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.	**Case No. S272238** Fourth District Court of Appeal, Div. 3, No. G058604 Super. Ct. No. 02CF2160

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT CURIEL

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INTEREST OF AMICUS CURIAE

The Office of the State Public Defender (OSPD) represents indigent persons in their appeals from criminal convictions in both capital and non-capital cases and has been instructed by the Legislature to "engage in … efforts for the purpose of improving the quality of indigent defense." (Gov. Code, § 15420, subd. (b).) Further, OSPD is "authorized to appear as a friend of the court[.]" (Gov. Code, § 15423.) OSPD has a longstanding interest in the fair and uniform administration of California criminal law and in the protection of the constitutional and statutory rights of those who have been convicted of crimes — particularly the crime of murder.

The parties agree that the question presented by this case turns on the proper application of the doctrine of *issue preclusion* — specifically whether a jury's true finding on the gang-murder special circumstance automatically precludes someone convicted of murder from seeking to vacate that conviction pursuant to Penal Code section 1172.6.[1] (PFR at 6; AABOM at 15.)[2]

In recent years, the Legislature has sought to stem the corrosive effects of mass incarceration by enacting a host of ameliorative statutes. At the same time, several landmark decisions of this Court set stronger guidelines to ensure the reliability of expert testimony. Together, these developments changed existing law in ways that have a profound effect on the rights of those

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

[2] PFR denotes "Respondent's Petition for Review"; AABOM "Appellant's Answer Brief on the Merits"; and RRBOM "Respondent's Reply Brief on the Merits."

charged with and convicted of crimes. These changes in the law frequently implicate the doctrine of issue preclusion in two respects, both of which are presented here. First is the matter of whether and when prior determinations regarding an issue material to subsequent litigation are to be given preclusive effect. The second is whether new laws or decisions have sufficiently "shifted the legal terrain" as to render application of the doctrine inappropriate. (*California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 573.)

How these questions are to be resolved is of great concern to OSPD and its clients. In addition, the prosecutions of many of OSPD's clients have depended on accusations and evidence concerning alleged criminal street gang activities, and the effect of the dramatic changes in the law governing those matters is of particular interest to the agency and those it represents.

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A. Why applying issue preclusion is inappropriate in this case

As the parties' briefs reflect, this Court's determination of the question presented in this case turns on the application of the doctrine of issue preclusion, also known as collateral estoppel. And, as the Attorney General acknowledges, "issue preclusion is an equitable doctrine . . . ." (RRBOM at 12.) Thus, as this Court has repeatedly instructed, "'[u]nder California law, collateral estoppel will apply in any setting only where such application comports with fairness and sound public policy.'" (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 835 (*Vandenberg*), quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343 (*Lucido*); accord, *People v. Strong* (2022) 13 Cal.5th 698, 716 (*Strong*); see also *People v. Santamaria* (1994) 8 Cal.4th 903, 938 [citing opinions that "describe the doctrine as an equitable concept whose application depends on principles of fairness relevant to a particular case"].) So, at its base, the question before the Court is whether it is fair and appropriate to deny Freddy Curiel an opportunity to a hearing to determine whether or not he is actually guilty of murder under current law. (See § 1172.6, subd. (d)(3).)

That such preclusion is not fair in these circumstances, and why it is not, is demonstrated by two of the key principles enunciated by this Court and others in applying the doctrine. *First*, it is a core requirement of issue preclusion that the issue was

actually and fully litigated in the prior proceeding. (See, e.g., *Haring v. Prosise* (1983) 462 U.S. 306, 311; *Strong*, *supra*, 13 Cal.5th at p. 716.) *Second*, issue preclusion may not be applied where either the applicable law or controlling facts have changed in the interim since the issue was first decided. (*Commissioner of Internal Revenue v. Sunnen* (1948) 333 U.S. 591, 599–600 (*Sunnen*); *Strong*, *supra*, 13 Cal.5th at pp. 716–717; *Younger v. Jensen* (1980) 26 Cal.3d 397, 412–413 [citing *Sunnen* regarding change in law]; *Hurd v. Albert* (1931) 214 Cal. 15, 26 [change in facts].)

Neither of those predicates was met in the instant case.

1. Appellant had no incentive to *actually* litigate the special circumstance allegation, and did not do so

The parties agree — as they must — that a fundamental requirement of the doctrine of issue preclusion is that the "issue must have been actually litigated in the former proceeding." (*Strong*, 13 Cal.5th at 716, citations omitted.)[3] The parties disagree, however, as to what this means.

The Attorney General asserts that the issue — namely, Mr. Curiel's intent — was "actually litigated" because it was an element

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[3] The requirements for issue preclusion, reiterated in *Strong*, are as follows: "'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this 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.'" (*Strong*, *supra*, 13 Cal.5th at p. 716, quoting *Lucido*, *supra*, 51 Cal.3d at p. 341.)

of the gang-murder special-circumstance allegation and "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." (RRBOM at 15.) Although acknowledging that Mr. Curiel's counsel did not contest the special circumstance allegation "at all" (*id.* at 14), the Attorney General observes that counsel had the *opportunity* to do so and contends that is all that is necessary to satisfy the "actually litigated" requirement. (*Id.* at 14–15, citing *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869 (*Murray*) and *United States v. Utah Constr. Co.* (1966) 384 U.S. 394, 422.)[4]

This crabbed view of the "actually litigated" requirement not only blinkers reality (counsel did absolutely nothing to "litigate" the matter) — it fails to reckon with the very essence of the equitable

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[4] The Attorney General also quotes *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, for the proposition that "an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." (*Id.* at 511.) While, taken out of context, that language does track the Attorney General's argument, in fact the *Hernandez* case was addressing a very different question than is now before the Court. The *only* issue in dispute in that case was a different collateral estoppel requirement, i.e., the first of those reiterated in *Strong* — "whether the issues as to which defendants assert preclusion are identical to issues decided in the earlier … proceeding …." (*Ibid.*) In deciding that the two proceedings involved "actual" litigation of the same issues in that case the Court had no occasion to consider whether the second issue preclusion requirement is satisfied if the party against whom preclusion is asserted lacked any real incentive to litigate the issue and so made no effort to do so. As set out in the text, other precedent speaks directly to that situation, which is the one presented here.

doctrine of issue preclusion, namely *fairness*. As the Supreme Court has repeatedly stressed, "collateral estoppel does not apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue[.]" (*Kremer v. Chem. Constr. Corp*. (1982) 456 U.S. 461, 480–481, citing *Allen v. McCurry* (1980) 449 U.S. 90, 95; *Montana v. United States* (1979) 440 U.S. 147, 153; and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* (1971) 402 U.S. 313, 328–329; accord, *Vandenberg*, *supra*, 21 Cal.4th at p. 834.) And "[t]he 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 Wright & Miller, Federal Practice and Procedure (3d ed. Supp. 2022) § 4423.) Thus, as the Supreme Court has reiterated, "among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party to be estopped had not only a full and fair opportunity but an adequate incentive to litigate 'to the hilt' the issues in question." (*Haring v. Prosise*, *supra*, 462 U.S. at p. 311 (citation omitted).)[5]

The Attorney General responds that the law governing the doctrine of issue preclusion in California is different than that of other state and federal jurisdictions and "does not place the same

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[5] Appellant discusses "lack of incentive" as an exception to the issue preclusion doctrine. (AABOM at 30–35.) That is an appropriate analytical approach traced in much of the case law. Amicus suggests, however, that "the incentive to litigate vigorously in the first action" may also be viewed as an integral part of the "actually litigated" requirement itself.

emphasis" on the party's incentive to litigate the issue. (RRBOM at 15.) The Attorney General is mistaken in both the major and minor premises of that assertion.

First, California courts apply the same rules of issue preclusion as do the federal courts and the vast majority of other states. (See *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 Cal.App.4th 1195, 1202 (*Hunt*) [observing that California opinions "are consistent with the rules on application of collateral estoppel found in the Restatement Second of Judgments."]) One need look no further than the reliance placed by the opinions of this Court, cited by the Attorney General, on federal precedent and the Restatement. (See, e.g., *Strong*, *supra*, 13 Cal.5th at pp. 716–717 [citing Rest.2d Judgments, § 28, *Sunnen*, *supra*, 33 U.S. 591, and *Montana v. United States* (1979) 440 U.S. 147]; *Lucido*, *supra,* 51 Cal.3d at p. 343 [discussing *Ashe v. Swenson* (1970) 397 U.S. 436]; *id.* at pp. 345–346 [surveying the law in other jurisdictions]; see generally, *Samara v. Matar* (2018) 5 Cal.5th 322, 330–337 [tracing the application of the Restatements of Judgments to jurisdictions throughout the country and overruling California precedent "'diverg[ing] from the path followed by the Restatements.'"].) California Court of Appeal cases relying on federal cases and on the provisions of the Restatement of Judgments to define the contours of the issue preclusion doctrine are too numerous to cite.

Second, among the provisions of the Restatement of Judgments that have been explicitly embraced by California courts is that issue preclusion "does not apply where 'the party sought to be precluded, as a result of the conduct of his adversary or other special

circumstances, *did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action*.'" (*Hunt*, *supra*, 25 Cal.App.4th at 1202, italics in original, quoting Rest.2d Judgments (1982) § 28, subd. (5).) Accordingly, our courts have repeatedly — and without controversy — "'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. . . . Such 'unfair' circumstances include a situation where the defendant had no incentive to vigorously litigate the issue in the prior action[.]'" (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150; quoting *Roos v. Red* (2005) 130 Cal.App.4th 870, 880; accord, *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 256; *Flynn v. Gorton* (1989) 207 Cal.App.3d 1550, 1556; *Mueller v. J.C. Penney Co.* (1985) 173 Cal.App.3d 713, 720; see also, *People v. Sims* (1982) 32 Cal.3d 468, 481 [in upholding issue preclusion, finding it "significant" that the party to be precluded had "the opportunity and incentive to present its case"].)

The Attorney General dismisses out of hand any consideration of whether the party to be precluded had an adequate incentive to litigate the issue in the prior proceeding. But the Attorney General does not explain how that position is compatible with basic notions of equity and fairness. Instead, the reply brief asserts that the otherwise unbroken line of cases, recognizing the unfairness of precluding a party from litigating an issue that they neither actually contested nor had sufficient reason to litigate, was overruled by the general definition of the term "actually litigated"

set forth in *Murray*. (RRBOM at 15–16.) But there was no question about the party's incentive to litigate in *Murray* and so the Court was not called upon to consider its effect on the application of the issue preclusion doctrine. It scarcely requires citation that "'cases are not authority for propositions not considered'" (*Geiser v. Kuhns* (2022) 13 Cal.5th 1238, 1252, quoting *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11.)

Appellant carefully traces the reasons why his trial counsel lacked incentive to litigate the gang-murder special-circumstance allegation despite the intent-to-kill element embedded within it. (AABOM at 29–42.) Briefly: Before it considered the special circumstance allegation, the first question for the jury, both temporally and in its fundamental importance, was whether Mr. Curiel was guilty of first-degree murder. Given that the jury had a much easier pathway to finding Mr. Curiel guilty — namely the since-abolished "natural and probable consequences" theory — counsel chose not to argue about his intent but instead challenged the prosecution's evidence regarding Mr. Curiel's *actions*. In that scenario (as appellant points out) it could have been counter-productive for counsel to argue, in essence, "he didn't do it but if he did he didn't mean for anyone to get killed." (See *id.* at 31–33.)

The truly compelling reason for contesting an intent determination did not arise until more than a decade later — when Senate Bill 1437 (2017–2018 Reg. Sess.) abolished natural and probable consequences as a legally viable theory of liability for aiding and abetting murder. As appellant points out — and the Attorney General does not offer any contrary authority or argument

— Mr. Curiel and his trial counsel had no way of foreseeing this change in the legal terrain and thus could not have known the crucial importance of an intent finding piled on top of the existing natural and probable consequences finding. (See AABOM at 35–36, discussing *Bobby v. Bies* (2009) 556 U.S. 825, 836–837.) In this respect as well, appellant lacked the incentive to attack, in 2006, an issue that did not become all-important until January 1, 2019.

This is not to say that Mr. Curiel lacked *all* incentive to contest the special circumstance allegation. As the Attorney General fairly points out, the jury's decision sustaining that allegation determined whether he would be eligible for parole. But, just as accurately, appellant argues that, on the facts of this case, there was "only [a] *de minimis* real-life difference between LWOP (special circumstance) and lifetime imprisonment with earliest parole eligibility in 50 years (no special circumstance.)" (AABOM at 31.) As appellant observes — and, again, the Attorney General fails to controvert — not only did Mr. Curiel's minimum sentence function as "'functionally equivalent to LWOP'" (*id.* at 33, quoting *People v. Contreras* (2018) 4 Cal.5th 349, 369), but the odds against him *ever* getting paroled were vanishingly small: at the time they were less than 1 percent. (*Ibid.*) Certainly, what was at the time little more than a theoretical difference in sentence would not have given counsel adequate incentive to undertake the risky strategy of arguing potentially conflicting alternative defense theories — that appellant was not acting as an aggressive participant in a gang confrontation, but, assuming that he was, he harbored no intent to kill. (Cf. *Turk v. White* (9th Cir. 1997) 116 F.3d 1264, 1266–1267

[counsel clearly not ineffective in electing to pursue unitary defense theory; "[p]ursuit of . . . conflicting theories would have confused the jury and undermined whatever chance [the defendant] had of an acquittal"].)

The Attorney General replies that these facts "do[] 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." (RRBOM at 16, fn. 3.) The first of those assertions is an exercise in *ipse dixit*, and it is inaccurate; in fact appellant *did* demonstrate that there was "little or no difference between the two sentences." And the notion that counsel somehow should have banked on a change in the draconian parole practices that had persisted for years, if not decades, confuses an actual incentive to litigate with something more akin to wishful thinking.

Unlike the Attorney General, the opinions discussing this matter do not define a "lack of incentive to litigate" as being *no* incentive (or, in the Attorney General's phrase, an "absence of incentive"). Rather, from the high court on down the courts have recognized that it is unfair — and thus incompatible with the fundamental principles of the doctrine — to impose issue preclusion on a party who had "*little* incentive to defend vigorously, particularly if future suits are not foreseeable." (*Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 330 (emphasis supplied); see e.g., *Dailey v. City of San Diego, supra*, 223 Cal.App.4th at p. 256, quoting *Parklane*; *Flynn v. Gorton*, *supra,* 207 Cal.App.3d at p. 1556 [where the "stakes involved are low" it "leave[s] parties without a

serious incentive to litigate"].) Here, as appellant observes, the possibility of a "future suit" — a petition to vacate his murder conviction pursuant to section 1172.6 — was completely unforeseeable.

Indeed, absent the (easily satisfied) natural and probable consequences theory, there is every likelihood that competent counsel *would* have contested the issue of intent at trial and, in doing so, would have obviated the gang-murder special-circumstance finding. There is no persuasive justification in equity or public policy to require the court below to afford preclusive effect to a gang-murder special-circumstance finding that only came about because the jury was instructed on a natural and probable consequences theory that has been abolished.

In short, Mr. Curiel certainly did not have "an adequate incentive to litigate 'to the hilt' the issues in question" (*Haring v. Prosise*, *supra*, 462 U.S. at p. 311) — indeed, he had very little incentive to litigate the intent issue at all and very good reason not to. Where, as in this case, a petitioner lacked the incentive necessary to mount what would likely be a viable challenge to a given finding, it is unfair to afford that finding preclusive effect and in doing so deny the petitioner his day in court to determine whether he is in fact guilty of murder and lawfully consigned to life in prison.

2. Changes in the legal and factual terrain render issue preclusion inapplicable

This case also presents a related and equally fundamental limitation on the use of issue preclusion. To quote the seminal high court case, "collateral estoppel must be used with its limitations

carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first *proceeding and where the controlling facts and applicable legal rules remain unchanged*." (*Sunnen*, *supra*, 333 U.S. at pp. 599–600, italics added.) As this Court emphasized in *Strong*, it would be inimical to both of the foundational concerns underlying the doctrine of issue preclusion — fairness and the integrity of the judicial system — to allow a prior determination to have preclusive effect in a later proceeding "when a material change in the governing law calls for a different outcome in a second proceeding." (*Strong*, *supra*, 13 Cal.5th at p. 717.) And as this Court recognized many decades earlier (and the Courts of Appeal have frequently reiterated), the same is true when "the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants." (*Hurd v. Albert*, *supra*, 214 Cal. at p. 26; see, e.g., *People v. Carmony* (2002) 99 Cal.App.4th 317, 322; *Evans v. Celotex Corp*. (1987) 194 Cal.App.3d 741, 748.) In this case, and others like it, the applicable law has certainly changed, and as a consequence the universe of evidence (i.e., the "controlling facts") admissible to establish the gang-murder special-circumstance allegation has changed quite radically.

As will be detailed in the balance of this brief, there have been wholesale changes in the statutes and case law governing both what needs to be proved in order to support gang allegations and what evidence may be admitted to do so. As will also be shown, there is no question that those changes could have completely altered the

outcome in regard to the gang-murder special-circumstance allegation upon which the state places its reliance, and in particular on the *mens rea* determination that the state asserts is preclusive.[6]

The Attorney General responds by rewriting this Court's precedent. According to the Attorney General, "[f]or [the change in law] exception to apply, the change *must involve* 'different substantive law than the previous proceeding.'" (RRBOM at 20 (emphasis added), quoting *Ronald F. v. State Dept. of Developmental Services* (2017) 8 Cal.App.5th 84, 93; and citing, *inter alia*, *California Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559 (other citations omitted).) The Attorney General argues that, because appellant's argument focused on changes in the law regarding the admission of evidence rather than "substantive law" (i.e., the elements of the offense) it does not matter that those changes might alter the outcome of the new proceeding — the exception is simply inapplicable. (RRBOM at 20–21.)

The first problem with the Attorney General's argument is that neither this Court's opinion nor the other cited cases say that the change "***must involve*** 'different substantive law ….'" To be sure, those specific cases all *did* involve what the Attorney General defines as "different substantive law" — but none of them said that the exception was limited in that fashion. The "must involve"

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[6] The point is amply demonstrated by the lower court's earlier, nonpublished opinion on direct appeal, relying on the now-inadmissible "gang expert" testimony as the basis for denying Mr. Curiel's challenge to the sufficiency of the evidence that he harbored an intent to kill. (See *People v. Curiel* (February 21, 2008, G037359) [2008 WL 458520 at *15].)

language is the Attorney General's own interpolation, unsupported by the cited cases — or indeed any cases amicus has discovered.

In fact, this invented limitation defies both the logic and the language of pertinent precedent. As the high court has repeatedly stressed, "'Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'" (*Kremer v. Chem. Constr. Corp.*, *supra*, 456 U.S. at pp. 480–481 (citations omitted).) The appropriate question then, is not whether the change in law is "substantive" or "procedural," but rather (to quote a case upon which the Attorney General relies) whether it "'shifted the legal terrain surrounding plaintiffs' suit[.]'" (*California Hospital Assn. v. Maxwell-Jolly*, *supra*, 188 Cal.App.4th, at p. 573 (citation omitted); see Rest.2d Judgments, § 29, subd. 2 [among factors weighing against affording preclusive effect: "The 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."].)

Thus, the cases that have addressed the point have specifically held that changes in the admissibility of evidence *can* constitute changes in law that render issue preclusion inapplicable. (See *People v. Demery* (1980) 104 Cal.App.3d 548, 561 [issue preclusion inappropriate in later proceeding in which "the standards of admissibility of evidence differ"]; *Worcester v. Commissioner of Int. Rev.* (1st Cir. 1966) 370 F.2d 713, 717 [denying issue preclusion where evidence admitted at the first proceeding would be

inadmissible at the second proceeding]; *In re Ranbaxy Generic Drug Application Antitrust Litigation* (D. Mass. 2021) 573 F.Supp.3d 459, 477 [issue preclusion inapplicable if potentially precluded party "may benefit from substantial differences in the availability or admissibility of evidence" in the second proceeding]; *Buranen v. Hanna* (D. Minn. 1985) 623 F. Supp. 445, 450–451 [collateral estoppel denied because there were substantive differences in the admissible evidence that was permitted]; 18 Wright & Miller, Federal Practice and Procedure (3d ed. Supp. 2022) § 4422 ["issue preclusion … may be defeated by substantial changes in the admissibility of evidence"]; cf. Rest.2d Judgments, § 83, cmt. (c) [determinations in prior agency proceeding may not be preclusive if they were "based on evidence that would be inadmissible in [subsequent] judicial proceedings"].)

A second defect in the Attorney General's argument is it assumes that only changes in the *law* bring into play this exception to issue preclusion. But, as the high court made clear, the exception also applies where there has been a change in the "controlling facts." (*Sunnen*, *supra*, 333 U.S. at pp. 599–600.) Indeed, "the doctrine of claim or issue preclusion 'was never intended to operate so as to prevent a re-examination of the same question between the same parties where, in the interval between the first and second actions, the facts have materially changed or new facts have occurred which may have altered the legal rights or relations of the litigants.'" (*People v. Carmony*, *supra*, 99 Cal.App.4th at p. 322, quoting *Hurd, supra.* 214 Cal. at p. 26; accord, *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.* (2014) 231 Cal.App.4th 134, 179

["Collateral estoppel does not bar a later claim if new facts or changed circumstances have occurred since the prior decision."].)[7]

In this and every judicial proceeding the "controlling facts" are limited to those properly admitted as evidence. And as will be traced below, the recent judicial and statutory limitations on the evidence admissible to prove criminal gang allegations would radically alter the set of "controlling facts" available to the prosecution in this case. Simply put, it is likely that the state could not now prove the gang allegation or any of its requisite elements.

Finally, the Attorney General's response fails on its own terms, for — as will also be discussed in the next portion of this brief — the "substantive law" governing the elements of the gang sentencing enhancement has indeed changed. (See *People v. Tran* (2022) 13 Cal.5th 1169, 1206–1207 [discussing recent amendments to section 186.22].) These significant changes do not render all gang findings meaningless in section 1172.6 proceedings. However, they require that courts carefully evaluate the facts of each particular case to determine whether the preclusive finding sought to be relied upon would have existed in the first place under current law.

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[7] As recent legislation has made clear, it is not only fair but in line with sound public policy to disallow issue preclusion when new facts have emerged that would likely change the outcome. Senate Bill 467 (2021–2022 Reg. Sess.) subjects convictions based on expert testimony — like that adduced in the instant case — to collateral attack if a "significant dispute has emerged or further developed in the petitioner's favor regarding expert medical, scientific, or forensic testimony that was introduced at trial and contributed to the conviction, such that it would have more likely than not changed the outcome at trial." (Stats. 2022, ch. 982, § 1, amending Pen. Code, § 1473, subd. (b)(4).)

In short, the principles of fairness and respect for the integrity of the judicial process that shape and limit the doctrine of issue preclusion do not permit using the prior jury finding in this case to strip Mr. Curiel of his statutory right to a determination of whether he is guilty of murder under current law.

B. The law governing both the admissibility of police officers' gang-expert testimony, such as Detective Lodge's testimony at the trial in this case, and the elements of gang allegations has substantially changed in several ways in the nearly two decades since appellant's trial

Since the trial in 2006, substantial changes in the law pertaining to expert testimony and criminal street gangs have significantly altered the legal landscape regarding which evidence is admissible to prove gang allegations. First, this Court overruled past precedent and barred the common practice of expert witnesses relating hearsay evidence, ostensibly to show the basis for their expert opinion. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684–685 (*Sanchez*).) Second, in order to prevent unreliable expert testimony from tainting trials, this Court imposed a new duty on trial courts to act as gatekeepers to the admission of expert evidence. (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770–772 (*Sargon*).) This change has been applied to bar gang-expert testimony, such as that proffered in this case, for which police-officer experts cite only their observations and experiences, and which lack "any logical basis" other than "unsubstantiated beliefs" as the foundation for their opinions. (*People v. Gonzalez* (2021) 59 Cal.App.5th 643, 649 (*Gonzalez*).)

Third, in 2021, the Legislature enacted Assembly Bill Number 333 (AB 333), a landmark law that significantly altered the proof required to establish a gang enhancement and which gang evidence is admissible in court. (Stats. 2021, ch. 699.) Individually and collectively, these sweeping changes in law — and the resulting constriction of the evidence that the prosecution can employ — render issue preclusion inapplicable to the intent-to-kill finding encompassed by the jury's gang-murder special-circumstance determination in appellant's 2006 trial.

As will be demonstrated below, most of the gang-expert testimony presented at trial would not have been admissible under current law. The changes in law would have altered the outcome. When the Court of Appeal rejected a sufficiency challenge appellant had made in his direct appeal, the court relied almost exclusively on now-inadmissible expert testimony to conclude that a rational jury could have inferred from appellant's conduct that he had harbored an intent to kill. (*People v. Curiel*, *supra*, 2008 WL 458520 at *15.)

1. Gang experts may no longer relate case-specific hearsay

In *Sanchez*, *supra*, 63 Cal.4th at pp. 684–685, overruling decades of precedent, this Court prohibited the admission of hearsay consisting of case-specific facts to show the basis of an expert witness's opinion. Prior practice had deemed admissible such hearsay facts under the legal fiction that the basis evidence was not proffered to prove the truth of the matter asserted. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 619–620.) The *Sanchez* Court continued to permit expert witnesses to relate hearsay consisting of

"background information generally accepted in their fields of expertise." (*Sanchez*, at pp. 684–685.)

This Court applied *Sanchez* to gang experts in *People v. Valencia* (2021) 11 Cal.5th 818 (*Valencia*). In *Valencia*, this Court concluded that facts used to prove predicate offenses are case-specific facts to which gang experts lacking personal knowledge cannot testify in the absence of competent evidence independently establishing those facts. (*Id.* at p. 838.)

In his Answer Brief on the Merits, appellant explains how the change in law that *Sanchez* and *Valencia* brought about could have impacted the outcome of his trial, and in particular the gang-murder special-circumstance finding upon which the Attorney General attempts to rely for its purportedly preclusive effect. In short, the gang expert based his theories of "gang culture" on hearsay and imputed appellant's thoughts and actions from those "gang culture" theories. (AABOM at 54–64.) Amicus concurs with appellant's analysis and will not discuss these issues further. However, additional changes to the law provide other grounds for concluding that the gang expert's testimony would not have been admissible at a judicial proceeding today, would likely have affected the original jury's finding on the gang-murder special circumstance, and therefore this finding (and the intent-to-kill finding contained therein) should have no preclusive effect on appellant's section 1172.6 petition. Below, amicus will discuss those changes in the law and their impact.

2. Trial courts must now act as gatekeepers for gang-expert testimony

a. This Court has imposed a gatekeeping duty on superior courts

Until a decade ago, trial courts in California had not been assigned the task of guarding the courthouse from expert testimony that was not founded on reliable and valid methodologies. Several years after appellant's trial, however, this Court in *Sargon* made clear that trial courts bear a meaningful gatekeeping duty to keep out speculative, illogical expert opinion testimony. *Sargon* signaled a sea change in the admissibility of testimony from gang experts. (Faigman & Imwinkelried, *Wading into the* Daubert *Tide*: Sargon Enterprises, Inc. v. University of Southern California (2013) 64 Hastings L.J. 1665, 1682–1683 (*Wading into the* Daubert *Tide*).)

The import of *Sargon* can best be understood by examining the gatekeeping duty that the United States Supreme Court placed on district courts in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 (*Daubert*). In *Daubert*, the Supreme Court required district courts to make "a preliminary assessment of whether the reasoning or methodology underlying [expert] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." (*Id.* at pp. 592–593.) This gatekeeping function assigned district court judges "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." (*Id.* at p. 597.) In *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 147–149 (*Kumho Tire*), the Supreme Court clarified that district court judges

were obligated to act as gatekeepers for all expert testimony, regardless of whether it is scientific.

Prior to *Sargon*, superior courts in California did not fill a similar gatekeeping role. Indeed, California courts contrasted California's expert-evidence standard from the federal standard articulated in *Daubert* and *Kumho Tire*. (*People v. Superior Court (Vidal)* (2007) 44 Cal.4th 999, 1014 [characterizing the *Daubert* standard as "arguably more searching" than the *Kelly/Frye* test[8]]; see also *People v. Leahy* (1994) 8 Cal.4th 587, 593–604 [declining to adopt *Daubert*].)

Before *Sargon* tasked superior courts to be gatekeepers to expert testimony, California courts routinely admitted gang-expert testimony without significant limitation. Our courts' formerly lax approach to gang-expert testimony is vividly illustrated in *People v. Hill* (2011) 191 Cal.App.4th 1104 (*Hill*). In that case, the Court of Appeal rejected a challenge to the admissibility of gang-expert testimony based on the unreliability of the gang expert's methodology. (*Id.* at pp. 1122–1125.) Rather, the *Hill* court concluded that the *Kelly/Frye* test was inapplicable to gang experts and that gang experts need not ground their opinions on a reliable methodology:

> In contending that the sources of [gang expert] Chaplin's opinion were unreliable, appellant cites [*Daubert*] and argues that an expert may not simply rely on hearsay but "must form his opinion by applying his experience and a reliable methodology to the hearsay material upon which he relies." This argument

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[8] *People v. Kelly* (1976) 17 Cal.3d 24, 30–32; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014.

> fails for several reasons. First, California has rejected the *Daubert* analysis in favor of the [*Kelly/Frye* test]. (*People v. Leahy* (1994) 8 Cal.4th 587, 612, 34 Cal.Rptr.2d 663, 882 P.2d 321.) Second, appellant has cited no California authority for the proposition that a gang expert's opinion is subject to the *Kelly* test or that it must be based on a "reliable methodology," and, generally speaking, *Kelly* does not apply to the type of expert testimony provided by Chaplin.

(*Id.* at pp. 1123–1124.)

After *Sargon*, however, courts can no longer overlook a gang expert witness's lack of a reliable methodology. This Court explained that trial courts have a preliminary role in preventing unreliable expert testimony from influencing the jury and the focus of this gatekeeping function is on the principles and methodology applied to generate the expert's conclusions. (*Sargon*, *supra*, 55 Cal.4th at p. 772, citing *Daubert*, *supra*, 509 U.S. at p. 595.) The court must determine "'whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.'" (*Sargon*, at p. 772, quoting Imwinkelried & Faigman, *Evidence Code Section 802: The Neglected Key to Rationalizing the California Law of Expert Testimony* (2009) 42 Loyola L.A. L. Rev. 472, 449.) This Court has made clear that trial courts must act as gatekeepers for both scientific and nonscientific expert testimony. (*People v. Veamatahau* (2020) 9 Cal.5th 16, 33 [expert testimony that does not require a *Kelly/Frye* analysis must still be screened under Evidence Code section 801].)

Legal scholars have recognized that *Sargon* transformed trial judges' role:

> *Sargon* alters the fundamental focus of a trial court's admissibility decision. Before *Sargon*, California courts either deferred to what was generally accepted in a particular field or accepted the professional practice of the testifying witness. After *Sargon*, trial judges have been appointed gatekeepers charged with scrutinizing the reliability of all expert evidence.

(*Wading into the* Daubert *Tide*, *supra*, 64 Hastings L.J. at pp. 1682–1683.) After *Sargon*, superior court judges have had to examine how expert witnesses acquired their knowledge:

> *Sargon* no longer permits trial judges to defer to some proxy professional group, but rather assigns them the weighty responsibility of inquiring how the knowledge was derived. In epistemological terms, what is the group's knowledge claim, and is there an adequate warrant for this claim?

(*Id.* at p. 1683.)

Perhaps most importantly for purposes of an issue preclusion analysis, *Sargon*'s imposition of a gatekeeping duty on superior courts has altered the admissibility of gang-expert testimony. The recent decision in *Gonzalez*, *supra*, illustrates the impact. The Court of Appeal in *Gonzalez* relied on *Sargon* to find that the gang expert lacked a logical basis for his opinion that the defendant committed robberies for his gang's benefit and therefore held that insufficient evidence supported the gang enhancements. (*Gonzalez*, *supra*, 59 Cal.App.5th at pp. 649–650.) The court articulated the importance of the requirement that experts' opinions have logical support:

> Expert opinion . . . must not be speculative. Expert opinion has no value if its basis is unsound. ([*Sargon*, *supra*, 55 Cal.4th at pp. 769–770].) Expert opinion must have a logical basis. Experts declaring unsubstantiated beliefs do not assist the truth-seeking enterprise. (See [*People v. Vang* (2011) 52 Cal.4th 1038,] 1046.) This

> applies to all experts, including gang experts. (*Ibid.*; see *People v. Franklin* (2016) 248 Cal.App.4th 938, 949–952 [striking gang enhancement supported only by gang expert's speculation].)

(*Gonzalez*, at p. 649.) The court also explained that experts cannot merely cite the sum of their observations and experience to support their opinions:

> The expert also based his opinion "on the pattern of my observations about this gang, as well as [of the defendant]...." 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."' (*Sargon*, *supra*, 55 Cal.4th at p. 766; see *id.* at p. 778 [excluding expert opinion that was "'nothing more than a tautology"']).

(*Gonzalez*, at p. 649.)

b. Under *Sargon*, the gang-expert testimony elicited at appellant's trial would likely be inadmissible under current law

Detective Steven Lodge, the prosecution's gang expert, testified about "gang culture" in order to predict or infer appellant's acts and mental state. This "gang culture" testimony formed the centerpiece of the prosecution's case that appellant harbored an intent to kill. (See *post*, at pp. 43–46; see also *People v. Curiel*, *supra*, 2008 WL 458520 at *15 [relying primarily on "gang culture" testimony to conclude that the prosecution had presented sufficient evidence of intent to kill].) There was no evidence, however, that Det. Lodge had derived his expert opinions from reliable

methodologies. That absence of evidence rendered the "gang culture" evidence inadmissible. (See *Gonzalez*, *supra*, 59 Cal.App.5th at p. 649.)

Det. Lodge did not testify that he had acquired specific expertise regarding O.T.H., the gang to which appellant belonged. Det. Lodge presented no evidence of having studied gang sociology as an academic discipline. Rather, he testified that he learned about gangs at law-enforcement seminars, not at colleges or universities. (4 TRT 539–543.) More importantly, Det. Lodge provided no evidence that he had validated his general theories of "gang culture" with respect to O.T.H. and its members. In other words, Det. Lodge did not examine whether the conclusions he had reached regarding "gang culture" in general were consistent with the culture of O.T.H. or that O.T.H. members' actions typically were congruent with "gang culture." (Cf. *Gonzalez*, *supra*, 59 Cal.App.5th at p. 649 [expert opinion "must have a logical basis" and cannot be grounded simply on "unsubstantiated beliefs"].)

Despite the lack of a showing that he based his expert opinions on sound, reliable methodologies applicable to the case at hand, Det. Lodge testified extensively about "gang culture." He articulated his understanding of "gang culture" to discuss, among other things, the concepts of "backup" and "gang guns."

Det. Lodge opined that "within the gang culture," gang members are expected to have each other's back and "help [each other] out in any situation that comes up." (4 TRT 480.) He added that the expectation of "backup" provides strength in numbers. Based on his "training and experience," Det. Lodge opined that gang

members would commit crimes with one another only if they trust one another to provide "backup." (4 TRT 480–481.)

From talking to unspecified "gang members from Santa Ana," Det. Lodge learned that gangs generally have "gang gun[s]," which could be "a cache of weapons or … just a couple that [gang members] are able to use when they want to." (4 TRT 487.) Moreover, he opined, based on his "training and experience and conversations with specific gang members, and listening to conversations between gang members, if there is a gun within a group, that it is expected that everybody knows if there is a gun and who has it." (4 TRT 488–489.) In addition to constituting the improper relation of hearsay (AABOM at 57–62), Det. Lodge's testimony regarding "gang culture" — completely untethered from the gang at issue in this case — violated the principles of *Sargon*. (See *Gonzalez*, *supra*, 59 Cal.App.5th at pp. 649–650.)

This Court recently recognized the flaws of testimony in which gang experts extrapolate from gangs in general rather than the defendants' *specific* gang:

> The prosecution's gang expert testified that gang members must carry out "missions" to gain respect — and presumably to advance in the group — but the testimony appeared to be based on an impression of gangs generally, rather than the specific practice of the 5/9 Brims.

(*People v. Ware* (2022) 14 Cal.5th 151, 170.) Although this Court in *Ware* was discussing the weight, rather than the admissibility, of the gang expert's testimony, the gang-expert testimony's shortcomings were identical: *Ware* accorded little weight to the gang expert's characterization of the defendant's gang because the expert

based his opinion on *gangs in general*, rather than the specific gang. (*Id.* at p. 169.)

In this case, Det. Lodge testified about purported characteristics of "gang culture" without first establishing that he had used a reliable methodology — or any methodology — to form his opinions. The trial court permitted the prosecution to elicit that evidence because, at the time of trial, trial courts had no duty to act as gatekeepers to ensure the reliability of expert witnesses' testimony.

Moreover, Det. Lodge cited nothing more than his unspecified training and experience to support some of his conclusions. For instance, he testified that he based his opinion that appellant's gang, O.T.H., was a turf-oriented gang on his "training and experience." (4 TRT 496.) In addition, his "training and experience" formed the foundation for his opinion regarding "gang gun[s]." (4 TRT 482–489.) In this respect, Det. Lodge's testimony had the same fundamental flaw that the Court of Appeal identified in the gang-expert testimony in *Gonzalez*: Courts and factfinders cannot assess the methods of gang experts who base their opinions entirely on their unsubstantiated "observations and experience," particularly where that experience does not even pertain to the gang at issue in the case. (*Gonzalez*, *supra*, 59 Cal.App.5th at p. 649.)

For these reasons, the principles of *Sargon* would likely render some or all of Det. Lodge's trial testimony inadmissible today. At a bare minimum, the trial court was never tasked with fulfilling its gatekeeping function to assess the validity of this questionable expert testimony. In addition, as demonstrated below

(see *post*, at pp. 43–46), the jury's special circumstance finding at appellant's trial was likely attributable to the introduction of evidence that would not be admissible at a trial held today and the Court of Appeal cited Det. Lodge's now-inadmissible "gang culture" testimony to reject appellant's sufficiency claim regarding the intent-to-kill element.

3. The enactment of Assembly Bill Number 333 also changed pertinent law that would likely have impacted the prior jury's special circumstance finding

Another reason the gang-murder special-circumstance finding should have no preclusive effect is that the evidence presented at appellant's trial would not have been sufficient to prove the special circumstance today. Assembly Bill No. 333 (2021–2022 Reg. Sess.) (AB 333) essentially added new elements to the section 186.22 gang enhancement. (*People v. Tran*, *supra*, 13 Cal.5th at pp. 1206–1207.) The amended law requires "'proof that gang members [have] "collectively engage[d]" in a pattern of criminal gang activity, that the predicate offenses were committed by gang members, that the predicate offenses benefitted the gang, and that the predicate and underlying offenses provided more than a reputational benefit to the gang. . . .'" (*Id.* at p. 1207, quoting *People v. E.H.* (2022) 75 Cal.App.5th 467, 479.) The changes to the definition of criminal street gang have also amended the statutes that incorporate provisions of section 186.22, including the gang-murder special circumstance. (*People v. Lee* (2022) 81 Cal.App.5th 232, 239–240; *People v. Lopez* (2021) 73 Cal.App.5th 327, 346–347; but see *People v. Rojas* (2022) 80 Cal.App.5th 542 [holding AB 333

unconstitutionally amended the gang-murder special circumstance], review granted Oct. 19, 2022, S275835.) In short, assessed under current law, there would be no special circumstance finding upon which the Attorney General could rely for its issue preclusion argument in the first place.

Equally important, AB 333 altered which gang evidence would be admissible at a trial held under current law. As part of the new law, the Legislature made express findings regarding the profoundly prejudicial impact of gang evidence: "Studies suggest that allowing a jury to hear the kind of evidence that supports a gang enhancement before it has decided whether the defendant is guilty or not may lead to wrongful convictions." (Stats. 2021, ch. 699, § 2, subd. (e) (AB 333, § 2(e).) The Legislature further found and declared: "Bifurcation of trials where gang evidence is alleged can help reduce its harmful and prejudicial impact." (*Id.* at subd. (f) (AB 333, § 2(f)).) Accordingly, the new law permits defendants charged with section 186.22 enhancements to demand bifurcation of the allegations from the guilt determinations of substantive offenses.[9] (§ 1109, added by AB 333, § 5.) In other words, the Legislature recognized that the gang evidence which was admitted at a unitary trial prior to AB 333 was likely to significantly impact a jury's determination of guilt issues —

[9] This Court is considering the retroactivity of section 1109. (See *People v. Burgos* (2022) 77 Cal.App.5th 550, review granted July 13, 2022, S274743.) But this Court's resolution of the retroactivity issue has no bearing on the prejudicial impact of gang evidence that would be excluded at a trial held under current law.

among them the special circumstance finding on which the Attorney General now relies.

In addition to the new bifurcation requirement, AB 333 affects which evidence courts admit at trials of substantive gang offenses or enhancements. It is likely that the quantity and quality of gang evidence allowed under current law would be vastly different than that permitted at the original trial.

In assessing the preclusive effect of the jury's prior gang-murder special-circumstance finding under prior law, courts must take into account how AB 333 alters trial courts' control of gang evidence, an analysis conducted primarily under the Evidence Code section 352.

Such an analysis must begin by giving weight to the Legislature's recent pronouncement that gang evidence is exceptionally prejudicial. (AB 333, § 2(e).) Two years before the trial in this case, this Court found significance in the *lack* of a legislative pronouncement regarding the prejudicial nature of gang evidence when this Court held that trial courts need not typically bifurcate gang allegations from trials determining guilt of substantive offenses. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) The enactment of AB 333 renders that observation in *Hernandez* inoperative. When weighing the prejudicial nature of gang evidence under Evidence Code section 352, courts should be guided by the Legislature's pronouncement on the subject in AB 333. In turn, courts assessing the preclusive effect of findings rendered under prior law must take into account these changes

and how prior law allowing such inflammatory evidence might have impacted a prior jury's findings.[10]

Second, AB 333 reduces the probative value of gang evidence in many cases. Under AB 333, many cases that were previously charged with gang allegations that would no longer qualify as gang cases under current law. For example, following the enactment of AB 333, many groups no longer qualify as criminal street gangs. In addition, the section 186.22 enhancement is no longer applicable in a case where a defendant intends to promote, further, or assist gang members' criminal conduct by enhancing the gang's reputation. (AB 333, § 4, subd. (b)(2).)

As explained above, the trial court's decision to admit gang evidence in a non-gang case is likely to be vastly more restricted. For example, in a case without gang allegations, evidence of a gang's primary activities would be irrelevant, because the prosecution would not have to prove that a gang fulfills the

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[10] As a general matter, courts have repeatedly recognized that gang evidence is highly prejudicial (see, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 193), but that evidence may be admissible when highly probative toward elements of non-gang offenses to establish issues such as motive, intent, or identity (see, e.g., *People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1048–1051). Thus, it is at least possible — even if this case would not support a special circumstance finding under AB 333 — that some of the gang evidence might have nonetheless been admitted under current law. But in the absence of the evidence adduced in support of the (fatally flawed) special circumstance finding, the sheer quantity of such highly prejudicial evidence would be greatly reduced and — most crucially — the testimony specifically cited by the Court of Appeal as supporting the intent finding would not have come in at all.

statutory definition of a criminal street gang. Accordingly, extraordinary prejudicial expert testimony such as the fact that the defendant joined a group that has committed murders as one of its primary activities — evidence from which a jury might infer a defendant's intent to kill — would never be admitted. Likewise, evidence of predicate offenses — from which a jury might make improper guilt-by-association inferences — would also be inadmissible.

Thus, like *Sargon*, AB 333 constitutes another change in law that impacts the admissibility of gang evidence and should impact the preclusive effect of a gang-murder special-circumstance finding.

C. The intent-to-kill finding at appellant's trial was likely attributable to the introduction of evidence that would be inadmissible at a trial held under current law

For this Court to give preclusive effect to the gang-murder special-circumstance finding, it must be satisfied that the significant changes in law would not impact that finding. (Cf. *Strong*, *supra*, 13 Cal.5th at p. 711 [refusing to grant preclusive effect to prior finding where it was reasonably likely that "the evidence would not have been sufficient" for that finding under current law].)

Any fair assessment of the highly prejudicial gang evidence admitted at trial illustrates that it was likely to have impacted all of the jury's findings. Det. Lodge's testimony was not an immaterial sideshow: It was the centerpiece of the prosecution case with respect to the gang-murder special circumstance. The prosecution relied upon Det. Lodge's "uncontradicted gang expert testimony" regarding

"backup" and "gang guns" within "gang culture" to support the assertion that appellant knew that Abraham Hernandez, the triggerman, was armed with a gang gun and that appellant was providing Hernandez "backup." (7 TRT 1089–1090.) The prosecution further contended that Hernandez and appellant "were out on the streets acting like the death [s]quad for O.T.H." (7 TRT 982.) The prosecution connected that contention to appellant's alleged intent to kill: "Was there an intent to kill and premeditation and deliberation? The death squad, planning, waiting and hunting." (7 TRT 1088.)

The prosecution used the same concepts to undergird its assertion that appellant had constructive possession of the gun Hernandez had used:

> So when Abraham Hernandez is walking with the gun in his waist, the defendant is in constructive possession of that weapon. They are both in possession of that weapon.
>
> You take into consideration the testimony of Detective Lodge about how gang members operate. This is the gang's gun. You are supposed to do backup, you are supposed to be willing, if Hernandez is down, to grab it and do whatever needs to be done. That's where requiring that knowledge element that we are talking about.

(7 TRT 993.)

The prosecution also relied on Det. Lodge's "gang culture" testimony to contend that appellant had the implied malice that demonstrated his culpability for murder: "I don't think anybody, anybody is going to argue to you that the gang members with guns doing hit-ups and confronting people is not dangerous to human life." (7 TRT 971.) Moreover, the prosecution averred that the

homicide was "a natural and probable consequence of the gang lifestyle." (7 TRT 975.)

Because Det. Lodge's expert testimony — evidence that is reasonably likely to have been excluded under current law — constituted the critical evidence supporting the gang-murder special-circumstance finding, the change in law would have significantly and directly impacted the jury's special circumstance finding. Consequently, the gang-murder special-circumstance finding should have no preclusive effect on appellant's section 1172.6 petition. (See *Strong*, *supra*, 13 Cal.5th at pp. 716–717.)

Furthermore, the Court of Appeal opinion rejecting, on direct appeal, appellant's sufficiency challenge to the intent-to-kill element of the gang-murder special-circumstance finding spotlights the centrality of Det. Lodge's now-inadmissible testimony to undergird the intent-to-kill finding:

> There was sufficient circumstantial evidence from which the jury could conclude Curiel possessed the requisite intent to kill. As we explain above, Curiel and Hernandez were OTH gang members walking in OTH gang territory when Hernandez asked Curiel who the group of people were. Lodge explained the culture and habits of criminal street gangs, including gang territory, respect, hit-ups, and backing each other up. Lodge testified that based on his background, training, and experience, when one gang member has a gun, the other gang members know. Curiel admitted that when Hernandez crossed the street, he followed him. There was testimony Curiel yelled, "This is OTH" and "This is my neighborhood[.]" And, there was evidence Curiel confronted and argued first with Tejada, and then with Ramirez. This was sufficient evidence for the jury to conclude Curiel possessed the requisite intent to kill.

(*People v. Curiel*, *supra*, 2008 WL 458520 at *15.) When Det. Lodge's unverified, unreliable, and now-inadmissible testimony about "gang culture" is removed from the equation, a factfinder would have no basis to conclude that appellant intended to do more than engage in a verbal confrontation with Cesar Tejada. It follows with greater force that a factfinder could not have inferred, from evidence that would be admissible today, that appellant intended to kill Tejada.

D. Because changes in law must be considered cumulatively, and because there have been several significant changes bearing directly on the issue at hand, application of issue preclusion is inappropriate in this case.

The law is well settled that the application of issue preclusion, a doctrine grounded in equity, is a holistic determination. (*Ashe v. Swenson*, *supra*, 397 U.S. 436, 444 ["The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings'"]; *Haber v. Biomet Inc.* (7th Cir. 2009) 578 F.3d 553, 556 [application of issue preclusion "holistic" question]; see also Rest.2d Judgments §§ 28 & 29 cmt. j [discussing the basis for issue preclusion and noting that a court must consider the totality of circumstances].) This Court's recent decision in *Strong* underscores that significant changes in law must be evaluated in their totality. (See *Strong*, *supra*, 13 Cal.5th at p. 706 [rejecting application of issue preclusion because *Banks* and *Clark* "*both* substantially clarified the law governing findings under Penal Code section 190.2, subdivision (d)"], italics added.)

In this case, there have been multiple, substantial changes in law, overruling decades-old cases that bore significantly on the issues tried. This tectonic shift in the legal landscape likely impacted both the evidence admitted and the defense decision whether to meaningfully contest that evidence in the first instance — both considerations crucial to the application of issue preclusion. Most significantly, the extent of the gang testimony — testimony at the heart of the very gang finding upon which the Attorney General now relies — would have been radically altered.

Were the same trial held today, the jury likely would not have sustained the special circumstance finding. And given the centrality of the now-inadmissible gang evidence in establishing Mr. Curiel's mens rea, it is probable that a jury at a trial held today would not determine that he harbored an intent to kill. As it did in *Strong*, this Court should conclude in this case that the jury's special circumstance finding does not preclude the defendant from making a prima facie showing of eligibility for relief under section 1172.6.

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CONCLUSION

For all the reasons argued above and in Appellant's Answer Brief on the Merits, this Court should affirm the Court of Appeal.

Dated: January 31, 2023

Respectfully submitted,

MARY K. McCOMB
State Public Defender

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/s/
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CERTIFICATE OF COUNSEL

I, Craig Buckser, have conducted a word count of this brief using our office's computer software. On the basis of the computer-generated word count, I certify that this brief is 9,752 words in length, excluding the tables and this certificate.

Dated: January 31, 2023

Respectfully submitted,

/s/

CRAIG BUCKSER
Deputy State Public Defender

DECLARATION OF SERVICE

Case Name: ***People v. Freddy Alfredo Curiel***
Case Number: **Supreme Court Case No. S272238**
Orange County Superior Court
No.02CF2160

I, **Paula Pimentel**, declare as follows: I am over the age of 18, and not party to this cause. I am employed in the county of Sacramento. My business address is 770 L Street, Suite 1000, Sacramento, CA 95814. I served a true copy of the following document:

AMICUS CURIAE BRIEF OF THE OFFICE OF THE STATE PUBLIC DEFENDER IN SUPPORT OF APPELLANT CURIEL

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Court of Appeal of the State of CA Fourth Appellate District-Div. Three 601 West Santa Ana Blvd. Santa Ana, CA 92701	Office of the Public Defender – Orange County 801 W. Civic Center Drive, #400 Santa Ana, CA 92701

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on **January 31, 2023**, at Merced County, CA.

Paula Pimentel Digitally signed by Paula Pimentel Date: 2023.01.31 09:32:49 -08'00'

Paula Pimentel

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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/s/Paula Pimentel
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Buckser, Craig (194613)

Last Name, First Name (PNum)

Office of the State Public Defender

Law Firm