no argument on that special circumstance, effectively conceding it. Nor did he have a realistic incentive for such an argument, since litigating the special circumstance could have undermined his defense of innocence while advocating for only the minimal "difference" between 50 years-life imprisonment and LWOP. Counsel in 2006 couldn't have predicted that litigating the special circumstance would become so important, because he couldn't predict S.B. 1437's enactment in 2018.

In this setting, issue preclusion is inapplicable on multiple bases. Section (E) addresses this as failure of the "actually litigated" *Lucido*/*Strong* element; sections (B), (C) and (D) address it from different exceptions in issue preclusion authority, which also help to explain why an attorney in trial counsel's position may have chosen not to litigate the special circumstance. The exceptions are discussed first for clarity of presentation.

* * *

The three issue preclusion exceptions in the next three sections invoke different analyses and bodies of caselaw. However, they are related to each other, in the sense that they all involve reasons why an attorney might have had little incentive to litigate vigorously an issue in a first proceeding that an adverse party in the later second proceeding seeks to assert as preclusive, and all recognize those reasons as supporting an issue preclusion exception.

Because these analyses involve issue preclusion *exceptions*, by definition they assume all elements of issue preclusion are satisfied. We assume it *arguendo* for the next three sections, but will then show in section (E) that they are not.

B. Issue Preclusion exception for *lack of incentive* to litigate the special circumstance, on the basis that such litigation *could undermine counsel's main argument of innocence*.

"[C]ourts have recognized that certain circumstances exist that so undermine the confidence in the validity of the prior proceeding that the application of collateral estoppel would be 'unfair' to the defendant as a matter of law. [Citation.] Such 'unfair' circumstances include a situation where the defendant had no incentive to vigorously litigate the issue in the prior action ...." (*Roos v. Red* (2005) 130 Cal.App.4th 870, 880; *accord Parklane Hosiery Co. v. Shore, supra,* 439 U.S. 332, 330.) "The most general independent concern reflected in the limitation of issue preclusion by the full and fair opportunity requirement goes to the incentive to litigate vigorously in the first action." (18 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* (2d ed. 2005), § 4423.) California authority recognizes this as essential to "due process requirements [being]

satisfied" (*Mueller v. J.C. Penney Co.* (1985) 173 Cal.App.3d 713, 720): "The party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time. [Citation.] This includes a consideration of the incentive to litigate in the first action. [Citation.]" (*Ibid.*)

Here, Mr. Curiel's counsel had no realistic incentive to – and did not – litigate vigorously (or at all) the question presented by CALCRIM No. 700, given at 7TRT 1149-1150: **If** (and only if) the jury found Freddy Curiel guilty of first-degree murder, should it then find the special circumstance true?

Since the attorneys knew the trial court would be giving "natural and probable consequences" instructions for first-degree murder (CALCRIM Nos. 403 and 416/417 [*see* 6RT 923, 949-950]), Freddy Curiel's counsel could only realistically try to defend the Tejada murder charge by contending that Raul Ramirez erred in his belief that Freddy yelled gang slogans and participated in "angry staring." Counsel did so. (*See* 7TRT 1024-1028, 1032-1034, 1041-1042, 1055-1057, 1059-1060)

Moreover, as counsel would have known, the secondary question of whether the special circumstance should be found true **if** Freddy was convicted of first-degree murder reflected only the *de minimis* real-life difference between LWOP (special circumstance) and lifetime imprisonment with earliest parole eligibility in 50 years (no special circumstance). Thus, trial counsel could properly have decided that litigating the relatively unimportant special circumstance could undermine the case for innocence – the only case counsel and Mr. Curiel would have cared about. In that setting, issue preclusion is inapplicable.

In many criminal cases, it can be a solid tactical choice for counsel to focus only on an innocence defense, not diluting it with an alternative argument "But if you don't believe my first pitch, here's another...." Such an alternative pitch can be easy fodder for prosecution rebuttal. (*See, e.g., People v. Cunningham* (2001) 25 Cal.4th 926, 1006-1007 [argument that defendant was too intoxicated to form intent to kill "would have conceded defendant was the killer, in contravention of the chief defense theory"]; *People v. Thomas* (1992) 2 Cal.4th 489, 531-532 ["[T]he inconsistency inherent in arguing both innocence and lack of premeditation or deliberation would be apparent to the jury and would likely draw prosecutorial comment."]) It also tells jurors that even defendant's counsel agrees they may reject the client's defense, which often isn't the message counsel wants to convey. (*See also McCoy v. Louisiana* (2018) 584 U.S. ___ [138 S.Ct. 1500] [counsel cannot constitutionally argue "defendant is guilty, but not of everything," when client maintains innocence].)

An example of counsel focusing solely on innocence in a charged special circumstance case is *People v. Lopez* (2022) 78 Cal.App.5th 1, in which counsel argued Lopez was present but didn't participate in the robbery or the murder, with no special circumstance argument (*see id*. at p. 16). Another example is *People v. Eloy Gonzalez, supra,* 65 Cal.App.5th 520, discussed further below.

The above considerations were especially salient for special circumstance issues prior to S.B. 1437; which by definition involved only the difference between LWOP and life imprisonment with earliest parole eligibility in 25 years, at a time when it was perceived that few people were paroling. (*See, e.g.,*

D. Slater, "Can You Talk Your Way Out Of A Life Sentence?" *New York Times Magazine* (Jan. 1, 2020), https://www.nytimes.com/2020/01/01/magazine/prison-parole-california.html [after Polly Klaas's 1993 murder, "parole all but disappeared," and "[b]y 1999, a lifer's chance of receiving parole was well below 1 percent"].) They were all the more salient in cases like Mr. Curiel's which had 25 year-to-life gang firearm enhancement allegations (Pen.Code, § 12022.53, subds. (d/e)), or other factors that made conviction *without* a special circumstance punishable in a manner functionally equivalent to the LWOP that would result *with* a special circumstance. (*Cf. People v. Contreras* (2018) 4 Cal.5th 349, 369 [for juvenile sentencing, "a sentence of 50 years to life is functionally equivalent to LWOP"].) In such situations, counsel and the defendant may have had little or no incentive to litigate the special circumstance because it would have been perceived as accomplishing nothing useful, while potentially undermining the argument of innocence.

In re Sokol (2d Cir. 1997) 113 F.3d 303 (*Sokol*) is an illustrative opinion where this was analyzed in another issue preclusion context, albeit a much less dramatic one.

Sokol was tried and convicted of grand larceny from the state's Medicaid program. The only evidence of the amount of the theft was at sentencing; it indicated losses of $222,000, and the trial court imposed a $222,000 restitution order without a separate hearing. The State then brought a civil action, and asserted issue preclusion based on the restitution order to fix Sokol's liability at $222,000. Sokol declared bankruptcy and sought to discharge the civil liability, leading to the question of

whether the $222,000 restitution order from the criminal case was issue-preclusive.

The Second Circuit held it was not, based on an issue preclusion exception. It held that Sokol lacked incentive to litigate the amount of damages vigorously at his criminal trial – and in fact did not litigate it at all – because his defense was based entirely on innocence:

> Sokol not only had no incentive to litigate damages, he did not actually do so. His entire trial strategy was dedicated to proving his innocence, not to proving a lesser degree of damages. He did not deny that over $1 million had been stolen from the State's Medicaid Program; he denied that he was a participant in the larceny. The focus of the criminal trial was on Sokol's knowledge of implicated billing practices and counterfeit sonograms, not on the amount stolen. Sokol never presented evidence as to the amount he stole, as that would have been inconsistent with a defense of innocence.

(*In re Sokol, supra,* 113 F.3d 303, 307.)

So too here. Mr. Curiel's counsel lacked incentive to make an alternative argument of "**if** you convicted my client of first-degree murder you should still find the special circumstance not true," since that would presume guilt and conviction of first-degree murder and 50 years-life imprisonment – functionally equivalent to LWOP – while being "inconsistent with a defense of innocence." And indeed, counsel made no such argument.

Similarly on point is *People v. Eloy Gonzalez, supra,* 65 Cal.App.5th 420 (opinion cited with approval in *Strong*, 13 Cal.5th 698, 712). Akin to *Sokol*, an alternative argument on the secondary issue that required assuming the defendant's guilt (the special circumstance) would have undermined the defense of innocence. But also, far worse than *Sokol*, such an argument

would have offered the jury an option counsel wouldn't have wanted it to utilize – one yielding a sentence of 50 years-life – while doing nothing useful for the client. In rejecting the People's use of the special circumstance verdict as issue-preclusive of a section 1172.6 petition, the *Eloy Gonzalez* Court found that counsel "made no effort to litigate the special circumstance, **and had no reason to do so**." (*Id*. at p. 433 [boldface added].) Mr. Curiel's counsel was in the same situation.

This Court need go no further. Based on the "lack of incentive to litigate vigorously" exception, the special circumstance verdict is not issue-preclusive.

C. Issue Preclusion exception for the *unforeseeable change in law* – S.B. 1437's creation of Penal Code section 1172.6.

Another "well-settled equitable exception to the general rule holds that [issue] preclusion does not apply when there has been a significant change in the law since the factual findings were rendered that warrants reexamination of the issue. [Restatement citation.]" (*Strong, supra,* 13 Cal.5th 698, 716-717.)

For purposes of this section, the "significant change in law" was the creation of Penal Code section 1172.6 itself. Had counsel in 2006 been able to foresee the enactment of S.B. 1437 in 2018, he would have had much more reason to litigate the special circumstance, because he would have known the issue of intent to kill would become far more important 12 years later. Of course, counsel in 2006 lacked psychic powers. Thus, the unforeseeability of a new proceeding that hadn't been created at the time of the original one, in which the allegedly precluded issue (intent to kill)

achieved equally unforeseeable extra importance, falls within the "change of law exception" to issue preclusion.[3]

Bobby v. Bies (2009) 556 U.S. 825, a capital murder case, provides an example. On appeal, Bies argued the evidence showed a mitigating factor of intellectual disability; however, the state Supreme Court affirmed the death sentence, holding that while this factor was mitigating, the aggravating factors outweighed the mitigating. (*State v. Bies* (1996) 74 Ohio St.3d 320, 327-328 [658 N.E.2d 754, 761-762].) Years later, the U.S. Supreme Court held it unconstitutional to impose a death sentence on an intellectually disabled person, in *Atkins v. Virginia* (2002) 536 U.S. 304 (*Atkins*). Bies then argued that because the Ohio courts found he was intellectually disabled, the State was issue-precluded from relitigating that issue, so that *Atkins* barred a death sentence.

The U.S. Supreme Court disagreed. Most relevant here is its third basis, that "even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to this Court's intervening decision in *Atkins* .... Because the change in law substantially altered the State's incentive to contest Bies' mental capacity, applying preclusion would not advance the equitable administration of the law. [Restatement citation.]" (*Bobby v. Bies, supra,* 556 U.S. 825, 836-837; *see also, e.g., Red Lake Band*

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[3] Forcing parties to bear the burden of preclusion for unforeseeable legislation that wouldn't be enacted until many years later would also be contrary to the policy bases underlying preclusion, since it would create "an incentive to conduct lengthy mini-trials on tangential issues." (*Maciel v. Commissioner* (9th Cir. 2007) 489 F.3d 1018, 1024.)

v. United States (Ct.Cl. 1979) 607 F.2d 930, 934-935 [when law creating new cause of action was unforeseeable, and there was little incentive for the plaintiff to litigate the allegedly precluded issue under the prior law, issue preclusion exception applied].)

So too here. At the time of the 2006 trial, the laws governing murder culpability were much more expansive. The change in law effected by S.B. 1437 12 years later "substantially altered" Mr. Curiel's incentive to contest issues relevant to the elements of murder under current law, but both the new law and the current proceeding were unforeseeable. Therefore, "applying preclusion would not advance the equitable administration of the law." (*Bies*, at p. 837.)

D. Issue Preclusion exception, based on the *relatively minor stakes of the issue in the first litigation*, plus *the unforeseeability of the future importance of that issue*.

Another well-recognized exception implicates the minimal stakes of the first proceeding, the 2006 trial, arising from the virtually nonexistent real-life difference between a special circumstance (LWOP) and no special circumstance (50 years-life imprisonment, "functionally equivalent to LWOP"). While that difference was *de minimis* at trial, it is now far more important, due to the People's assertion that the special circumstance issue-precludes the entire second proceeding.

Issue preclusion requires that "the role of the issue in the second action was foreseeable in the first action." (*Butler v. Pollard* (10th Cir. 1986) 800 F.2d 223, 224-225.) It must be "foreseeable that the facts to be the subject of estoppel would be of importance in future litigation." (*Mosher Steel Co. v. NLRB* (5th Cir. 1978) 568 F.2d 436, 440.)

Consequently, there is an issue preclusion exception for cases where the stakes in the first proceeding were relatively minor compared with those in the second, and the affected issue's importance in the second proceeding was unforeseeable in the first. (Restatement,§ 28, cmt. j, pp. 283-284.) Comment j to Restatement section 27 similarly refers to "a basis for an exception under § 28 [*op. cit. ante*] ... that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action." (*Id.* at p. 261.)

This exception usually arises in the civil arena. "If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. [Citations.]" (*Parklane Hosiery, supra,* 439 U.S. 322, 330.) The example cited in *Parklane Hosiery* was an airline disaster in which the first action resulted in a judgment of $35,000 which the defendant didn't appeal, not knowing this judgment would later be assigned as issue-preclusive in a $7,000,000 lawsuit on behalf of a different passenger. The Second Circuit rejected issue preclusion in that case. (*Berner v. British Commonwealth Pacific Airlines, Ltd.* (2d Cir. 1965) 346 F.2d 532, 540-541.) Similar examples include *Eureka Federal Savings & Loan Ass'n v. American Casualty Co.* (9th Cir. 1989) 873 F.2d 229, 233 [no issue preclusion when first action involved $3,321 in fees plus compensatory damages, but second action potentially involved over $100 million], and *Remington Rand Corp. v. Amsterdam-Rotterdam Bank, N.V.* (2d Cir. 1995) 68 F.3d 1478, 1486-1487 [no issue preclusion when verdict in first action did not "remotely approach[]" the $220 million sought by Remington in the second action, which was

unforeseeable].) Cases in hybrid criminal/civil contexts often involve petty misdemeanors or infractions as nonpreclusive. (*See, e.g.,* authorities cited in *Anderson v. City of Pocatello* (1986) 112 Idaho 176, 184 [731 P.2d 171, 179].)

As the above examples show, what matters is the relatively minimal nature of the controversy or result in the first proceeding, plus the defendant's inability to foresee a later preclusion contention based on that first judgment. As the venerable Judge Learned Hand explained:

> [I]t often works very harshly inexorably to make a fact decided in the first suit conclusively establish even a fact "ultimate" in the second. The stake in the first suit may have been too small to justify great trouble and expense in its prosecution or defense; and the chance that a fact decided in it, even though necessary to its result, may later become important between the parties may have been extremely remote.... What jural relevance facts may acquire in the future it is often impossible even remotely to anticipate.... Defeat in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train. There is no reason for subjecting the loser to such extravagant hazards....

(*The Evergreens v. Nunan* (2d Cir. 1944) 141 F.2d 927, 929 [emphasis added] [cited in *Parklane Hosiery*, 439 U.S. 322, 330].)

So too here. The issue of whether the jury should find the special circumstance <u>if</u> it convicted Mr. Curiel of murder affected only the nearly nonexistent real-life difference between LWOP and 50 years-life imprisonment. Furthermore, in Learned Hand's words, it was "impossible even remotely to anticipate" in 2006 that S.B. 1437 would be enacted 12 years later, elevating the special circumstance to major importance because it was the only verdict the People could assert for the "utter disaster" of precluding Mr. Curiel's 2019 statutory remedy to the murder

conviction. Accordingly, "[t]here is no reason to subject [Mr. Curiel] to such [an] extravagant hazard[] ...."

Again, this Court need go no further. The "relatively minor matter" exception applies, and the special circumstance verdict is not issue-preclusive.

E. *Failure of an essential element* of Issue Preclusion, the "actually litigated" element

As quoted *ante*, p. 27, the second *Lucido*/*Strong* element of issue preclusion is that the assertedly precluded issue "must have been actually litigated in the former proceeding." (*Strong*, at p. 716, quoting *Lucido*, at p. 341, emphasis added.)

"Whether an issue was actually litigated in a prior action ... is generally determined by ascertaining whether the parties to the original action disputed the issue and whether that issue subsequently was resolved by the court entertaining the action." (*Hardy v America's Best Home Loans* (2014) 232 Cal.App.4th 795, 806 [emphasis added].) Here, Freddy Curiel's counsel did not dispute the issue of: **If** the jury were to find Freddy guilty of first-degree murder, should it also find the special circumstance? (*See, e.g., People v. Jennings* (2010) 50 Cal.4th 616, 677-678 [when defendant does not contest a serious charge, it amounts to a real-life concession]; *People v. Flood* (1998) 18 Cal.4th 470, 504-505 [similar].)

The Court of Appeal in *People v. Eloy Gonzalez, supra,* addressed this situation. It rejected the People's effort to issue-preclude a section 1172.6 petition based on a special circumstance verdict because counsel did not "actually litigate" the special circumstance, the second *Lucido*/*Strong* element. After quoting *Lucido*'s statement of issue preclusion's elements, the Court held:

> Here, defense counsel did not "actually litigate" the robbery special circumstance. Instead, he argued Gonzalez was not guilty of murder at all. Because Gonzalez made no effort to litigate the special circumstance, and had no reason to do so, the "actually litigated" element of collateral estoppel is not satisfied by the jury's true finding. Therefore, the jury's prior special circumstance finding has no preclusive effect on a current section 1170.95 proceeding.

(*Eloy Gonzalez, supra,* 65 Cal.App.5th 420, 433.) Similarly in a civil context, the Second Circuit held the defendant did not "actually litigate" an issue (the $222,000 in damages) that he did not argue in the first action. (*In re Sokol, supra,* 113 F.3d 303, 307.)

That analysis applies equally to Mr. Curiel's case.

Akin to these cases, in holding an issue was not "actually litigated" when counsel didn't argue it, was *Gates v. District of Columbia* (D.D.C. 2014) 66 F.Supp.3d 1. *Gates* held that because the affected party (defendant District) presented no argument in the original proceeding on a factual issue (related to plaintiff's possible misconduct), the "actually litigated" element of issue preclusion wasn't satisfied: "The federal government's choice not to make an issue of whether Gates' misconduct caused or brought about his prosecution is akin to facts proven by consent or stipulation that are not 'actually litigated.' ... On this issue, in particular, the court lacked the benefit of an adversarial process to determine the facts because the federal government provided no opposition.... '[A]ctual litigation' involves 'something more' than this. [Citation.]" (*Gates*, at pp. 12-13.)

The U.S. Supreme Court has used similar formulations. In rejecting issue preclusion based on the jury's possible failure to return a verdict on an intent to kill issue, *Schiro v. Farley* (1994) 510 U.S. 222, drew support from the defense's failure to dispute

the issue. (*Id*. at pp. 235-236.) And in *Dowling v. United States* (1990) 493 U.S. 342, one of the bases on which the Court rejected issue preclusion was that the allegedly precluded issue, identity, "was not seriously contested in the [original] case" because Dowling had admitted he was there (*id*. at p. 351). Thus, the Court held, "there is nothing that persuasively indicates that the question of identity was at issue and was determined in Dowling's favor at the trial ...." (*Id*. at p. 352.)

In our case, the question of whether the nonkiller met the criteria in the special circumstance instructions "was not seriously contested in the original case" (*id*. at p. 351); in fact, it wasn't contested at all. Therefore, counsel did not "actually litigate" the allegedly precluded issue of current-law murder *mens rea* contained in the special circumstance. On that basis, issue preclusion doesn't bar Mr. Curiel's section 1172.6 petition, for failure of the *Lucido*/*Strong* "actually litigated" element.

II. Under the jury's instructions, the special circumstance verdict could have been based on the jury finding Freddy Curiel "criminally responsible" for an act within the scope of a conspiracy to disturb the peace, and that Hernandez's murder of Cesar Tejada was such an act; thus, the issue of whether Mr. Curiel had a mental state required for murder under current law was not "necessarily decided," and there is no Issue Preclusion.

A. Summary and applicable law.

The third element of issue preclusion described in this Court's *Lucido* and *Strong* opinions is that the allegedly precluded issue was "*necessarily* decided" in the prior proceeding.

For jury trials, this requires that under the instructions and verdicts, the record must conclusively show the jury considered and necessarily decided the assertedly precluded issue. If the jury had a pathway to reach its verdicts without finding that issue, there is no preclusion. (*See, e.g., Hardwick v. County of Orange* (9th Cir. 2020) 980 F.3d 733, 742; *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1438-1439.) "Where doubt exists as to the basis for the jury's finding, [issue preclusion] does not apply." (*Taco Bell Corp. v. TBWA Chiat/Day Inc.* (9th Cir. 2009) 552 F.3d 1137, 1145.)

Post-*Lewis* section 1172.6 opinions (and some pre-*Lewis*) have utilized the same standard, but without using the terms "issue preclusion" or "collateral [or direct] estoppel." An example is *People v. Langi* (2022) 73 Cal.App.5th 972, which held a prior verdict cannot bar a section 1172.6 petition if "the record of conviction does not conclusively eliminate the possibility that the jury found the defendant guilty of murder on a theory under which malice was imputed to him based solely on his participation in a crime." (*Id.* at p. 976 [underscoring added].)

Another is *People v. Flores* (2022) 76 Cal.App.5th 974, which held that "[o]nly where the record of conviction contains facts conclusively refuting the allegations in the petition may the court make credibility determinations adverse to the petitioner." (*Id.* at p. 991 [emphasis added] [citing, *inter alia*, *People v. Lewis, supra,* 11 Cal.5th 952, 971].) To like effect are *People v. Harden* (2022) 81 Cal.App.5th 45, 52; *People v. Lopez, supra,* 78 Cal.App.5th 1, 20; *People v. Jenkins* (2021) 70 Cal.App.5th 924, 936; *People v. DeHuff* (2021) 63 Cal.App.5th 428, 441-442; and *People v. Duchine* (2021) 60 Cal.App.5th 798, 815-816.

With or without issue preclusion language, the principle is the same: If the jury had a pathway to reach its verdicts without finding beyond a reasonable doubt every element of murder under current law, then the section 1172.6 issue of whether the prior verdicts satisfy every element of current-law murder (beyond a reasonable doubt) was not necessarily decided by those verdicts. Then, the third *Lucido/Strong* element of issue preclusion is not satisfied, and a section 1172.6 petition is not precluded.

Here, under its uncharged conspiracy instructions and the evidence, the jury could have found Mr. Curiel "criminally responsible" for Hernandez's murder of Cesar Tejada and the associated special circumstance via a pathway that didn't require of statutory malice. Hence, the People cannot show that by the special circumstance verdict, jurors "necessarily decided" the elements of murder under current law.

B. Discussion: Under its uncharged conspiracy instructions, the jury had a pathway to the special circumstance verdict by finding Freddy Curiel "*criminally responsible*" for Hernandez's murder, as an act within a Hernandez-Curiel gang-related conspiracy to disturb the peace.

The uncharged conspiracy instructions were CALCRIM Nos. 416 and 417, excerpted in the footnote below.[4] The most obvious target offense of the uncharged conspiracy was disturbing the peace, on which the court also instructed. (7TRT 1138)

From these instructions, and the prosecution's gang officer opinion evidence, the jury could certainly have found that Mr. Curiel was part of a conspiracy with Abraham Hernandez to

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[4] CALCRIM No. 416, as given, states in pertinent part:

"* * * A member of a conspiracy is **criminally responsible** for the acts or statements of any other member of the conspiracy to help accomplish the goal of the conspiracy. To prove that the defendant was a member of a conspiracy in this case, the People must prove that: Number one, the defendant intended to agree and did agree with Abraham Hernandez to commit the crime of disturbing the peace ... number two, at the time of the agreement the defendant and Abraham Hernandez intended that one or more of them would commit the crime of disturbing the peace ... [and] number three, the defendant or Abraham Hernandez or both of them committed at least one overt act to accomplish the crime of disturbing the peace .... [¶] An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted for the common purpose to commit the crime." (7TRT 1131-1132 [boldface added])

CALCRIM No. 417, as given, states in pertinent part:

"A member of a conspiracy is also **criminally responsible** for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan...." (7TRT 1135-1136 [boldface added])

disturb the peace by gang-related confrontation and "hit-up." (4TRT 475; 5TRT 615) The uncharged conspiracy instructions didn't require a formal agreement, since the jury was instructed it could infer a conspiracy from conduct alone. (7TRT 1132)

The 2008 Court of Appeal opinion found "there was overwhelming evidence Curiel aided and abetted in disturbing the peace, and the jury's verdict convinces us that no reasonable jury could have concluded Curiel did not aid and abet that crime." (CT 245) We respectfully disagree with the "overwhelming" and "no reasonable jury" characterizations; moreover, the 2008 Court of Appeal wasn't using this Court's 2021 *Lewis* standard, which requires taking the evidence most favorably to a section 1172.6 petition. But we agree the jury heard evidence that Mr. Curiel committed, aided and abetted, and conspired to commit acts of disturbing the peace.

We agree that although the evidence was conflicting, there was evidence that Freddy Curiel was part of the "angry staring" with Abraham Hernandez, and that Freddy and Hernandez got into a confrontation with people in the Lupe/Raul/Cesar group in furtherance of the O.T.H. gang; in Det. Lodge's phrasing, a gang "hit-up." (4TRT 475; 5TRT 614-615) Det. Lodge testified that he had investigated cases in which gang "hit-ups" resulted in violence up to and including murder (4TRT 476) (he didn't state how many investigations or which gangs), but there was no evidence that a "hit-up" would <u>necessarily</u> result in violence, let alone murder. Nonetheless, Det. Lodge testified that if violence was used in a "hit-up," that would create more gang-related respect and fear in a neighborhood. (4TRT 478-479)

The above was evidence that when Abraham Hernandez shot and killed Cesar Tejada, that violent act furthered gang-based aims of the alleged conspiracy to disturb the peace. The prosecutor so argued. (7TRT 973-974)

Further, gang officer Lodge testified that "most Hispanic gangs" were "turf-oriented" and "turf-oriented" gangs customarily used violence and intimidation to defend their "territory," so that violence and intimidation were typical for "most Hispanic gangs." (4TRT 472-473) He further testified that the O.T.H. gang was such a "turf-oriented" gang. (4TRT 496) He also testified that violence and intimidation would be a potential consequence of a gang "hit-up" (4TRT 477-479), particularly if a person who lived in the neighborhood reacted with disrespect. (4TRT 482-483) Similarly, the prosecutor argued the Cesar Tejada murder was a natural and probable consequence of the "hit-up." (7TRT 974)

Thus, under CALCRIM Nos. 416 and 417, the jury could have concluded that Mr. Curiel was "criminally responsible" for Abraham Hernandez's act of murdering Cesar Tejada.

The instructions didn't define "criminally responsible," a phrase which "does not have a common definition every jury member could easily agree upon." (*Lindsay v. State* (Tex.Ct.App. 2003) 102 S.W.3d 223, 231.) Jurors are presumed to use common meanings of their instructions (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 368), but no common-meaning analysis excluded the possibility that jurors used CALCRIM Nos. 416/417 to find the special circumstance based on Mr. Curiel being "criminally responsible" for Abraham Hernandez's murder of Cesar Tejada.

One meaning in plain English is that whatever legal consequences – "criminal responsibility" – a jury would affix to

the perpetrator of the greater crime, it would also attach to a defendant who conspires with that perpetrator to commit a target crime, of which the greater crime was a natural and probable consequence and within the scope of the conspiracy.[5] And no instruction told Mr. Curiel's jury that "criminal responsibility for a perpetrator's act" excluded special circumstances.

Consequently, by applying CALCRIM Nos. 416 and 417, the jury could have found Mr. Curiel guilty of first-degree murder with a special circumstance based on culpability for conspiracy to disturb the peace by participating in a gang confrontation with Hernandez, of which Hernandez committing a gang-related murder (§ 190.2, subd. (a)(22)) was a natural and probable

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[5] As well as being a plain-English reading, that is a traditional legal definition emanating from common law (*see, e.g.,* Witkin, Cal.Crim.Law (4th ed.), Elements, § 98). For example:

> [A] conspirator is vicariously liable for the unintended acts by coconspirators if such acts are in furtherance of the object of the conspiracy, or are the reasonable and natural consequence of the object of the conspiracy.... The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. Every conspirator is legally responsible for an act of a conspirator that follows as one of the probable and natural consequences of the object of the conspiracy even though it was not intended as a part of the original plan.

(*People v. Hardy* (1992) 2 Cal.4th 86, 188 & fn.31.) Expressions of common law that have a plain-English meaning will often mesh with jurors' expectations, since "sound reason, common sense, and common honesty ... are the foundation of the common law." (*Gildersleeve v. Hammond* (1896) 109 Mich. 431, 438 [67 N.W. 519, 521].) Common-law and plain English meanings often coincide. (*See, e.g., North Bay Schools Ins. Auth. v. Industrial Indemnity Co.* (1992) 6 Cal.App.4th 1741, 1747.)

consequence and within the scope of the conspiracy. The jury had no need to find intent to kill.

The People may reply that while the uncharged conspiracy instructions in CALCRIM Nos. 416-417 didn't require intent to kill for the special circumstance, CALCRIM No. 736 did. However, if the jury were to apply the uncharged conspiracy instructions, it wouldn't have needed to use CALCRIM No. 736. And nothing in CALCRIM No. 736 stated that it superseded the uncharged conspiracy instructions.[6]

Thus, the uncharged conspiracy instructions permitted verdicts that assigned to Mr. Curiel the "criminal responsibility" of Abraham Hernandez, first-degree murder with a gang special circumstance. Jurors were instructed that they were required to follow the law given them (CALCRIM No. 200, given at 7TRT 1104), and are presumed to have followed those instructions (*People v. Delgado* (1993) 5 Cal.4th 312, 331).

It is entirely possible that Mr. Curiel's jury returned its special circumstance verdict (and first-degree murder verdict) based on CALCRIM Nos. 416/417's expansive assignation of uncharged conspiracy liability. The evidence *ante*, pp. 19-21, supported a conclusion that Hernandez's intent to kill Cesar

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[6] The prosecution argued to the jury that the special circumstance required intent to kill – but only as part of its argument that Freddy was guilty of both murders as part of a "death squad" (7TRT 1000-1002, 1088), which the jury rejected by deadlocking 6-6 in count 1; the defense made no argument on either special circumstance. In any event, jurors were instructed that they had to follow the court's statements of the law, even if it conflicted with statements by the attorneys (CALCRIM No. 200 [given at 7TRT 1104], and it is presumed that jurors followed their instructions (*People v. Delgado* (1993) 5 Cal.4th 312, 331).

wasn't formed until Cesar pushed Hernandez over a shopping cart, which occurred during Freddy's separate gang-based argument with Lupe and Raul; and thus, that Freddy couldn't have known of Hernandez's later-formed intent to kill Cesar, let alone committed any *actus reus* with an intent to facilitate it. Moreover, there is evidence from neighbors that when Hernandez murdered Cesar, Freddy exclaimed "You killed him, you killed him" (5TRT 827-828, 831-832, 834-835), indicating that Freddy wasn't expecting it – the antithesis of intent to kill.

C. Recapitulation.

The Court of Appeal assumed the special circumstance verdict required a finding of intent to kill. (CT 247; 2021 WL 5119900, p. 3) For the reasons above, we respectfully disagree, since there was a pathway to the special circumstance verdict – as well as the first-degree murder verdict – without intent to kill.

In light of the above, the jury had a pathway to find Mr. Curiel guilty of first-degree murder with a special circumstance as a theory of imputed malice, without finding the State proved facts beyond a reasonable doubt that would support murder liability under post-S.B. 1437 law. Hence, the prior verdict does not "conclusively establish" that the conviction and special circumstance finding were based on a theory of murder that continued to exist after enactment of S.B. 1437 (malice murder or current felony-murder). (*People v. Langi, supra,* 73 Cal.App.5th 972, 976; *People v. Flores, supra,* 76 Cal.App.5th 974, 991.)

In preclusion language, the question of whether Mr. Curiel is culpable for all elements of current-law murder was not "necessarily decided," the third *Lucido*/*Strong* element. (*See ante*, section (A), pp. 43-44) Thus, there is no issue preclusion.

III. A special circumstance verdict based largely on evidence which was then admissible, but is now inadmissible under subsequent Evidence Code interpretations of this Court (*Sanchez* and *Valencia*), is not Issue-Preclusive due to the change in law.

A. Issue Preclusion's "*change of law* exception."

This Court held in *Strong*: "Even when the threshold requirements for issue preclusion are met, one well-settled equitable exception to the general rule holds that preclusion does not apply when there has been a significant *change in the law* since the factual findings were rendered that warrants reexamination of the issue. [Restatement citation.] As the high court explained more than a half century ago: '[A] judicial declaration intervening between the two proceedings may so *change the legal atmosphere* as to render the rule of collateral estoppel inapplicable.' (*Commissioner v. Sunnen* (1948) 333 U.S. 591, 600; see *Montana v. United States* (1979) 440 U.S. 147, 155, 161-162.) The Courts of Appeal in this state have likewise long recognized that *changes in the law* may supply a basis for denying a prior determination preclusive effect. [Citations.]" (*Strong*, 13 Cal.5th 698, 716-717 [italics added].)

"This exception ensures basic fairness by allowing for relitigation where 'the change in the law [is] such that preclusion would result in a manifestly inequitable administration of the laws.' [Restatement citation.] It also reflects a recognition that in the face of this sort of legal change, the equitable policies that underlie the doctrine of issue preclusion — 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation' (*Lucido v. Superior Court, supra,* 51 Cal.3d at p. 343) —

are at an ebb. The integrity of the judicial system may be compromised by inconsistent determinations — but so might it be compromised by fastidiously insisting on identical determinations even when a material change in the governing law calls for a different outcome in a second proceeding. Concerns about judicial economy and vexatious litigation likewise have little purchase when there has been a significant change in the law that applies to determination of the relevant issue." (*Strong,* at p. 717.)

Here, the allegedly precluded issue – whether the trial verdicts included all of the current-law elements of murder beyond a reasonable doubt – was "proved" only with a mass of opinion evidence that was admissible at the time of trial, but which is now excludable as inadmissible hearsay under the change in law effected by this Court's authorities years later, *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Valencia* (2021) 11 Cal.5th 818 (*Valencia*). Those authorities are interpretations of the Evidence Code, which governs this section 1172.6 proceeding under subdivision (d)(3). (*See also* Evid.Code, § 300.) It is also presumed the Legislature enacted S.B. 1437 in 2018 with relevant judicial decisions, such as *Sanchez* and *Valencia*, in mind. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135.)

The Restatement states an issue preclusion exception in situations where "a new determination is warranted in order to take account of an intervening change in the applicable legal context." (Restatement, *supra*, § 28, subd. (2), p. 273.) A material change in evidentiary rules that can be used to prove a charge, which could potentially change a proceeding's outcome, is such an intervening change. (*See Strong*, 13 Cal.5th 698, 717 ["change in law exception" applies "when a material change in law calls for a

different outcome in a second proceeding"]; *see also Settle v. Beasley* (1983) 309 N.C. 616, 622-623 [308 S.E.2d 288, 292] [issue preclusion exception applied, in part because the "present cause of action is governed by rules of evidence substantially different from those applicable to the prior action"].)

A related preclusion exception applies where "[t]he forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined." (Restatement, § 29, subd. (2), p. 291.) This includes situations in which the original proceeding permitted extensive evidence that would be excludable in the second proceeding (*see, e.g., Cunningham v. Prime Mover, Inc.* (1997) 252 Neb. 899, 904 [567 N.W.2d 178, 182]; *Village Supply Co. v. Iowa Fund, Inc.* (Iowa 1981) 312 N.W.2d 551, 554), which we have here. Because this preclusion exception applies to the current case via the change in law effected by *Sanchez* and *Valencia*, we will treat it as coextensive with the change of law exception.

This Argument discusses how the 2006 judgment was obtained by extensive use of gang officer opinions based on hearsay – evidence believed to be admissible at that time under *People v. Gardeley* (1997) 14 Cal.4th 605 (*Gardeley*) and its progeny, but which this Court later held was inadmissible hearsay in *Sanchez* and *Valencia*.[7]

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[7] The party that proffers evidence has the burden of establishing its admissibility under rules governing matters such as hearsay and relevance. (*People v. Morrison* (2004) 34 Cal.4th 698, 724; *People v. Thompkins* (2020) 50 Cal.App.5th 365, 416.)

B. Discussion: *Sanchez* and *Valencia*, as applied here.

Sanchez disapproved numerous opinions from this Court, beginning with *Gardeley*, which had held that hearsay was admissible as the basis for a gang expert's opinion because it was supposedly not admitted for its truth. Thus, *Sanchez* held that if an expert's opinion is based on case-specific out-of-court statements that lack independent competent proof, then the opinion is founded on inadmissible hearsay and is itself incompetent. (*Id*. 63 Cal.4th 665, 684-685.)

Valencia elaborated on *Sanchez* by holding that case-specific facts used as the basis for an expert's opinion which are not "generally accepted by experts in the field" must be proven by independent competent evidence, failing which the opinion and its foundation are hearsay. (*Id*., 11 Cal.5th 818, 837.) It held that "facts concerning particular events and participants alleged to have been involved in predicate offenses ... constitute case-specific facts that must be proved by independently admissible evidence." (*Id*. at p. 839.)

Sanchez and *Valencia* effected a material change in law governing hearsay-based opinions from gang officers testifying as experts. Numerous such opinions were offered in Mr. Curiel's trial, and they were instrumental in the prosecution's ability to obtain its first-degree murder conviction and special circumstance verdict. Indeed, without them, the prosecution had nothing with which to assert that Freddy met any of the elements of murder under current law.

Gang officer Det. Lodge, who was also part of a gang suppression unit for overtime work (4TRT 560), testified to opinions regarding Felix Robles's O.T.H. gang that were based on

hearsay specific to Mr. Curiel's case. The foundation for Det. Lodge's O.T.H.-related opinions included (4TRT 496, 501-503, 505, 508, 513-514):

a. He had investigated unstated cases regarding O.T.H., with unstated results. (Hernandez's case was one (4TRT 513-514); it is not clear if there were others.)

b. He had talked to unidentified people that were members of O.T.H.

c. He testified in the trial of co-defendant Hernandez, who he asserted was an O.T.H. member.

d. He "talked to other detectives relating to O.T.H."

e. He had "seen police reports and viewed police reports regarding O.T.H."

f. He had "reviewed crime reports regarding O.T.H. gang members."

g. He determined O.T.H.'s alleged "territory" by "talk[ing] to the gang members who claim a particular area[,] review[ing] reports and documentation regarding these gang members[,] [or] see[ing] where the graffiti is and where they are placking [*sic*] or writing on the walls of a particular area."

h. He reviewed police reports and prior offenses relating to Hernandez.

With this mass of hearsay as foundation, Det. Lodge testified to case-specific opinions regarding O.T.H.:

1. O.T.H. was a "turf oriented gang." (4TRT 496) Det. Lodge also opined that a "turf oriented gang" would customarily use violence and intimidation to defend their claimed "territory." (4TRT 472-473)

2. The territory O.T.H. "claimed" was "the 2000 Block of South Ross and Birch, and also the area of 2100 South Rene and that general area" (4TRT 496).[8]

3. O.T.H. originally stood for "On the Habit." This referred to "either ... criminal habit or drug habit. But, it is kind of evolved into the Hoodlums now." (4TRT 506)

4. 2126 South Rene Drive, the home of Mr. Curiel's childhood and later young adult friend Felix Robles and Felix's uncle Armando described *ante*, p. 23, was an O.T.H. "kick pad," a "location where a group of gang members hang out." (4TRT 511)

5. Because 2126 S. Rene Dr. was a "gang house" for O.T.H., any person whose name appeared on its walls was an O.T.H. gang member. (4TRT 511)

6. Freddy Curiel had a gang "moniker" of "Champ." (4TRT 518)[9]

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[8] Those two areas were about 1¼ miles from each other, and based on the evidence, had nothing in common except that they happened to be the areas in which Abraham Hernandez murdered Andres Cisneros and then Cesar Tejada. Det. Lodge had testified at the preliminary hearing that the location of the Cisneros murder was not necessarily in an area "claimed" by O.T.H. (4TRT 554-555)

[9] Freddy testified the nickname "Champ" was given him by his teenaged friend Eric Jimenez, who lived in the neighborhood (*see ante*, p. 22), and who called Freddy "Champ" because he had won a few breakdancing competitions. (5TRT 669) There was no evidence that Eric was gang-involved.

7. Abraham Hernandez was an O.T.H. gang member in August 2002 whose gang moniker was Clumsy. (4TRT 511-513, 515-516; 5TRT 647-648)[10]

The prosecution's hypotheticals to the gang officer were also founded on these hearsay-based opinions. This included the gang officer's opinions that O.T.H. was a "turf gang" that "claimed the areas" of the two murders (4TRT 531-534); the dispute in the Tejada case related to "claiming turf," and the Tejada murder resulted from a gang challenge that was part of this "turf dispute" (4TRT 534-536); the murder was committed to "do the work for the gang, promote the gang, and act in a violent manner against somebody who would disrespect the gang" (4TRT 536); and the nonshooter's role in this turf-based hypothetical was to protect the shooter and advertise the gang (4TRT 536-537).

Furthermore, Det. Lodge testified repeatedly to hearsay-based theories of "gang culture," which he then attributed to O.T.H. and Freddy Curiel on this particular occasion. His theories of "gang culture" came almost entirely from members of other gangs, law enforcement officers, and other sources not demonstrated to be from whatever personally acquired expertise with O.T.H. that Det. Lodge might have had (if any). There was no evidence of the basis on which he believed his theories of "gang culture" were applicable to O.T.H. and Freddy Curiel on this specific occasion. His testimony thus had the same hearsay error

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[10] This opinion was based on a hearsay letter from Hernandez in jail to an unidentified woman named Erica that said "They call me Clumsy from O.T.H. Hoodlums S.A." (5TRT 647-648), and someone in Felix's Robles's home having written "O.T.H. Clumsy 2002" at an unidentified time (4TRT 512).

that was found reversible in *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 197-199.

These hearsay-based "gang culture" theories included:

1. A "traditional or turf-oriented gang is one that holds a particular neighborhood or claims a location in a particular area. They defend that for many purposes, and use violence and intimidation for that purpose." (4TRT 472-473)

2. "Most Hispanic gangs tend to be turf-oriented gangs." (4TRT 473) Det. Lodge identified three persons as O.T.H. gang members in his opinion, all of whom had Hispanic names. (*See* 4TRT 514-516 [Hernandez], 516 [Curiel, by stipulation], 516-518 [Lopez])

3. Based on Det. Lodge's "training and experience" and talking and listening to discussions with unidentified gang members, "if there is a gun within a group ... it is expected that everybody knows if there is a gun and who has it." (4TRT 488-489) (We are unaware of any other evidence that Freddy Curiel knew Hernandez had a gun when Freddy committed acts of disturbing the peace.)

4. Other gang members described the function and import of guns in "gang culture," including that gangs will have "gang guns" which members can use as needed. (4TRT 482-487)

5. In "gang culture," respect, fear and intimidation are crucial; "[t]he more violent you are, the more the community fears you or the neighborhood fears you." (4TRT 477)

6. When there is graffiti with a gang's name, that is a claim of the "turf" where the graffiti can be found. It is a form of

"claiming" a location, which tells rivals "don't be in there. This is our territory." (4TRT 476-477)[11]

7. In "gang culture," gang members gain respect by crimes, "being violent, working, putting in work for the gang, selling drugs and sharing that with the gang," and "[t]he other gang members knowing about it, because they brag about it," because "[t]he more violent the individual is, the more respect he has within the gang and the more fear that he produces in the community." (4TRT 478-479)

8. In "gang culture," being disrespected by residents of an area means gang members "are unable to instill fear in that particular neighborhood," which means "they can't control that neighborhood. And if they can't control it, then they really aren't doing what it is that they want to do." (4TRT 480)

9. In "gang culture," a person will only commit a crime with another whom he trusts to provide backup. If the second person does not provide "backup," then "there is going to be consequences." (4TRT 480-481)

10. In "gang culture," "backup" can have many possible functions – "[b]ackup as a lookout, backup as covering them, fighting with them or getting involved in any violent act that they are participating in." (4TRT 481-482)

11. "[G]uns are a significant part of the gang culture now because that is the ultimate offense and defensive weapon. They use guns to protect the neighborhood from encroachment from other gangs, and they also use guns to go into other neighborhoods and encroach on their territory. It is also

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[11] There was no evidence of who, if anyone, O.T.H.'s "rivals" were.

protection during commissions of crimes and violent acts upon another rival." (4TRT 482)

12. If a gang member is in their gang's "territory" and a civilian says "get out of here," that is disrespect, and the gang member is expected to do something about it, "[p]robably a violent reaction." (4TRT 482)

13. If a gang member is in their territory and is told "you don't live here, get out of here," the gang member is expected to do something, "probably a violent reaction." (4TRT 482)

14. Gang members pressure the community or civilian witnesses so they wouldn't cooperate with the police. (4TRT 493) That is also a reason for gang graffiti. (4TRT 492-494)

15. Gang members brag about their crimes "to enhance their reputation within the gang. The more violent the crime, the more their reputation is enhanced." (4TRT 495) (There is no evidence of Freddy Curiel bragging about any of these events.)

Since these "gang culture"-based opinions were founded in hearsay, their application to this case was also founded in hearsay. Moreover, insofar as the prosecution offered Det. Lodge's "gang culture" opinions as evidence of what Freddy Curiel supposedly did and thought on this single occasion, they were hearsay for that purpose too. The defense could not cross-examine the people who originated the theories (whoever they were) to ascertain whether they believed that whatever they said applied to every member of every gang, or of every "Hispanic gang," and their actions and thoughts on every occasion.[12]

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[12] Interlaced with Det. Lodge's hearsay-based theories and assumptions were catchphrases such as "based on my

(continued...)

Authority from other jurisdictions elucidates that an expert can "rely on hearsay evidence for the purpose of rendering an opinion based on his expertise," but cannot merely "repeat[ ] hearsay evidence without applying any expertise whatsoever, thereby enabling the government to circumvent the rules prohibiting hearsay." (*United States v. Dukagjini* (2d Cir. 2003) 326 F.3d 45, 59; *Gilmore v. Palestinian Self-Government Authority* (D.C.Cir. 2016) 843 F.3d 958, 972.) Thus in gang cases, "the state should not be permitted to launder inadmissible hearsay evidence,

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[12](...continued)
training and experience." Det. Lodge did not try to establish that his training or experience relevant to this case was based on anything other than hearsay; however, the burden was on the People to set forth an evidentiary foundation that their proffered evidence met admissibility criteria, including hearsay exceptions and relevance. (*People v. Morrison, supra,* 34 Cal.4th 698, 724.) Moreover, such catchphrases are insufficient to establish admissibility of expert witness opinions:

> Expert opinion ... must not be speculative. Expert opinion has no value if its basis is unsound. [Citation.] Expert opinion must have a logical basis. Experts declaring unsubstantiated beliefs do not assist the truth-seeking enterprise. [Citation.] This applies to all experts, including gang experts. [Citations.]....
>
> The expert ... based his opinion ... "on the pattern of my observations about this gang, as well as [of Gonzalez] ...." It is insufficient for an expert simply to announce, "based on my experience and observation, X is true." This is the method of the Oracle at Delphi. It is the black box. This method cannot be tested or disproved—a feature convenient for would-be experts but unacceptable in court. " 'This "Field of Dreams" "trust me" analysis' " amounts only to a defective " 'faith-based prediction.' " [Citations.]

(*People v. Leonard Gonzalez* (2021) 59 Cal.App.5th 643, 649.)

turning it into admissible evidence by the simple expedient of passing it through the conduit of purportedly 'expert opinion.' That criminal gang involvement is an element of the crime does not open the door to unlimited expert testimony. [Citations.]" (*State v. DeShay* (Minn. 2003) 669 N.W.2d 878, 886.) In light of *Sanchez* and *Valencia*, California hearsay law is no different.

The only evidence of a connection between O.T.H. and "gang culture" was Det. Lodge's unsupported claim that "Hispanic gangs" were generally "turf oriented gangs" (4TRT 473) which as such would defend "turf" with violence (4TRT 472-473). But even if one disregards its racially objectionable nature (*compare* Pen.Code, § 745, subd. (a)(2)), it was another of Det. Lodge's theories that had no foundation beyond hearsay, insofar as he purported to apply it to O.T.H. and Freddy Curiel's thoughts and actions on this individual occasion.

This use of hearsay also amounted to "profile" evidence – a witness's assertion of how they expect a person to think or act, based on criteria deemed to exist in a group of which that person is a member, followed by the witness deeming the person to have so acted and thought on the given occasion. Outside of narrow exceptions irrelevant here, profile evidence is recognized as <u>inadmissible</u> as evidence of guilt; whether because it requires a person to defend against hearsay of what other people said or did, or because it amounts to inadmissible character evidence, or because it is too easily manipulated by the expert, or because it starts from presuming a defendant guilty and goes through various steps to permit the jury to draw that conclusion, or for other reasons recognized in caselaw. Authorities are legion. (*See, e.g., People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084-1087 [sex

offender profile evidence]; *State v. Vazquez* (2021) 198 Wash.2d 239, 264-265 [494 P.3d 424, 439-440] [drug seller profile evidence]; *United States v. Wells* (9th Cir. 2018) 879 F.3d 900, 920-923 [workplace violence profile evidence], and authorities cited; *Commonwealth v. Horne* (2017) 476 Mass. 222, 226-227 [66 N.E.3d 633, 637-638] [crack cocaine user profile evidence]; *State v. Ketchner* (2014) 236 Ariz. 262, 264-265 [339 P.3d 645, 647-648] [domestic abuser profile evidence]; *State v. DeShay, supra,* 669 N.W.2d 878, 885-886 [gang member profile evidence]; *State v. Litzau* (Minn. 2002) 650 N.W.2d 177, 185 [drug seller profile evidence]; *United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1017 [drug organization structure evidence]; *People v. Berrios* (Sup.Ct. 1991) 150 Misc.2d 229, 231-232 [568 N.Y.S.2d 372, 374] [child abuser profile evidence], and authorities cited].) " 'Our system of justice is a trial on the facts, not a litmus-paper test for conformity with any set of characteristics, factors, or circumstances.' " (*Wells*, 879 F.3d at pp. 922-923, citation omitted.)

In gang contexts in particular, "[s]eemingly unlimited development of the roles and activities of gangs in general and gangs unrelated to the defendant is unnecessary, potentially prejudicial and, as a practical matter, places the defendant in the position of defending allegedly criminal activities of others, regardless of formal charges." (*State v. DeShay, supra,* 669 N.W.2d 878, 887.) That passage could as easily have been written about the testimony of Det. Lodge, regarding his linkage of actions and thoughts of Freddy Curiel on this occasion to an alleged "gang culture" that Det. Lodge derived from hearsay.

Det. Lodge's hearsay-based opinions were the only foundation that could be asserted to connect his theories and

hypotheticals to the evidence. Without these opinions, the prosecution would have had nothing to support an assertion that Freddy Curiel might expect Hernandez to commit murder as a result of this particular "gang hit-up," even if – in the Court of Appeal's words – 19-year-old Freddy supposedly had the "mindset of a murderer." (2021 WL 5119900, p. *3.) There also would have been no evidence that Freddy had "the mindset of a murderer": That theory's only "foundation" was Det. Lodge's hearsay-based claims linking O.T.H. to "gang culture," now inadmissible under *Sanchez* and *Valencia*. Thus after the *Sanchez*/*Valencia* change in law, nothing would support the special circumstance's elements under *any* theory.

The change of law exception applies when a change in legal doctrine is so significant that it could affect a result. (*Strong*, 13 Cal.5th 698, 716-717; *Commissioner v. Sunnen, supra,* 333 U.S. 591, 607.) *Sanchez* and *Valencia* have that significance here. Accordingly, the special circumstance that preceded *Sanchez* and *Valencia* has no issue-preclusive effect.

IV. The special circumstance verdict is not Issue-Preclusive because the instructions did not require the jury to find the *mens rea* elements of aiding and abetting murder under current law – knowledge that Hernandez intended to commit murder, and intent to aid Hernandez in that known intended murder

The People seek to issue-preclude Mr. Curiel's section 1172.6 petition based on the special circumstance verdict. They can only do so if it is conclusively established that the original jury found, beyond a reasonable doubt, all of the elements of aiding and abetting the charged murder of Cesar Tejada under current law. Only then could one say the special circumstance verdict "necessarily decided" those elements. (*See ante*, Argument II(A), pp. 43-44, and authorities cited)

The *mens rea* of aiding and abetting the murder of Cesar Tejada under current law is that Mr. Curiel must have acted with **knowledge** that the perpetrator (Hernandez) intended Cesar's death, with an **intent** to facilitate or encourage Hernandez to kill Cesar. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118 & fns. 1-2; *People v. Offley* (2020) 48 Cal.App.5th 588, 595-596.) These elements are interrelated, since "[o]ne cannot intend to help someone do something without knowing what that person meant to do." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.)

The gang special circumstance instruction here, CALCRIM No. 736 (as given), was:

> To prove that this special circumstance is true, the People must prove that: Number one, the defendant intended to kill; number two, at the time of the killing the defendant was a member in a criminal street gang; and, number three, the murder was carried out to further the activities of the criminal street gang. (7TRT 1153-1154)

The jury was never instructed that to find the special circumstance against Freddy Curiel as an alleged aider and abettor, he had to have **knowledge** that Hernandez intended to kill, and a consequent **intent** to aid Hernandez in so doing. Moreover, the jury's first-degree murder verdict also did not necessarily include that issue, because the instructions permitted the jury to return its murder verdict as a natural and probable consequences of lesser offenses of misdemeanor disturbing the peace or carrying a concealed firearm by a gang member (*see* CALCRIM Nos. 2520, 2688, given at 7TRT 1138-1139); whether as an aider and abettor of a lesser offense (CALCRIM No. 403, given at 7TRT 1130-1131), or as part of a conspiracy with Hernandez to commit one of the lesser offenses (CALCRIM Nos. 416/417, given at 7TRT 1131-1138).

Taking the evidence favorably to the petitioner as is required at the prima facie case stage (*People v. Lewis, supra,* 11 Cal.5th 952, 971-972), and referring back to the evidence *ante*, pp. 19-21, the evidence showed Hernandez killing Cesar was an immediate murderous reaction to Cesar shoving Hernandez over a shopping cart, that was independent of Freddy yelling about his neighborhood and "O.T.H." in arguing with Lupe Olivares and Raul Ramirez; and thus, that Freddy couldn't have had **knowledge** of Hernandez's later-formed intent to kill, let alone committed any *actus reus* with an **intent** to facilitate it. Moreover, there is evidence from neighbors that when Hernandez murdered Cesar, Freddy exclaimed "You killed him, you killed him" (5TRT 827-828, 831-832, 834-835), indicating Freddy wasn't expecting it – the antithesis of foreknowledge of Hernandez intending to kill.

In reply, the People have only Det. Lodge's hearsay-based theories of "gang culture" and "Hispanic gangs are turf oriented gangs that use violence and intimidation." However, generalized expert witness theories cannot create otherwise nonexistent evidence of the *mens rea* elements of aiding and abetting the charged murder in a specific case.

This is illustrated by *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243 (*Garcia*). Garcia arrived at a party waving a red bandana, yelling his Blood affiliation, and insulting Crips along with two other Blood gang members. At some point, Bloods and Crips started shooting at each other, but there was no evidence of what happened immediately before, except that Garcia asked "Who has the gun?" There was no evidence that Garcia shot anyone, and he was charged only with conspiracy to assault three shooting victims. The Government offered testimony from a gang officer designated as an expert, similar to Det. Lodge's testimony in Mr. Curiel's case, that "generally gang members have a 'basic agreement' to back one another up in fights, an agreement which requires no advance planning or coordination." (*Id.* at pp. 1245-1246.) Garcia was convicted, and appealed on the basis of insufficient evidence.

The Court of Appeals agreed and reversed. It held "[t]his testimony, which at most establishes one of the characteristics of gangs but not a specific objective of a particular gang—let alone a specific agreement on the part of its members to accomplish an illegal objective—is insufficient to provide proof of a conspiracy to commit assault or other illegal acts." (*Id.* at p. 1246.) The fact that gang members had weapons "may prove that they are prepared for violence, but without other evidence it does not

establish that they have made plans to initiate it." (*Ibid*.) Thus, the Court held "a general agreement among gang members to back each other up" was not "sufficient evidence of a conspiracy," and "evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs." (*Ibid*.) Furthermore, "[e]ven if the testimony presented by the state had sufficed to establish a general conspiracy to assault Crips, it certainly did not even hint at a conspiracy to assault the three individuals listed in the indictment." (*Id*. at pp. 1246-1247.)

Like the Government in *Garcia*, the People here wish to rely on opinion testimony that gang members *can* react violently to certain events, as evidence the defendant had *actual* knowledge on this occasion of another gang member's alleged intent to inflict violence, and *actual* intent to facilitate the perpetrator's alleged plan. As in *Garcia*, however, there was no evidence to support that unless one counts the gang officer evidence, which the Court of Appeal here did in its opinions. But the Court didn't explain how it could get beyond what *Garcia* refutes – stretching generalized gang officer testimony such as "gang culture" into evidence of knowledge of a specific plan to commit the charged attack and specific intent to facilitate it.

The Court of Appeal's 2021 opinion held that the jury found 19-year-old Freddy had "the mindset of a murderer," on the basis that the jury found intent to kill under its gang special circumstance instruction. (*See* 2021 WL 5119900, p. *3.) We respectfully disagree that the jury necessarily found Freddy had intent to kill, as we have discussed.

But if it were assumed (*arguendo*) there was a finding of intent to kill which meant Freddy had "the mindset of a murderer," that wouldn't be a finding of every current-law element of aiding and abetting murder: The instructions didn't require the jury to find Freddy had **knowledge** of Hernandez's intent to kill Cesar, let alone that Freddy **intended** to assist Hernandez with the latter's intended murder of which the jury wasn't required to find Freddy had knowledge. Indeed, based on the evidence, Hernandez's intent to kill might not even have existed when Freddy decided to disturb the peace. All of that created a pathway by which the jury could reach its verdicts without finding all elements of murder under current law.

Thus, the allegedly precluded issue – whether Mr. Curiel was guilty of murder under current law – was not "necessarily decided" by the 2006 jury. Again, the third *Lucido*/*Strong* element fails, and the prior verdicts are not issue-preclusive.

V. The Court of Appeal correctly rejected preclusion on the basis that the special circumstance instructions did not require the jury to find an *actus reus* required for a finding of murder under current law.

This Argument discusses the basis on which the Court of Appeal reversed the trial court's dismissal of Mr. Curiel's section 1172.6 petition. We agree with the Court of Appeal, but would frame the analysis under issue preclusion law.

The Court's 2021 opinion did not use the phrases "issue preclusion" or "collateral [or direct] estoppel." That is understandable, since its opinion preceded this Court's *Strong* opinion.

Nonetheless, the opinion still embodied issue preclusion law: Since there was a pathway for the jury to reach its verdicts without finding the *actus reus* element of murder post-S.B. 1437, the jury did not conclusively find all of the elements of murder under current law. As the Court of Appeal held, that defeats the People's effort to preclude consideration of the petition. (*See* authorities *ante*, Argument II(A), pp. 43-44)

The instructions permitted the jury to find Freddy Curiel guilty of first-degree murder based on a "natural and probable consequences theory"; whether by aiding and abetting a lesser target offense (misdemeanor disturbing the peace or aiding and abetting the carrying of a concealed firearm), or by conspiracy to commit one of the lesser offenses described in Argument IV, *ante*, p. 66. If the jury were to have found Freddy guilty of first-degree murder on one of those grounds, he need have committed no *actus reus* greater than one of the misdemeanors.

The People do not disagree. They simply say the jury had to find "intent to kill" on top of the *actus reus* of a misdemeanor.

(ROBM 36) Since 19-year-old Freddy wasn't the killer, the People are talking about aiding and abetting.

To issue-preclude Mr. Curiel's section 1172.6 petition for relief from his conviction for the murder of Cesar Tejada, the People would have to show the jury found he aided and abetted Hernandez in that murder. But to convict Freddy of murder, the 2006 jury didn't have to utilize its instruction on aiding and abetting murder (CALCRIM No. 400), since it had "natural and probable consequences" pathways for a first-degree murder conviction. Thus, there would have had to be special circumstance instructions that contained the elements of aiding and abetting Hernandez in murdering Cesar Tejada, including *actus reus* elements.

No such instructions were given. Instead, the jury was permitted to return a special circumstance verdict based solely on Freddy Curiel committing or conspiring to commit a gang misdemeanor with an intent to kill that the Court of Appeal called "the mindset of a murderer" (elements #1 and 2 of then-CALCRIM No. 736), and Abraham Hernandez committing the murder of Cesar Tejada to further the activities of a criminal gang (element #3).

Most importantly, <u>the instructions didn't require the jury to link the two</u>. A finding of aiding and abetting murder would have required a connection between Freddie's *actus reus* of a gang-related argument with Raul and Lupe, and Hernandez's murder of Cesar, since "[e]vidence that a person aided one crime cannot substitute for evidence that the person aided a different crime. [Citation.]" (*In re K.M.* (2022) 75 Cal.App.5th 323, 330.) No

instruction required this, so the jury wasn't required to find an *actus reus* of aiding and abetting Hernandez's murder.

There were ample bases for the jury not to make such a finding, irrespective of Freddy's supposed *mens rea* or "mindset." Referencing the Statement of Evidence *ante*, pp. 19-24, and taking the evidence favorably to the prima facie case (*Lewis,* 11 Cal.5th 952, 971-972), Cesar Tejada responded to a gang "hit-up" from Hernandez and Freddy Curiel, in which Hernandez took the leading role, by telling Hernandez "Just go home." Hernandez replied by yelling at Cesar, pushing him and 'getting in his face.' Raul Ramirez defended Cesar, which led Freddy to start an argument with Raul and Lupe Olivares that included Freddie yelling "This is my neighborhood" and "O.T.H." According to Raul, Freddy and Lupe were also trading insults.

While Freddy was busy arguing with Raul and Lupe, Cesar pushed Hernandez, grabbed his shirt, and shoved him over a shopping cart. Hernandez rose, pulled a gun and shot Cesar to death, at which Freddy exclaimed "You killed him, you killed him!" That was ample basis to infer that while Freddy's argument with Raul and Lupe split off separately from Hernandez's argument with Cesar, Hernandez's act of killing Cesar was an immediate murderous reaction to Cesar pushing him over a shopping cart, and Freddy wasn't involved in the shopping cart shove or Hernandez's murderous reaction and didn't know in advance that either would happen.

This doesn't meet the criteria for aiding and abetting. " ' "Aid" means to assist, to help or to supplement the efforts of another' [citation]" (*People v. Blake* (1963) 214 Cal.App.2d 705, 708) – which Freddy didn't do, because Hernandez's murder of

Cesar was an immediate reaction to Cesar pushing Hernandez down; and Freddy wasn't part of that reaction, since he was busy arguing with Raul and Lupe. " ' "Abet" means to knowingly and with criminal intent promote, encourage, or instigate, by act or counsel, or by both act and counsel the commission of a criminal offense' [citation]" (*ibid.*); but again, since Hernandez's murder of Cesar was his immediate reaction to the physical 'insult' of Cesar shoving him onto a shopping cart, Freddy didn't meet the definition of "abet" for Hernandez's murder.

The 2008 and 2021 Court of Appeal opinions relied on gang officer evidence to fill holes in the *mens rea* evidence that enabled the Court to find Freddy had "intent to kill," though not necessarily a specific intent to kill within the actual sequence of events (i.e., merely a generalized "mindset of a murderer"). But the Court of Appeal couldn't do that for *actus reus*, since Det. Lodge couldn't (and didn't) assert that Freddy acted on this specific occasion according to what Det. Lodge expected from "gang culture." The 2021 Court of Appeal opinion thus reflected the reality, under the *Lewis* standard, that the jury need not have found beyond a reasonable doubt that Mr. Curiel committed an *actus reus* of murder under current law on this specific occasion, due to lack of evidence as well as lack of instruction.

Thus, the Court of Appeal was correct in its 2021 opinion: Whatever Freddy's mindset (*mens rea*) is deemed to have been, the record does not show that the jury found any *actus reus* of either aiding or abetting Hernandez's murder of Cesar Tejada, let alone aiding and abetting. With no basis to conclude the jury found all current-law elements of murder, the "necessarily decided" *Lucido/Strong* element of issue preclusion fails.

CONCLUSION

The People's petition for review (*see ante*, p. 15) and presentation of the issue in their brief (*see ante*, p. 28) illustrate what we contend here: Because the People want to use the 2006 special circumstance verdict to preclude Freddy Curiel from pursuing his section 1172.6 petition as to his conviction of the murder of Cesar Tejada, the governing body of law is that of issue preclusion. The People's brief never mentions issue preclusion (or its synonyms direct or collateral estoppel), but that is what they hope to accomplish.

Now that this Court's *Strong* opinion has illuminated the relationship between the People's efforts to use prior verdicts for precluding section 1172.6 petitions, and the body of law governing issue preclusion, Mr. Curiel can invoke that law to defend against the People's effort to take away his day in court. There is a prima facie case under section 1172.6 (*see ante*, pp. 25-26); and for the reasons herein, the body of law governing issue preclusion requires rejecting the People's effort to preclude his petition despite his prima facie case. This Court may affirm based on the Court of Appeal opinion; it can also affirm on any other basis supported by the record (*see ante*, p. 28). We have shown that within the body of issue preclusion law, there are many.

For all of these reasons, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted this 29th day of September, 2022.

By: Michelle Peterson

Michelle M. Peterson
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Under Appointment by the Supreme Court

CERTIFICATION OF WORD COUNT

As counsel for the appellant, I certify under rule 8.360(b)(1), California Rules of Court, that this brief contains 15,988 words according to the word count of the computer program used to prepare the brief.

I declare under penalty of perjury of the laws of the State of California that the above is true and correct, and that this document was executed on the date below.

Respectfully submitted this 29th day of September, 2022.

Michelle Peterson

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Under Appointment by the Supreme Court

DECLARATION OF SERVICE BY MAIL AND E-SERVICE

I, MICHELLE MAY PETERSON, declare: I am an active member of the State Bar of California, over the age of 18 and not a party to this action. My address is P.O. Box 387, Salem MA 01970. On September 30, 2022, I submitted the foregoing APPELLANT'S ANSWER BRIEF ON THE MERITS, in No. S272238, to TrueFiling for filing with this Court and e-service as stated below; and served paper copies to the other persons/ entities below by placing a copy in an envelope to the addresses below, deposited in the U.S. Mail, postage paid:

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I declare under penalty of perjury of the laws of the State of California that the above is true and correct. Executed this 30th day of September, 2022.

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