No. S272238

In the Supreme Court of the State of California

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

v.

FREDDY ALFREDO CURIEL,
Defendant and Appellant.

Fourth Appellate District, Division Three, Case No. G058604
Orange County Superior Court, Case No. 02CF2160
The Honorable Julian Bailey, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The People's opening brief explained why the intent-to-kill finding made by Curiel's trial jury precludes resentencing as a matter of law under Penal Code section 1172.6, without the need to consider any separate actus reus issue as the Court of Appeal below did.[1] In his answer brief, Curiel primarily advances a different analysis. Relying on *People v. Strong* (2022) 13 Cal.5th 698, he argues that principles of collateral estoppel, or issue preclusion, show that the jury's intent-to-kill finding is not binding in these section 1172.6 proceedings and instead must be relitigated. But *Strong* only underscores that jury findings such as the one in this case are ordinarily preclusive in section 1172.6 proceedings. There is no extraordinary circumstance here, like the change of law at issue in *Strong*, that would require relitigation of the intent-to-kill finding.

Curiel also asserts that the jury's intent-to-kill finding is insufficient to preclude resentencing as a matter of law because, standing alone, it encompassed neither the actus reus determination that would support murder liability under a direct aiding and abetting theory nor the full mens rea requirement underlying such a theory. The acts required for direct aiding and abetting, however, are the same as those required under a natural and probable consequences theory: encouragement or participation in conduct that foreseeably results in a homicide. The defining difference between the two theories is the required

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

mental state. The now-invalid natural and probable consequences theory imposed murder liability for unintended, though foreseeable, killings, while direct aiding and abetting restricts murder liability to intended killings. If a person commits the actus reus that supports either theory by encouraging or participating in conduct that foreseeably results in a homicide and, as here, *does so with malice*, then murder liability is established as a matter of law.

ARGUMENT

I. THE TRIAL JURY'S INTENT-TO-KILL DETERMINATION IS BINDING IN THESE SECTION 1172.6 PROCEEDINGS

The People's opening brief explained that the gang-murder special circumstance finding made by Curiel's trial jury precludes him from stating a prima facie case for relief under section 1170.26. In returning that finding, the jury concluded, beyond a reasonable doubt, that Curiel intended to kill the victim. As a matter of law, resentencing is unavailable for those convicted of murder with the mental state of express malice, which is the equivalent of an intent to kill. And an intent-to-kill finding alone is sufficient to preclude a prima facie case for resentencing in section 1172.6 proceedings, without the need to analyze any separate actus reus requirement. (See OBM 19-33.)

In his answer brief, Curiel takes a different approach. He argues mainly that the prior intent-to-kill finding by his trial jury must be disregarded for purposes of these proceedings and for that reason it does not prevent his making a prima facie case for relief. He relies on background principles of issue preclusion, as recently addressed in *Strong*, *supra*, 13 Cal.5th 698. (See ABM

29-69.) This court's discussion of issue preclusion in *Strong*, however, only shows that the trial jury's intent-to-kill finding should have binding force in these proceedings.

A. A prior jury determination reflected in the record of conviction will ordinarily have preclusive effect in section 1172.6 proceedings

In *People v. Lewis* (2021) 11 Cal.5th 952, this court held that, in adjudicating a resentencing petition under section 1172.6, a court may look to the record of conviction to determine whether the petitioner has made a prima facie case for relief. (*Id.* at pp. 971-972.) "The record of conviction will necessarily inform the trial court's prima facie inquiry under section [1172.6], allowing the court to distinguish petitions with potential merit from those that are clearly meritless." (*Id.* at p. 971.) "If the record, including the court's own documents, contains facts refuting the allegations made in the petition, then the court is justified in making a credibility determination adverse to petitioner." (*Id.* at p. 972.)

And in *Strong*, this court recently elaborated that findings reflected in the record of conviction ordinarily are not subject to relitigation in section 1172.6 proceedings. (*Strong*, *supra*, 13 Cal.5th at p. 715.) "[T]he structure of the statute—which permits trial courts to consult the record of conviction to determine whether the defendant has made out a prima facie case of eligibility [citation], and which notably does not open resentencing to every previously convicted murder defendant—strongly suggests that many, and perhaps most, such findings would be given effect on resentencing." (*Ibid.*)

Strong held, however, that a true finding on a felony-murder special circumstance made before *People v. Banks* (2015) 61 Cal.4th 788 and *People v. Clark* (2016) 63 Cal.4th 522, does not preclude a defendant from setting forth a prima facie case for relief under section 1172.6. (*Strong*, *supra*, 13 Cal.5th at pp. 703, 710.) This was so, *Strong* reasoned, because "*Banks* and *Clark* . . . substantially clarified the law governing" the "major participant" and "reckless indifference" aspects of the section 190.2, subdivision (d), felony-murder special circumstance—a clarification that, in turn, was expressly incorporated into the felony-murder statute by Senate Bill. No. 1437 as part of newly-enacted section 189, subdivision (e)(3). (*Strong*, at pp. 706, 710, 721; see § 189, subd. (e)(3) [a person is liable for felony murder if he or she "was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2"].) Because a pre-*Banks* and *Clark* special circumstance finding does not necessarily reflect a jury determination that the defendant was a major participant acting with reckless indifference under the more stringent standards of *Banks* and *Clark*—and, hence, section 189, subdivision (e) itself—it cannot establish ineligibility for relief as a matter of law, since it does not necessarily establish guilt of felony murder under section 189 as amended by Senate Bill No. 1437. (*Strong*, at pp. 710-714, 717-718.)

An intent-to-kill finding such as the one at issue here is materially different. There has been no intervening change in the law that would undermine its validity or effect in a section

1172.6 proceeding. Unlike the terms "major participation" and "reckless indifference" at issue in *Strong*, the term "malice" has not undergone any intervening change. Section 188, subdivision (a)(1) reflects the longstanding definition of express malice: "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature." Intent to kill and express malice are "one and the same." (*People v. Smith* (2005) 37 Cal.4th 733, 749; accord, e.g., *People v. Saille* (1991) 54 Cal.3d 1103, 1114.)

In this key regard, an intent-to-kill finding is functionally identical to a special circumstance finding of major participation and reckless indifference rendered after *Banks* and *Clark*, which this court noted in *Strong* "ordinarily establish[es] a defendant's ineligibility for resentencing under Senate Bill 1437 and thus preclude[s] the defendant from making a prima facie case for relief." (*Strong*, *supra*, 13 Cal.5th at p. 710.) As this court explained in *Strong*, "[i]f a jury has determined beyond a reasonable doubt that a defendant was a major participant who acted with reckless indifference to human life, as those phrases are now understood and as the Legislature intended them to be understood when incorporating them into Penal Code section 189, then that defendant necessarily could still be convicted of murder under section 189 as amended." (*Ibid.*) That rationale applies to the intent-to-kill finding at issue here.

This court in *Strong*, moreover, squarely rejected the argument made by amicus curiae the Office of the State Public Defender (OSPD) that the Legislature did not intend for any

special circumstance findings to be preclusive in section 1172.6 resentencing proceedings. (*Strong*, *supra*, 13 Cal.5th at pp. 714-715.) The court observed that not only is there nothing in section 1172.6 to support such a conclusion, but "OSPD's argument proves too much," because it would mean that adverse felony-murder special circumstance findings after *Banks* and *Clark*, and "every other finding that might ordinarily be dispositive, *such as a special circumstance finding that requires proof of intent to kill*," would be open to challenge. (*Id.* at p. 715, emphasis added.) Such a result would conflict with "the structure of the statute," which "strongly suggests the Legislature contemplated that many, and perhaps most, such findings would be given effect on resentencing," since it "permits trial courts to consult the record of conviction to determine whether the defendant has made out a prima facie case of eligibility [citation], and . . . notably does not open resentencing to every previously convicted murder defendant. . . ." (*Ibid.*) Thus, *Strong* itself recognizes that an intent-to-kill finding, such as that rendered by Curiel's trial jury, ordinarily forecloses section 1172.6 relief. After all, "[h]ad the Legislature intended to permit wholesale relitigation of findings supporting murder convictions in the context of section 1172.6 resentencing . . . it would have said so more plainly." (*Ibid.*)

The circumstances in *Strong*, in other words, represent the exception, not the rule. It was because "the text of section 1172.6 does not speak in any direct way to the issue" before this court in *Strong*—that is, whether a pre-*Banks* and *Clark* special circumstance finding bars section 1172.6 relief, considering that

Banks and *Clark* constituted a significant, intervening change in the law—that this court turned to background principles of issue preclusion for guidance. (*Strong*, *supra*, 13 Cal.5th at p. 715.) That critical factor is not present in this case, as there has been no intervening change in the law applicable to an intent-to-kill finding. And where there has been no intervening change in the law relevant to the changes that the Legislature made to sections 188 and 189, the factual finding at issue is "ordinarily . . . dispositive." (*Id.* at p. 715.)

B. There is no extraordinary circumstance in this case, of the sort at issue in *Strong*, that would require relitigation of the intent-to-kill issue

Issue preclusion prohibits "a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding." (*People v. Sims* (1982) 32 Cal.3d 468, 477.) Several threshold requirements must be satisfied to support issue preclusion. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, the issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

Because issue preclusion is an equitable doctrine, even when the threshold requirements are satisfied, courts must "look to public policies underlying the doctrine before concluding that

collateral estoppel should be applied in a particular setting." (*Lucido*, *supra*, 51 Cal.3d at p. 341; see *Strong*, *supra*, 13 Cal.5th at pp. 716-717 [applying equitable exception to issue preclusion for intervening changes in the law].) "[T]he public policies underlying collateral estoppel—preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation—strongly influence whether its application in a particular circumstance would be fair and constitute sound judicial policy." (*Id.* at p. 343.) "The party asserting collateral estoppel bears the burden of establishing [its] requirements." (*Id.* at p. 341.)

Here, Curiel's trial and his section 1172.6 petition presented an identical question: whether he acted with express malice. Curiel's jury necessarily decided this question when it found the gang-murder special circumstance true. A decision on intent to kill (i.e., express malice) was required in order for the jury to reach its verdict. The judgment in Curiel's criminal trial is final and was on the merits. And the parties to both proceedings—Curiel and the People—are the same. (See *Strong*, *supra*, 13 Cal.5th at p. 716.) The threshold requirements for issue preclusion are therefore met in this case.

Curiel raises a number of unpersuasive arguments against issue preclusion, which are discussed in turn below. Unlike in *Strong*, the circumstances of this case do not present any extraordinary reason for relitigating the intent-to-kill question.

1. The intent-to-kill issue was actually litigated at Curiel's trial

Curiel argues that the issue of intent to kill was not litigated at trial adequately enough to support issue preclusion because his attorney may have had little "realistic incentive" to contest the gang-murder special circumstance. (ABM 30-35.) He points to the fact that a trial attorney may choose not to pursue inconsistent theories, but may instead choose to focus on guilt or innocence. (ABM 31-32.) Curiel also cites statistics indicating that at the time he was tried, very few criminal defendants were being granted parole. (ABM 32-33.) Thus, he maintains, there was no practical difference between a sentence of life without the possibility of parole and 25 years to life that would have motivated his counsel to challenge the special circumstance. (ABM 33.) Curiel further notes that, in his case, counsel chose not to address the special circumstance at all. (ABM 34.)

However, "[f]or purposes of collateral estoppel, an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511.) "The failure of a litigant to introduce evidence on an issue does not necessarily defeat a plea of collateral estoppel." (*Sims*, *supra*, 32 Cal.3d at p. 481.) Rather, the "focus" of the inquiry is the extent to which the party against whom issue preclusion is sought was provided "an adequate opportunity to litigate the factual finding" at the prior proceeding. (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869; see *U.S. v. Utah Const. & Min. Co.* (1966) 384 U.S. 394, 422.)

Here, the truth of the gang-murder special circumstance, which included the question of intent to kill, was "properly raised, submitted for determination, and determined" at trial. (*Hernandez*, *supra*, 46 Cal.4th at p. 511.) Curiel's not guilty plea and denial of the special circumstance allegation put its elements in issue and required the prosecution to prove it true beyond a reasonable doubt. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4.) Curiel had an adequate opportunity to litigate the factual issues underlying the special circumstance at his trial. (*Murray*, *supra*, 50 Cal.4th at p. 869.) And the jury found the gang-murder special circumstance true. (7 TRT 1188; 3 TCT 727.)[2]

To support his assertion that the issue of intent to kill was not actually litigated, Curiel relies primarily on *In re Sokol* (2d Cir. 1997) 113 F.3d 303. (ABM 33-34.) *Sokol* is not helpful because it was a federal case applying New York state law about issue preclusion, which specifically accounts for an absence of an incentive to litigate an issue in a prior action. (*Sokol*, at pp. 306-308.) California law does not place the same emphasis on that requirement. Curiel cites two California Court of Appeal decisions suggesting that a "full and fair opportunity" to litigate an issue includes an incentive on the part of the litigant to do so.

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[2] "TRT" and "TCT" refer, respectively, to the reporter's transcript and the clerk's transcript contained in the record on appeal from Curiel's underlying conviction. The People filed a motion for judicial notice of that record at the time the opening brief was filed in this court. The superior court considered the jury instructions when it denied Curiel's petition for resentencing. (CT 222.)

(ABM 30-31, citing *Roos v. Red* (2005) 130 Cal.App.4th 870, 880 and *Mueller v. J. C. Penney Co.* (1985) 173 Cal.App.3d 713, 720.) His reading of those decisions, however, is inconsistent with this court's later authority. (See *Murray*, *supra*, 50 Cal.4th at p. 869.) As *Murray* explains, a decision not to contest a particular issue in the prior proceeding does not defeat issue preclusion where there was nonetheless an adequate opportunity to litigate it. (*Id.* at pp. 870-871.) Here, counsel simply made a strategic decision not to contest the special circumstance allegation. To the extent a lack of incentive is relevant to the issue preclusion question (see *ibid.*), the facts of this case do not implicate that concern. The difference between parole eligibility and non-eligibility is real and significant; that counsel chose a trial strategy focusing on issues other than the special circumstance does not show that, for purposes of issue preclusion, there was insufficient incentive to contest the allegation.[3]

Curiel's reading of the "actually litigated" requirement is also unpersuasive because it sweeps too broadly, at least for purposes of section 1172.6. As this court observed in *Strong*, the

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[3] Indeed, Curiel argues only that "very few" inmates serving indeterminate life sentences were being granted parole around the time of his trial. (ABM 32-33.) That does not demonstrate that there was little or no difference between the two sentences, even as a practical matter. Nor does it show that counsel would have had reason to believe that the parole landscape would remain forever static. Again, for purposes of issue preclusion, there was sufficient incentive to contest the special circumstance, even if counsel made a strategic decision not to do so under the circumstances.

Legislature intended that a special circumstance finding requiring proof of intent to kill will normally be dispositive of the eligibility question in section 1172.6 cases. (*Strong*, *supra*, 13 Cal.5th at p. 715.) Under Curiel's theory, however, such findings would almost never be dispositive because an attorney could be said in nearly every case to have had little or no incentive to litigate the special circumstance in light of the purported lack of substantial practical difference between a life-without-parole sentence and the possibility of parole after 25 years. (ABM 33.)

2. The intent-to-kill issue was necessarily decided at Curiel's trial

Curiel argues that, in light of the instructions on uncharged conspiracy and "the prosecution's gang officer opinion evidence," the jury could have found the gang-murder special circumstance true if it concluded that Curiel was part of a conspiracy to disturb the peace and the conspiracy led to the murder of the victim. Because of this, Curiel continues, the question of intent to kill was not "necessarily decided" at his trial. (ABM 43-50.)

Curiel focuses on the conspiracy instructions that permitted a murder conviction without an intent-to-kill finding, but he largely ignores the instructions given to the jury about what was required to find the special circumstance true. The jury was instructed on the union of act and intent pursuant to CALCRIM No. 252, which stated that the gang-murder special circumstance required, in addition to a prohibited act, "a specific intent or mental state" as explained in the separate instruction on the special circumstance. (7 TRT 1118-1119; see 3 TCT 655-656.) In turn, CALCRIM No. 736, concerning the street gang special

circumstance, provided that "[t]o prove this special circumstance is true, the People must prove that: number one, the defendant intended to kill. . . ." (7 TRT 1153-1154; see 3 TCT 702.) And the jury was told, pursuant to CALCRIM No. 200, to "[p]ay careful attention to all these instructions and consider them together." (7 TRT 1104; see 3 TCT 639-640.)

Despite those instructions requiring the jury to make an intent-to-kill determination before returning a true finding on the special circumstance, Curiel posits that the jury "wouldn't have needed to use" the special circumstance instructions if it found him guilty of murder on the conspiracy theory. (ABM 49.) He offers no support for that assertion, and it is contrary to the usual presumption that jurors understood and followed all of the instructions, not just some of them. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 205-206.) There is nothing in the record of conviction to show, or even suggest, that the jury disregarded the instructions and found the special circumstance true without making a determination that Curiel acted with the required intent to kill.

3. The "change in law" exception to issue preclusion does not apply here

Curiel contends that because the law has changed in an unforeseeable manner since the gang-murder special circumstance was found true in his case, equitable principles counsel against giving that finding preclusive effect. (ABM 51-64.) As discussed above, in *Strong* this court noted that "[e]ven when the threshold requirements of issue preclusion are met, one well-settled 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." (*Strong*, *supra*, 13 Cal.5th at pp. 716-717.) And the court there held that an intervening change in the law with respect to the definitions of "major participant" and "reckless indifference," which were the relevant aspects of murder liability in that case, meant that the prior jury determination as to those issues were not preclusive. (*Id.* at pp. 710-714, 717-718.) But the law has not changed with respect to the intent to kill aspect of malice, which is the jury finding at issue here. (See Arg. I.A., *ante*.)

Curiel nonetheless asserts that a relevant change in law for issue preclusion purposes in this case "was the creation of Penal Code section 1172.6 itself." He adds that his attorney would have litigated the gang-murder special circumstance more vigorously had he known that section 1172.6 would later be enacted to narrow murder liability. (ABM 35-37.) His attorney's incentive was further reduced, Curiel continues, because section 1172.6 gives rise to a real possibility of release from prison, while the practical differences between a sentence of 25-years to life and life without the possibility of parole are "de minimus." (ABM 37-40.)

Curiel's reasoning is self-defeating in the context of section 1172.6 proceedings, however, since it could be alleged in nearly every such proceeding that counsel might have litigated a murder trial differently knowing of the eventual enactment of Senate Bill No. 1437. This is contrary to "the structure of the statute—which

permits trial courts to consult the record of conviction to determine whether the defendant has made out a prima facie case of eligibility [citation], and which notably does not open resentencing to every previously convicted murder defendant[.]" (*Strong*, *supra*, 13 Cal.5th at p. 715.)

Curiel additionally asserts that *People v. Sanchez* (2016) 63 Cal.4th 665 and *People v. Valencia* (2021) 11 Cal.5th 818 qualify as significant changes in the law such that the gang-murder special circumstance finding predating those decisions should have no preclusive effect in these proceedings. Curiel discusses the gang expert's trial testimony in detail, argues that it ran afoul of *Sanchez* and *Valencia*, and claims that without the allegedly inadmissible testimony, there was insufficient evidence of his intent to kill. (ABM 51-64.)

Curiel's argument misconstrues the "change of law" exception to issue preclusion. For that exception to apply, the change must involve "different substantive law than the previous proceeding." (*Ronald F. v. State Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 93; accord, e.g., *Huber v. Jackson* (2009) 175 Cal.App.4th 663, 678.) "The law defines the issue in the first action; thus, when the current claim of issue preclusion involves different substantive law the second action does not present the same issue as the first." (*California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 572; see e.g., *People v. Ruiz* (2020) 49 Cal.App.5th 1061, 1068-1070 [defendant could bring new motion to vacate conviction by plea for failure to advise her of immigration consequences when statute regarding such

motions to vacate had materially changed]; *Powers v. Floersheim* (1967) 256 Cal.App.2d 223, 229-230 [substantial change in statute under which defendants were prosecuted after former action concluded].)

Unlike the change in law at issue in *Strong*, *Sanchez* and *Valencia* did not change the substance of the law with respect to the relevant issue of what constitutes intent to kill or otherwise affect the amended elements of murder. (See *Montana v. U. S.* (1979) 440 U.S. 147, 155-165 [no "major changes in the law governing intergovernmental tax immunity" since prior court decision rejecting constitutional challenge to state's imposition of tax on federal government contractors]; cf. *Strong*, *supra*, 13 Cal.5th at pp. 717-718 [change in law effected by *Banks* and *Clark* related to substantive definition of major participant and reckless indifference to human life].) Rather, their changes related solely to the admission of evidence.

In *Sanchez*, this court held that "[i]f an expert testifies to case-specific out-of-court statements to explain the basis for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, they must be properly admitted through an applicable hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 684, fn. omitted.) In *Valencia*, this court held that the commission of predicate offenses for purposes of the active gang participation and gang enhancement statutes "must be proven by independently admissible evidence," and that, under *Sanchez*, "such proof may not be established solely by the testimony of an

expert who has no personal knowledge of facts otherwise necessary to satisfy the prosecution's burden." (*Valencia*, *supra*, 11 Cal.5th at p. 826.) Because *Sanchez* and *Valencia* do not relate to or bear upon the substance of the jury's intent-to-kill finding in this case, they do not provide a basis for the "change in law" exception to apply.

II. THE TRIAL JURY'S INTENT-TO-KILL FINDING BY ITSELF RENDERS CURIEL INELIGIBLE FOR RESENTENCING AS A MATTER OF LAW

Curiel makes two arguments as to why the jury's intent-to-kill finding standing alone does not bar resentencing as a matter of law under section 1172.6, regardless of whether that finding is subject to relitigation. He contends that his trial jury did not otherwise find that he performed the required actus reus for direct aiding and abetting (ABM 70-72), and that it did not find that he possessed the full mens rea required of a direct aider and abettor (ABM 65-69). Neither contention is correct.[4]

A. The same acts required under a natural and probable consequences murder theory satisfy the actus reus component of direct aiding and abetting

The Court of Appeal below held that the trial jury's intent to kill finding was not alone sufficient to preclude a prima facie case under section 1172.6 because the jury did not also find the necessary actus reus for a valid theory of murder following the reforms made to sections 188 and 189. (Opn. 7-8.) Echoing the

[4] Curiel couches these arguments in terms of issue preclusion, but they do not depend on the binding effect of the intent-to-kill finding in these proceedings.

Court of Appeal, Curiel contends that the jury's special circumstance finding did not actually resolve the question of actus reus that would be required under a direct aiding and abetting theory of murder. (ABM 71-72.)

As explained in the People's opening brief, however, if the record of conviction shows that the petitioner committed a murder with the intent to kill, that alone suffices to preclude resentencing under section 1172.6. (OBM 19-24.) The actus reus aspect of Curiel's murder conviction does not come into the prima facie analysis because the only change to the law of murder for which resentencing is available, as relevant here, is the requirement of non-imputed malice. (OBM 20-25.)

Indeed, the Legislature had no need to address any separate actus reus requirement when it eliminated the natural and probable consequences theory of murder liability. The actus reus aspect of that theory is equivalent to the actus reus required for direct aiding and abetting. And direct aiding and abetting remains a valid theory of murder. (See *People v. Gentile* (2020) 10 Cal.5th 830, 848.) Thus, where a defendant commits the acts required to support a natural and probable consequences murder theory and also possesses malice as required under the reforms to sections 188 and 189, liability for murder as a direct aider and abettor has been established as a matter of law, precluding a prima facie case for resentencing. (See OBM 34-37.)

This Court closely examined the actus reus and mental state requirements for directly aiding and abetting a homicide in *People v. McCoy* (2001) 25 Cal.4th 1111. There, the court held

that an aider and abettor to a drive-by shooting could properly be convicted of first degree murder even if the actual shooter was liable only for manslaughter. (*Id.* at p. 1122.)

In reaching that conclusion, the court observed that, as practical matter, "the dividing line between the actual perpetrator and the aider and abettor is often blurred." (*McCoy*, *supra*, 25 Cal.4th at p. 1120.) It explained that "when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea." (*Id.* at p. 1122.) The court reasoned that "[w]hen a person chooses to become a part of the criminal activity of another, she says in essence, your acts are my acts" but "that person's mental state is her own; she is liable for her mens rea, not the other person's." (*Id.* at p. 1118, internal quotation marks, alterations, and citations omitted.) In other words, "once it is proved that the principal has caused an *actus reus* . . . the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way." (*Id.* at pp. 1118-1119, internal quotation marks omitted.)

Under the now-invalid natural and probable consequences theory of murder liability, if a defendant encouraged or participated in some unlawful activity foreseeably resulting in a homicide, the defendant was then guilty of murder even in the absence of malice. (See *Gentile*, *supra*, 10 Cal.5th at pp. 843-844.) As Curiel's jury was instructed, to find him guilty under a natural and probable consequences theory of murder, it had to

first determine either that he aided and abetted a target offense, meaning he aided facilitated, promoted, encouraged or instigated the offense through words or conduct (7 TRT 1127, 1130-1131; 3 TCT 671-672, 676-677), or that he conspired to commit a target offense, meaning he agreed with others to commit the offense and committed an overt act to accomplish it (7 TRT 1131-1138; 3 TCT 678-682). The jury was also required to find that the murder itself was a natural, probable, and foreseeable consequence of the target offense. (7 TRT 1130-1131; 3 TCT 676; see *Gentile*, at p. 844.)

The two theories differ only in their required mental states. The actus reus under each theory entails, at a minimum, encouragement of, or participation in, some activity that foreseeably results in a homicide, at which point the defendant's and the actual perpetrator's acts merge for purposes of criminal liability. (See *McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.) The now-invalid aspect of the natural and probable consequences theory is the mental state component, which permitted murder liability on the basis of such acts *even when the defendant acted without malice*. (See *Gentile*, *supra*, 10 Cal.5th at p. 847; *McCoy*, at p. 1117; §§ 188, 1172.6, subd. (a).) But as *McCoy* explains, aiding and abetting or conspiring to commit activity foreseeably resulting in a homicide, *when done with malice*, amounts to murder. (*McCoy*, at pp. 1114-1122.)

A natural and probable consequences theory focuses on encouragement of, or participation in, an identified "target crime" other than murder, whereas direct aiding and abetting does not,

at least as a formal matter. But the analysis in *McCoy* makes clear that the same essential actus reus can support direct aiding and abetting liability. For example, the *McCoy* decision underscored that direct aiding and abetting murder liability may be imposed on a person who encouraged only negligent conduct: "'[I]t is possible for a primary party negligently to kill another (and, thus, be guilty of involuntary manslaughter), while the secondary party is guilty of murder, because he encouraged the primary actor's negligent conduct, with the intent that it result in the victim's death.'" (*McCoy*, *supra*, 25 Cal.4th at p. 1119.) Similarly, the court posited the following hypothetical:

> [A]ssume someone, let us call him Iago, falsely tells another person, whom we will call Othello, that Othello's wife, Desdemona, was having an affair, hoping that Othello would kill her in a fit of jealousy. Othello does so without Iago's further involvement. In that case, depending on the exact circumstances of the killing, Othello might be guilty of manslaughter, rather than murder, on a heat of passion theory. Othello's guilt of manslaughter, however, should not limit Iago's guilt if his own culpability were greater. Iago should be liable for his own acts as well Othello's, which he induced and encouraged. But Iago's criminal liability, as Othello's, would be based on his own personal mens rea. If, as our hypothetical suggests, Iago acted with malice, he would be guilty of murder even if Othello, who did the actual killing, was not.

(*Id.* at pp. 1121-1122.)

One who acts with malice is therefore liable for murder by encouraging or participating in another's conduct that foreseeably results in a homicide. Even under the former natural and probable consequences theory, such encouragement or

participation was required as the actus reus component of that theory. Here, Curiel's jury found that he acted with malice. (7 TRT 1149-1150, 1153-1154, 1188; 3 TCT 696, 702, 727.) And, at a minimum, Curiel's jury had to find that he encouraged or participated in disturbing the peace or carrying a concealed firearm by a gang member, which foreseeably resulted in the homicide. (7 TRT 1127, 1130-1138; 3 TCT 671-672, 676-682.) For the reasons explained in *McCoy*, this is enough to support murder liability under a direct aiding and abetting theory.

Because the mental state requirement is all that separates the invalid natural and probable consequences theory of murder liability from the valid direct aiding and abetting theory, a jury's finding of malice in a case like this one is sufficient to show liability for murder even after the reforms to section 188 and 189. This precludes resentencing as a matter of law under section 1172.6, and the Court of Appeal below was wrong in concluding otherwise.

B. The mental state of intent to kill satisfies the mens rea required for murder liability under current law

Curiel also claims that the jury's intent-to-kill finding cannot preclude resentencing because it did not encompass all aspects of the mental state required for direct aiding and abetting. In particular, he argues that the jury was not required to find that he knew of and shared the direct perpetrator's intent to kill. (ABM 65-66.) Curiel appears to misapprehend the nature of the mens rea required for murder as described in *McCoy*.

A direct aider and abettor to murder must know and share the unlawful purpose of the perpetrator. (See *McCoy*, *supra*, 25 Cal.4th at p. 1118; see also 7 TRT 1127 [direct aiding and abetting instruction]; 3 TCT 671-672 [same].)[5] When an aider and abettor acts personally with an intent to kill and encourages or participates in conduct by the direct perpetrator that foreseeably results in a homicide, the aider and abettor's liability for murder is established for the reasons explained in *McCoy*. (See *McCoy*, at pp. 1119-1122.) The aider and abettor in that situation necessarily possesses the same intent to commit the act resulting in a homicide that was foreseen by the aider and abettor and ultimately manifested by the direct perpetrator.

The requirement that an aider and abettor "share" the direct perpetrator's unlawful purpose does not mean, as Curiel seems to suggest, that there must necessarily be a preexisting agreement or meeting of the minds—or indeed any pre-formed intent on the part of the direct perpetrator—as to the commission of a homicide. Rather, an aider and abettor need only foresee an unlawful killing as the result of the combined acts of the principals, and the aider and abettor must personally possess

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[5] Although in *McCoy* and other cases this court has used the term "murderous intent," it is clear from the discussion in *McCoy* that the direct perpetrator need not subjectively intend to commit "murder," since the direct perpetrator might act with a mental state commensurate only with manslaughter or some other lesser crime. (See *McCoy*, *supra*, 25 Cal.4th at pp. 1119-1122.) Indeed, *McCoy* suggests that an aider and abettor could be liable for murder even when the direct perpetrator is "entirely innocent." (*Id*. at pp. 1120-1121; see also *id*. at p. 1119, fn. 2.)

malice. (See *McCoy*, *supra*, 25 Cal.4th at pp. 1119-1122.) The defining distinction between a natural and probable consequences theory of murder and a direct aiding and abetting theory, as observed by this court in *McCoy*, is that the former imposes murder liability for unintended, though foreseeable, homicides, while the latter restricts liability to intended homicides. (*Id.* at p. 1117.)

As a matter of law, if the trial jury has found that the defendant actually intended to kill (as it did here, by finding the special circumstance allegation true) and if the defendant also encouraged or participated in another's conduct that foreseeably resulted in a homicide (as will be the case under either a direct aiding and abetting theory or a natural and probable consequences theory), then liability for murder has been established. Thus, as this court properly suggested in *Strong*, a special circumstance finding that requires proof of intent to kill—like the one made by Curiel's jury—is dispositive as to a petitioner's eligibility for resentencing under section 1172.6.[6]

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[6] Curiel also argues that the evidence presented at trial was legally insufficient to support the mens rea aspect of direct aiding and abetting. (ABM 66-69.) Such a claim of trial error—at least one like Curiel's that is unrelated to the reforms made to section 188 and 189—is outside the ambit of section 1172.6. (See *People v. DeHuff* (2021) 63 Cal.App.5th 428, 438 ["The statute does not permit a petitioner to establish eligibility on the basis of alleged trial error"]; see also § 1172.6, subd. (f) ["This section does not diminish or abrogate any rights or remedies available to the petitioner."].) But in any event, Curiel's sufficiency claim is premised on the same misunderstanding of the mens rea requirement discussed above. (See ABM 66, 69 [arguing that the

(continued…)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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(…continued)

evidence did not show that Curiel had knowledge of direct perpetrator's "later-formed intent to kill"].) On a proper understanding of that requirement, ample evidence permitted a reasonable jury to conclude that Curiel acted with an intent to kill while encouraging or participating in another's conduct that foreseeably resulted in a homicide.

CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 5,980 words.

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December 15, 2022

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Orange County Public Defender's Office
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Court of Appeal of the State of California
Fourth Appellate District, Division Three
601 West Santa Ana Blvd.
Santa Ana, CA 92701

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 15, 2022, at San Diego, California.

Almeatra W. Morrison	*Almeatra W. Morrison*
Declarant	Signature

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Date

/s/Almeatra Morrison

Signature

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