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

ANSWER TO AMICUS CURIAE BRIEF

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April 5, 2023

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INTRODUCTION

Echoing one of the arguments in Curiel's answer brief, amicus, the Office of the State Public Defender (OSPD), contends that the intent-to-kill finding made by Curiel's trial jury has no binding effect in the present Penal Code[1] section 1172.6 proceedings under principles of collateral estoppel.[2] OSPD gives two reasons: the intent-to-kill issue was not actually litigated at Curiel's trial; and "changes in the legal and factual terrain render issue preclusion inapplicable." (OSPD Br. 14-47.)

OSPD takes an unduly restrictive view of how prior trial jury findings should be treated in section 1172.6 proceedings. Under OSPD's theory, such findings would virtually never have binding effect. But that position is unsupported by the principles motivating the collateral estoppel doctrine, especially as properly viewed in light of the purpose and intent behind section 1172.6

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

[2] The issues in this case have evolved since this Court granted review. The question initially presented, as addressed by the Court of Appeal below and in the People's opening brief, was whether the trial jury's intent-to-kill finding by itself precludes resentencing under section 1172.6 as a matter of law, or whether a separate and additional actus reus finding would also be required to preclude relief. Following this Court's decision in *People v. Strong* (2022) 13 Cal.5th 698, however, Curiel's answer brief additionally argued that, even apart from the actus reus issue, the jury's intent-to-kill finding is not binding in these proceedings under principles of collateral estoppel and would be subject to relitigation at a hearing under section 1172.6, subdivision (d), so that dismissal of his petition at the subdivision (c) prima-facie-case stage was erroneous. OSPD's amicus brief addresses only the latter question.

resentencing proceedings. And it cannot be reconciled with this Court's prior decisions.

The underlying record of conviction necessarily informs the determination in section 1172.6 proceedings whether a petitioner is entitled to resentencing. (*Strong*, *supra*, 13 Cal.5th at pp. 714-715; *People v. Lewis* (2021) 11 Cal.5th 952, 971-972.) Ordinarily, when the record of conviction contains a jury finding like the intent-to-kill determination at issue here, that finding is given effect. (*Strong*, at p. 715.) There is no extraordinary circumstance in this case that would require relitigation of the finding. The reasons OSPD gives for disregarding the jury's intent-to-kill finding are unconvincing and its approach to collateral estoppel ignores the important context of section 1172.6 resentencing. Indeed, in *Strong*, this Court rejected OSPD's overt argument that "the Legislature did not intend for any type of prior Penal Code section 190.2 finding to be treated as conclusive in resentencing proceedings" under section 1172.6. (*Strong*, at pp. 714-715.) It should reject OSPD's substantially equivalent argument now.

ARGUMENT

THE TRIAL JURY'S INTENT-TO-KILL FINDING IS PRECLUSIVE IN THESE SECTION 1172.6 PROCEEDINGS

A. Curiel actually litigated the intent-to-kill issue at his trial

OSPD first claims that the jury's intent-to-kill finding is not binding under collateral estoppel principles because Curiel did not "actually litigate" the gang-murder special circumstance at his trial. (OSPD Br. 14-22.) OSPD is incorrect.

At the outset, OSPD asserts that the People's characterization of the "actually litigated" legal standard is too "crabbed." (OSPD Br. 16-19.) In the reply brief, the People contended that California authority on collateral estoppel did not put the kind of emphasis on a prior incentive to litigate the relevant issue that Curiel sought. (RBM 15.) The People pointed to this Court's decision in *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, which explains that the proper "focus" of the inquiry is the extent to which the party against whom issue preclusion is invoked was provided "an adequate opportunity to litigate the factual finding" at the prior proceeding, "not whether the litigant availed himself or herself of the opportunity." (*Id.* at p. 869; see RBM 14-16.) This Court has also stated that, "[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) and that "[t]he failure of a litigant to introduce evidence on an issue does not defeat a plea of collateral estoppel" (*People v. Sims* (1982) 32 Cal.3d 468, 481, superseded by statute on other grounds as stated in *People v. Preston* (1996) 43 Cal.App.4th 450, 458). (See RBM 14.)

Rather than addressing *Murray* directly, OSPD argues that any opportunity to litigate the relevant issue in the first action must have been "full and fair" and that this necessarily implies an incentive to litigate the issue "vigorously" or even "to the hilt." (OSPD Br. 16 & fn. 5.) As OSPD acknowledges, however—indeed, as it insists—collateral estoppel is an equitable doctrine.

(OSPD Br. 13.) Its application must necessarily be informed by the "underlying fundamental principles of promoting efficiency while ensuring fairness to the parties." (*Strong*, *supra*, 13 Cal.5th at p. 716.) That in turn depends on context; and in the context of section 1172.6 proceedings, it is OSPD's formulation of the "actually litigated" requirement that is ill suited to serve the basic purposes of collateral estoppel and the Legislature's goal in establishing the provisions governing resentencing proceedings.[3]

As this Court observed in *Strong*, section 1172.6 "notably does not open resentencing to every previously convicted murder defendant." (*Strong*, *supra*, 13 Cal.5th at p. 715.) Only those who could not now be convicted of murder under the legislative changes to the natural-and-probable-consequences and felony-murder doctrines may seek relief. (§ 1172.6, subd. (a)(3).) And while those specific changes need only provide *a* basis for relief, not *the* basis for relief (*Strong*, at p. 712), the statutory scheme also makes clear that the Legislature did not intend "wholesale relitigation" of murder convictions (*id.* at p. 715). Rather, the scheme contemplates that prior jury findings will "ordinarily be dispositive, such as a special circumstance finding that requires proof of intent to kill." (*Ibid.*) Indeed, section 1172.6 "strongly

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[3] Of course, neither *Murray* nor the cases OSPD invokes considered collateral estoppel in the particular context of section 1172.6 proceedings. This Court's decision in *Strong* did that for the first time. The People's position is simply that *Murray* and the other authority cited in the reply brief aptly describe the "actually litigated" requirement for purposes of the present resentencing context.

suggests the Legislature contemplated that many, and perhaps most, such findings would be given effect on resentencing." (*Ibid*.)

Thus, in the context of section 1172.6 proceedings, *Strong*'s conclusion that the special circumstance finding at issue there had no binding effect for collateral estoppel purposes represents the exception, not the rule. (See RBM 11.) In OSPD's view, however, any prior finding that defense counsel did not litigate "vigorously" or "to the hilt" would be subject to relitigation in section 1172.6 proceedings, regardless of other circumstances. OSPD's approach to issue preclusion in this context would turn *Strong*'s construction on its head, ignoring the crucial context of the nature of section 1172.6 resentencing proceedings as established by the Legislature.

Several considerations undermine OSPD's proposed requirement that the factual determination in question must have been "vigorously litigated" at trial for it to be determinative in section 1172.6 proceedings. In resentencing proceedings under section 1172.6, the People do not seek to obtain a new or different judgment against the petitioner, but merely to preserve an existing murder conviction. In this regard, the use of the jury's intent-to-kill finding to establish ineligibility for relief at the prima facie stage is more akin to defensive collateral estoppel, in which an "incentive to litigate" is of less significance. (See *Roos v. Red* (2005) 130 Cal.App.4th 870, 880 ["fairness" concerns such as an incentive to litigate apply "especially where collateral estoppel is applied 'offensively' to preclude a defendant from

relitigating an issue the defendant previously litigated and lost"]; *Dailey v. City of San Diego* (2013) 223 Cal.App.4th 237, 256 [the "'fairness' exception to the collateral estoppel rule does not apply" to defensive collateral estoppel]; see also *Parklane Hosiery Co., Inc., v. Shore* (1979) 439 U.S. 322, 329-331 [unlike defensive collateral estoppel, "offensive use of collateral estoppel . . . may be unfair to a defendant" because, among other things, "[i]f a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable"].)

Section 1172.6 proceedings also do not involve prior findings rendered in a forum or proceeding governed by different standards, but at a criminal trial in which it was the People's burden to establish guilt beyond a reasonable doubt. (See, e.g., *Sims*, *supra*, 32 Cal.3d 468 at p. 481 ["The pertinent inquiry is whether the different standard for admitting evidence at the fair hearing deprived the parties of a fair adversary proceeding in which they could fully litigate the issue of respondent's fraud"]; *Roos*, *supra*, 130 Cal.App.4th at p. 880 [collateral estoppel unfair "where the second action 'affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result'"], quoting *Parklane Hosiery Company, Inc.*, *supra*, 439 U.S. at pp. 330-331; *Flynn v. Gordon* (1989) 207 Cal.App.3d 1550, 1556 [declining to afford collateral estoppel effect to judicial arbitration determination, as "the low monetary amount in controversy and the option of trial de novo can leave parties without a serious incentive to litigate"]; cf. *Cal Sierra*

Development, Inc. v. George Reed, Inc. (2017) 14 Cal.App.5th 663, 680 [affording collateral estoppel effect to arbitration determination where "Cal Sierra had the opportunity and the incentive to fully litigate its claims"]; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 400, fn. 4 [prosecution must prove every element of each crime charged and special circumstance alleged beyond a reasonable doubt, regardless of defendant's litigation strategy].)

Nor, in contrast to the cases on which OSPD principally relies, do section 1172.6 proceedings involve application of prior findings secured against the petitioner by another party. Instead, the relevant facts come from the record of conviction (*Strong*, *supra*, 13 Cal.5th at p. 715; *Lewis*, *supra*, 11 Cal.5th at p. 972) implicating only a prior factual determination that the People *themselves* obtained at the underlying trial. (See *Dailey*, *supra*, 223 Cal.App.4th at p. 256 [collateral estoppel applied to bar new plaintiff from suing defendant on issue on which defendant had prevailed in a previous action involving a different plaintiff who had equal incentive to litigate that issue]; *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150 [default judgment entered in favor of defendant against plaintiff's companies did not estop plaintiff himself from challenging his individual liability as to defendant, since "plaintiff's interests in defending the cross-complaint differed significantly from the interests of his companies"]; *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 Cal.App.4th 1195, 1203 [issue preclusion did not bar car race association from seeking equitable indemnity from physician

after driver voluntarily dismissed complaint with prejudice as to physician].)

Furthermore, OSPD's formulation of the "actually litigated" requirement would be counterintuitive by affording greater finality to less-established facts. At a criminal trial, defense counsel (and their clients) necessarily must make tactical decisions to focus on certain issues but not others, or in some cases concede them altogether. These decisions are based on a variety of factors, including the strength of the evidence. (See *People v. Carter* (2005) 36 Cal.4th 1114, 1190, fn. omitted ["[R]easonably competent counsel could have determined that in view of the strong evidence linking defendant to the murders, a guilty verdict was virtually a foregone conclusion, and that defendant's prospects of avoiding the death penalty would be improved if the defense refrained from placing its 'credibility' at risk by suggesting an implausible defense and instead focusing upon challenging the testimony of certain witnesses who testified for the prosecution"]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 749, internal quotation marks omitted ["Sometimes a defendant's best defense is weak. He may make a tactical decision to concede guilt as part of an overall defense strategy"].) Construing the "actually litigated" requirement in the manner OSPD suggests would, counterintuitively, give no binding effect to a jury determination that was not contested by the defense because the evidence in support of it was so overwhelming that counsel chose to focus elsewhere; whereas a jury determination premised on more debatable evidence that

counsel did choose to vigorously contest would be given binding effect.

In view of those considerations, for purposes of section 1172.6 proceedings, an issue was "actually litigated" at the underlying trial if there was an adequate opportunity to litigate it, regardless of whether the defendant actually chose to contest the point. (See *Murray*, *supra*, 50 Cal.4th at p. 869.) Properly applying that standard, the jury's intent-to-kill finding made at Curiel's trial is binding here. Ultimately, it is not possible to know why counsel did not "vigorously" contest that issue, nor should that make a difference in these section 1172.6 proceedings.

But even if a particular incentive to litigate—beyond that inherent in defending against criminal charges—were required, Curiel had an adequate incentive to contest the issue of intent to kill at his trial. Far from it being "counterproductive" for Curiel's trial counsel to contest Curiel's mental state, such an argument would have been entirely consistent with and even complemented his principal defense at trial, that Curiel was at the scene of the shooting but did not know that Hernandez, the shooter, possessed a gun, and was not involved in the hostilities that led to the shooting. (See 5 TRT 683-695 [Curiel's trial testimony regarding shooting].) That is, trial counsel could have argued that, just as (and even because) Curiel did not know that Hernandez possessed a gun and was not involved in the hostilities leading to the shooting, Curiel likewise did not intend, and indeed could not have intended, the murder. And even if there were some tension

between those arguments, attorneys are free to, and often do, argue alternative theories. (See, e.g., *People v. Felix* (1994) 23 Cal.App.4th 1385, 1396-1397 [defendant charged with burglary argued he had no intent to steal or alternatively, had implicit permission to enter premises].)

OSPD reasons that a sufficient incentive to litigate was nonetheless lacking because the practical difference between the sentence Curiel faced (50 years to life) and a sentence of life without the possibility parole is "de minimis." (OSPD Br. 20.) But it is not necessarily true that there is only a "de minimis" difference between sentences of life with the possibility of parole and life without parole (LWOP). The sentence for first degree murder is 25 years to life. (§ 190, subd. (a).) Such a sentence gives the defendant a realistic possibility for release in his or her lifetime. (See *People v. Scott* (2016) 3 Cal.App.5th 1265, 1282.) OSPD points out that without a special circumstance, Curiel's sentence would have been 50-years to life, because his jury found a gang-related arming enhancement under section 12022.53, subdivisions (d) and (e), to be true. Such a sentence, OSPD continues, is "functionally equivalent to LWOP." (OSPD Br. 20, citing *People v. Contreras* (2018) 4 Cal.5th 349, 369.) But 50-years to life is "less harsh than LWOP," because it still affords a chance for release. (*Id.* at p. 369.)

OSPD further urges that Curiel lacked the incentive to vigorously litigate the intent-to-kill issue because Senate Bill No. 1437, which abolished the natural and probable consequences doctrine for murder, was not enacted until 13 years after Curiel's

trial. For this reason, too, OSPD posits, the jury's finding can have no preclusive effect. (OSPD Br. 19-20.) But as pointed out in the People's Reply Brief, this argument is self-defeating, as it would apply to nearly *every* case tried before January 2019. (RBM 19-20.) It would mean that virtually no prior jury finding would be given preclusive effect, in contravention of the Legislature's intent that "many, and perhaps most," prior jury findings would be given effect in section 1172.6 resentencing proceedings. (*Strong*, *supra*, 13 Cal.5th at p. 715.)

B. There has been no relevant change in the law that would defeat the preclusive effect of the jury's intent-to-kill finding

OSPD also argues that the jury's intent-to-kill finding should be ignored because of "changes in the legal and factual terrain" surrounding it. (OSPD Br. 22-47.) Those changes, OSPD contends, are: (1) developments in the law governing the admission of expert testimony, as articulated in *People v. Sanchez* (2016) 63 Cal.4th 665, *People v. Valencia* (2021) 11 Cal.5th 818, and *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747; and (2) the amendments to the Street Terrorism Enforcement and Prevention Act, enacted as part of Assembly Bill No. 333 (AB 333). (OSPD Br. 22-47.) This argument, too, is unpersuasive.

OSPD takes issue at the outset with the People's description of the change-in-law exception as relevant to these proceedings. (OSPD Br. 24-26.) In the reply brief, the People pointed to authority, including this Court's decision in *Strong*, in which the exception was applied where the substantive law had changed

between the prior and current proceedings. (RBM 20-21.) OSPD's assertion that this authority is inapposite again ignores the crucial context of section 1172.6 proceedings.

As explained above, application of collateral estoppel principles here must be guided by the "underlying fundamental principles of promoting efficiency while ensuring fairness to the parties" (*Strong*, *supra*, 13 Cal.5th at p. 716), which necessarily must take into account the design and intent of section 1172.6 resentencing proceedings. And as this Court has recognized, the Legislature in enacting that statute did not intend "wholesale relitigation" of murder convictions but rather intended that prior jury findings will "ordinarily be dispositive." (*Id.* at p. 715). The changes OSPD points to, however they might be labeled—procedural, substantive, or something else—do not warrant relitigating the intent-to-kill finding made by Curiel's jury.

The decisions in *Sanchez* and *Valencia* tightened the scope of permissible gang expert testimony. (See RBM 21-22.) *Sanchez* applied traditional hearsay requirements to an expert's testimony regarding case-specific facts (*Sanchez*, *supra*, 63 Cal.4th at p. 684), while *Valencia* concluded that expert testimony in gang cases about predicate offenses fell within the *Sanchez* rule (*Valencia*, *supra*, 11 Cal.5th at p. 826).[4] AB 333 narrowed the scope of section 186.22's gang enhancement

[4] OSPD also points to this Court's decision in *Sargon*, which held "that the trial court has the duty to act as a 'gatekeeper' to exclude speculative expert testimony." (*Sargon*, *supra*, 55 Cal.4th at pp. 753, 771-772.)

generally. It did so by refining and strengthening the requirements for establishing that a group qualifies as a "criminal street gang" and by clarifying what it means to "benefit, promote, further, or assist" a criminal street gang. (Stats. 2021, ch. 699, § 3.) AB 333 also modified the requirements for the pattern of criminal gang activity that serves as a predicate for establishing the existence of a criminal street gang. (See Stats. 2021, ch. 699, § 3.)[5]

The changes in the law identified by OSPD do not approximate, let alone parallel, the change in the law at issue in *Strong* that justified departing from the ordinary rule that the trial jury's findings are given effect in section 1172.6 proceedings. In *Strong*, the change-in-law exception to issue preclusion applied because of a change to the legal definition underlying the jury's finding on the very issue that would otherwise have been dispositive in the resentencing proceedings. (See *Strong*, *supra*, 13 Cal.5th at p. 712 ["those changes matter for resentencing purposes only because the Legislature chose to write the same elements into its revised definition of murder"].) Far from pointing to any change in the definition of what constitutes intent

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[5] OSPD's brief asserts that AB 333 would apply not only to the gang enhancement (§ 186.22) but to the gang special circumstance (§ 190.2, subd. (a)(22)) that the jury found true in this case. (OSPD Br. 39.) That issue is presently before this Court, however, and has not yet been decided. (*People v. Rojas*, S275835, review granted Oct. 19, 2022.) If AB 333 does not apply to the gang special circumstance, that would be another reason why it does not implicate the change-in-law exception here.

to kill—which would be the appropriate analogue to the change in law at issue in *Strong*—OSPD focuses on changes to the law that are peripheral to the jury's intent-to-kill finding. (OSPD Br. 29-47.)

The thrust of OSPD's argument is that, if the gang special circumstance were retried today under the changes effected by *Sanchez*, *Valencia*, and AB 333, the jury, faced with the same evidence that was presented at trial, would not be able to return a true finding on the special circumstance as a whole, which includes as one of its elements the issue of intent-to-kill. (See OSPD Br. 39-43.) But to the extent that is true, the jury's failure to return the finding would be attributable to changes separate from the specific intent-to-kill question: either the lack of appropriate expert testimony about the general nature and activities of a gang or the lack of sufficient evidence about the attributes of the gang. As explained in the reply brief, an intent to kill long has been, and it continues to be, defined as express malice. (E.g., *People v. Smith* (2005) 37 Cal.4th 733, 749; see RBM 11-12.) Curiel does not dispute that the definition of that term remains unchanged and that his jury was properly instructed on it, and nothing about *Sanchez*, *Valencia*, or AB 333 has affected the intent-to-kill principle.[6]

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[6] Indeed, the Legislature could abolish the gang enhancement and gang special circumstance entirely as a matter of public policy, which would leave no doubt that such a finding could not be returned today. But that would not indicate anything, for purposes of applying collateral estoppel principles,

(continued…)

If a case like Curiel's were to proceed for whatever reason to a section 1172.6, subdivision (d) evidentiary hearing, the People would not be required to re-prove the gang special circumstance itself, but only the question of intent-to-kill. No gang expert testimony would be required, and neither AB 333 nor the elements of the gang special circumstance generally would be relevant. The only question would be whether Curiel acted with an intent to kill. There is no reason, then, why the changes OSPD points to should undermine the finding Curiel's jury already made in that regard, only to result in a hearing under subdivision (d) that would relitigate that question without even needing to take *Sanchez*, *Valencia*, and AB 333 into account.

The cases upon which OSPD relies for the proposition that procedural changes may support an exception to collateral estoppel are distinguishable from the present context. In *People v. Demery* (1980) 104 Cal.App.3d 548, defendant, a doctor, was charged with unlawfully prescribing a controlled substance, in violation of Health and Safety Code section 11154. (*Demery*, at p. 552.) At an administrative hearing conducted before the State Board of Quality Medical Assurance, the Board concluded the defendant had not violated the statute. (*Id.* at p. 560.) The defendant claimed that the People were collaterally estopped from proceeding with the criminal charges because of the prior

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(…continued)

about the substance or reliability of the intent to kill finding that Curiel's jury made at the time of his trial.

administrative finding. (*Ibid*.) The *Demery* court rejected this argument, explaining, "[w]hile administrative hearings employ fact-finding methods that are similar to those employed in criminal trials, the standards of admissibility of evidence differ and the objectives sought are not identical." (*Ibid*.; see *Sims*, *supra*, 32 Cal.3d at p. 483, fn. 13 [distinguishing *Demery* on the basis that "the function of the DSS fair hearing was virtually identical to that of a criminal trial"].)

In *Worcester v. C.I.R.* (1st Cir. 1966) 370 F.2d 713, a tax court determined that there were deficiencies in the defendant's tax returns and upheld the imposition of penalties and interest for fraud. (*Id*. at p. 714.) At an earlier probation revocation hearing, a judge found "candid, credible, and complete" testimony by the defendant that the subject taxes were not in fact owed. (*Id*. at p. 716.) The defendant asserted that under principles of collateral estoppel, the findings at the probation revocation hearing were binding against the Government in the tax court proceeding. (*Ibid*.) The First Circuit Court of Appeals disagreed, noting that a probation revocation hearing was "informal . . . not restricted by the rules of evidence" and that the burden at that hearing was on the government to prove wrongdoing, while a tax court hearing was a formal proceeding where the petitioner bore the burden of proof. (*Id*. at pp. 716-717.)

Demery and *Worcester* did not involve changes in the law like those pointed to by OSPD but prior proceedings where the issue sought to be precluded was determined under different factfinding standards. More importantly, however, the

difference in admissibility standards in those two cases directly affected the finding in issue. The question open to relitigation in *Demery* was whether the defendant violated Health and Safety Code section 11154 while in *Worcester* it was whether taxes were owed. In both cases those questions were directly affected by the difference in factfinding standards. Here, by contrast, the changes OSPD relies upon concern ancillary matters that do not directly bear on the question of Curiel's intent to kill. And as noted above, unlike the informal administrative proceedings in *Demery* and *Worcester*, the prior intent-to-kill finding at issue here was rendered in a criminal trial with identical burdens of proof and identical objectives, and in which admissibility of evidence was governed by the Evidence Code.

Finally, OSPD faults the People for "assum[ing] that only changes in the *law* bring into play this exception to issue preclusion" (OSPD Br. 26), an argument the People never made. Relying on *People v. Carmony* (2002) 99 Cal.App.4th 317, OSPD claims that, because of the different standards and requirements that would apply if the gang special circumstance were retried today, the "controlling" or "material" facts would be different and "it is likely that the state could not now prove the gang allegation or any of its requisite elements." (OSPD Br. 26-27.) This is simply a recasting of OSPD's argument about the changes made by *Valencia*, *Sanchez*, and AB 333.

The *Carmony* case involved a factual change much different from the theory OSPD attempts to advance. There, the court held that a mentally disordered offender's mental condition could

be relitigated for purposes of a later sexually-violent-predator determination because of "the changeable nature of a person's mental health and dangerousness, and the [Sexually Violent Predator Act's] emphasis on a person's current mental condition and continuing threat to society." (*Carmony*, *supra*, 99 Cal.App.4th at pp. 325-326.) Here, however, the factual circumstances surrounding Curiel's mental state in 2006 "occurred in the past" and are not "subject to change." (See *People v. Lopez* (2006) 146 Cal.App.4th 1263, 1276 [distinguishing elements that are capable of change and holding that sexually violent predator was estopped from relitigating at a recommitment proceeding whether prior conviction met definition of a qualifying offense].)

As already explained, the changes OSPD points to, whether characterized as legal or factual, do not undermine or otherwise affect the finding about Curiel's intent-to-kill at the time of the crime. They might well prevent a jury today from returning a true finding on a gang special circumstance because, for example, the prosecution might be unable to prove that Curiel was a member of a criminal street gang within the updated definition of that term. But that would not cast doubt on the jury's more specific intent-to-kill determination. And requiring relitigation of that issue in these 1172.6 proceedings would not serve the "underlying fundamental principles of promoting efficiency while ensuring fairness to the parties." (*Strong*, *supra*, 13 Cal.5th at p. 716.)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Respectfully submitted,

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April 5, 2023

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER TO AMICUS CURIAE BRIEF uses a 13 point Century Schoolbook font and contains 4,614 words.

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April 5, 2023

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

Case Name: **People v. Curiel** No.: **S272238**

I declare:

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

On April 5, 2023, I electronically served the attached **ANSWER TO AMICUS CURIAE BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on April 5, 2023, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 5, 2023, at San Diego, California.

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

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. CURIEL**
Case Number: **S272238**
Lower Court Case Number: **G058604**

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Date

/s/Almeatra Morrison

Signature

McGinnis, Lynne (101090)

Last Name, First Name (PNum)

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

Law Firm