Supreme Court No. S272238

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

FREDDY ALFREDO CURIEL,
Defendant and Appellant

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

APPELLANT'S ANSWER TO BRIEF OF STATE PUBLIC DEFENDER *AMICUS CURIAE*

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

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ARGUMENT

Introduction

We agree generally with the points in the State Public Defender's Brief *Amicus Curiae* (SPDB). However, we do wish to elaborate on a small number of items to which the State Public Defender alluded in her *amicus curiae* filing, but that we consider worthy of further elucidation.

I. The Restatement approach as California law.

Initially, we wish to agree specifically with the State Public Defender's discussion of why the Attorney General erred in claiming that California issue preclusion law is different in from modern issue preclusion law which centers on the approach in the Restatement (2d), Judgments (1982) (Restatement). (SPDB 16-18, critiquing Respondent's Reply Brief (RRB) 15)

The Attorney General did not explain what these differences are supposed to be, and we agree with the State Public Defender that California's approach is based on and fully consistent with the Restatement. (*See* SPDB 17) On preclusion law, "California courts routinely turn to the Restatement Second of Judgments for guidance." (*5th & LA v. Western Waterproofing Co.* (2023) 87 Cal.App.5th 781, 790; *see also, e.g., Samara v. Matar* (2018) 5 Cal.5th 322, 331-332 [using the Restatement approach to overrule older California caselaw]; *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 821-822 [adopting the Restatement approach]; *Meridian Financial Services, Inc. v. Phan* (2021) 67 Cal.App.5th 657, 692 [same].)

We did not have the opportunity to address this question in our briefing because it first arose in the Attorney General's reply brief. However, the question of what law applies is central to any

legal argument. Thus, we take this moment to highlight the State Public Defender's discussion of this issue, and our agreement with it.

II. The State Public Defender's critique of the Attorney General's reliance on this Court's *Murray* opinion.

We turn to the State Public Defender's critique of the Attorney General's reliance on *Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869 (*Murray*). (*See* SPDB 15, 18-19) The Attorney General's passages discussed by the State Public Defender, at RRB 14, 15-16, are:

> "[T]he 'focus' of the [issue preclusion] inquiry is the extent to which the party against whom issue preclusion is sought was provided 'an adequate opportunity to litigate the factual finding at the prior proceeding.' (*Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860, 869."...
>
> * * * Curiel cites two California Court of Appeal decisions suggesting that a "full and fair opportunity" to litigate an issue includes an incentive on the part of the litigant to do so. (ABM 30-31, citing *Roos v. Red* (2005) 130 Cal.App.4th 870, 880 and *Mueller v. J. C. Penney Co.* (1985) 173 Cal.App.3d 713, 720.) His reading of those decisions, however, is inconsistent with this court's later authority. (See *Murray*, *supra*, 50 Cal.4th at p. 869.) As *Murray* explains, a decision not to contest a particular issue in the prior proceeding does not defeat issue preclusion where there was nonetheless an adequate opportunity to litigate it. (*Id.* at pp. 870-871.) Here, counsel simply made a strategic decision not to contest the special circumstance allegation. To the extent a lack of incentive is relevant to the issue preclusion question (see *ibid.*), the facts of this case do not implicate that concern. The difference between parole eligibility and non-eligibility is real and significant; that counsel chose a trial strategy focusing on issues other than the special circumstance does not show that, for purposes of issue preclusion, there was insufficient incentive to contest the allegation.

(RRB 14, 15-16) The Attorney General does not explain what he believes to be the "real and significant difference" between a sentence of LWOP and a 50 year-to-life sentence that is the "functional equivalent of LWOP" (*People v. Contreras* (2018) 4 Cal.5th 349, 360-361), and we can't imagine what it would be.

We certainly agree with the State Public Defender's critiques of the Attorney General's reliance on this Court's 4-3 opinion in *Murray*. (*See* SPBD 14-19) We adopt them here by reference, so as to avoid any need to repeat them. But we would go farther than the State Public Defender, because *Murray*'s only relevance here is to help show what this case is not.

This Court's *Murray* opinion was expressly based on the "particular factual and procedural circumstances of this case, and the particular provisions of the [federal whistleblower] statutory scheme here at issue." (*Id.*, 50 Cal.4th 860, 866.) Neither that statutory scheme nor those factual or procedural circumstances are at issue here. As this Court has often held, and the Attorney General has argued elsewhere, "[A]n opinion is not authority for a proposition not therein considered." (*E.g., Serna v. Superior Court* (1985) 40 Cal.3d 239, 257, fn.13 [People's argument, quoting *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn.2]; *People v. Shah* (2019) 38 Cal.App.5th 813, 817 [agreeing with the People's argument].)

Beyond that, the four opinions the Attorney General cites in the last paragraph of RRB 14 – the paragraph that cites *Murray* – are all opinions in cases in which the precluded party was the party that initiated the first proceeding. In other words, all four opinions invoked defensive issue preclusion, in which the defendant/respondent in the first action sought to use preclusion

as a shield against a duplicative second proceeding by the party that was the plaintiff/petitioner in the first action. (*See, e.g., Smith v. ExxonMobil Oil Corp.* (2007) 153 Cal.App.4th 1407, 1414 (*Smith*).) In two of those four cases, including *Murray* (the other is *Sims*), the petitioner failed to adduce any evidence at all in a judicial or quasi-judicial forum that was available in the first proceeding, judgment entered against both petitioners, and it became final when review was not sought. As a result, the respondent who obtained judgment in the first proceeding could properly invoke defensive issue preclusion to bar the second one.

By contrast here, the *plaintiff* in the first action, the People, is seeking to invoke offensive issue preclusion. (*See Smith*, 153 Cal.App.4th 1407, 1414.) The first-action plaintiff wants to use a preclusion doctrine as a *sword* against the first-action defendant, on a subordinate issue which there was very little if any incentive to litigate in the original proceeding (*accord People v. Gonzalez* (2021) 65 Cal.App.5th 420, 433), and after a highly material change of law that created a new remedy not available at the time of the original litigation. "[T]he offensive use of [issue preclusion] is more closely scrutinized than the defensive use of the doctrine." (*Smith*, at p. 1414; *White Motor Corp. v. Teresinski* (1989) 214 Cal.App.3d 754, 763.)

Merely stating those differences between this case and *Murray* should show that it doesn't help the Attorney General to take one sentence in an opinion out of its actual context, as he has done with *Murray* at RRB 14 and 15-16, to try to fit that opinion's square peg into this case's round hole. Moreover, if anything, *Murray* is an excellent example of why the Attorney General's claims are misplaced.

In *Murray*, the plaintiff filed an administrative complaint with the U.S. Secretary of Labor under a federal whistleblower law, 49 U.S.C. sections 42121 *et seq.* (also known as "AIR 21") The Secretary of Labor investigated Murray's factual allegations (albeit *ex parte*), and ruled against Murray with findings of fact. Her ruling "closed by notifying Murray that he had 'important rights of objection which must be exercised in a timely fashion.' 'AIR 21 permits an aggrieved party, WITHIN 30 DAYS ... to file objections with the Department of Labor and to request a hearing on the record before an Administrative Law Judge.' (Original capitalization.) The letter also warned that if 'no objections are filed WITHIN 30 DAYS, this decision shall become final and not subject to judicial review.' (Original capitalization.) Murray never filed objections or requested an on-the-record hearing. Nor did he take any steps to formally withdraw his administrative complaint. [Citation to federal regulation] On July 8, 2005, by operation of law, the Secretary's preliminary investigative findings were 'deemed a final order ... not subject to judicial review.' (§ 42121(b)(2)(A).)" (*Murray*, at p. 866.)

The crux of this Court's decision in *Murray* was the plaintiff's abandonment of the administrative remedy that he himself had invoked, **plus** the federal statutory scheme that gave finality to an unappealed decision of the Secretary. "Once Murray failed to exercise his rights to a formal hearing and judicial review, the Secretary's investigative findings became "a final order ... not subject to judicial review." (§ 42121(b)(2)(A).) **Where Congress evinces a clear intent to preclude judicial review of final administrative decisions, a failure to properly appeal a final order must be given preclusive**

effect. [Citation.] California law is in accord." (*Murray*, at pp. 878-879 [boldface added].)

For multiple reasons, that plainly has nothing to do with this case.

Freddy Curiel did not invoke judicial or administrative processes in the first action. Rather, he was haled into court charged with first-degree murder and special circumstances, under a body of law in which he could be imprisoned for 50 years to life based on no more than engaging in an argument in which he made a gang reference. He would have been delighted if the plaintiff (People) had abandoned their original case as plaintiff Murray did; of course, that didn't happen. Which only underscores how *Murray* doesn't implicate anything in this case.

Furthermore, nothing in Freddy's original trial notified him or his counsel that deciding to seek a verdict of innocence and foregoing litigation of the special circumstance would have the kind of preclusive finality this Court found in *Murray*. In *Murray*, this Court held the plaintiff was on notice that an unappealed adverse finding would be preclusive of a subsequent civil action. (*Id*. at pp. 878-879 ; *see also id*. at p. 884 [dis. opn. of Werdegar, J.] ["Running through the majority opinion is the implication that Murray knew, or should have known, that failing to seek a full hearing before an administrative law judge would result in his forfeiture of any remedies—in essence, that he was on notice he must appeal or face a bar ...."]) Here, nothing in the 2006 trial put Freddy or his counsel on notice that if they sought a verdict of not guilty without litigating a secondary issue that was of *de minimis* real-life importance, it would categorically

preclude a legislative remedy that wouldn't exist until 12+ years after the trial.

Congress's "clear intent" in *Murray* is akin to this Court's holding in *Gikas v. Zolin* (1993) 6 Cal.4th 841, 851-852, that a Legislature can enact special rules of issue preclusion for a particular statutory scheme if it so chooses. This Court held in *Murray* that Congress did so, in a manner that barred the plaintiff from bringing a civil action duplicate of the administrative remedy he had invoked but then abandoned; i.e., as discussed above, *defensive* issue preclusion. There is no basis for the Attorney General to assert the California Legislature enacted any such legislation here – let alone of a kind that permits *offensive* issue preclusion to cut off the Legislature's 2018 remedy, just because trial counsel in 2006 defended his client based on the laws as they then existed.

While this Court divided sharply on many issues in *Murray*, it appears to have agreed unanimously that foreseeability that a judgment could preclude a future action is important to issue preclusion. The *Murray* majority found there **was** such foreseeability in that case (*id*. at pp. 878-879), while the dissent disagreed (*id*. at pp. 884-885). However, we construe both opinions as recognizing the importance of foreseeability at the time of the first proceeding that an issue in it could be preclusive in a second.

Thus, we presume the *Murray* majority and dissent would have agreed with the dissent's observations that "[n]umerous courts and commentators have recognized the significance of foreseeability in deciding whether the application of preclusion in a given case is appropriate [citations]," and "in the absence of

foreseeability, application of a bar ... is profoundly inequitable." (*Murray*, 50 Cal.4th 860, 885, fn.6 (dis. opn. of Werdegar, J.).) "[U]nforeseeable preclusion unfairly deprives the litigant of his constitutionally guaranteed opportunity to be heard. Penalizing someone for failing to follow unforeseeable rules of preclusion is fundamentally unfair, because penalties are unjustified unless the doctrine 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.' A court that invokes preclusion in an unforeseeable manner cannot legitimately dismiss the precluded party's complaints by repeating the old slogan that 'the predicament in which he finds himself is of his own making.'... [W]hen preclusion is unforeseeable, the goals of fairness and efficiency are undermined, and the ambiguities of the law create traps for the unwary and unprincipled windfalls for the fortunate." (Ziff, "For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement" (1992) 77 Cornell L.Rev. 905, 922-923.)

Here by contrast, trial counsel in 2006 couldn't have foreseen that deciding not to litigate the special circumstance in 2006 would have preclusive effect on a legislative remedy that wouldn't exist for another 12+ years.

This Court has never required trial attorneys to have the prescience of a sibyl. As one common example, in a long line of cases, this Court has issued "numerous decisions holding that a defendant need not predict subsequent substantive changes in law in order to preserve objections. [Citations.]" (*People v. Perez* (2020) 9 Cal.5th 1, 10.) "Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it

is unreasonable to expect trial counsel to have anticipated the change. [Citations.]" (*People v. Turner* (1990) 50 Cal.3d 668, 703.)

This rule exists partly because crystal balls do not. It is also essential because a contrary rule would squander judicial resources and disrupt trials, since then, counsel's preservation of a client's rights would require objections supported only by baseless speculation on possible future change. As this Court has held: " ' " '[W]e have excused a failure to object where to require defense counsel to raise an objection "would place an unreasonable burden on defendants to anticipate unforeseen changes in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal.' " ' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 705; *see also, e.g., In re Ramey* (1999) 70 Cal.App.4th 508, 511 [a different example of a court rejecting a waiver of unforeseeable events because people can't be charged with the ability to predict the future].)

Preclusion law does not require prescience any more than forfeiture law does. Moreover, charging attorneys with prescience of future enactments would defeat preclusion's policies of judicial economy by encouraging objections frivolous under the law at the time of trial, on the theoretical possibility that the Legislature might validate or require the objection later. "[R]isk-averse litigants will overlitigate collateral issues and claims for fear of being precluded later. Any burdens on the parties or the court that are avoided by invoking unforeseeable preclusion in one case are therefore not eliminated-they are transferred to litigants and courts in future cases." (Ziff, "For One Litigant's Sole Relief," *supra*, 77 Cornell L. Rev. 905, 923.)

Finally, whether the circumstances of a case "provided 'an adequate opportunity to litigate the factual finding' at the prior proceeding" (RRB 14) *is the very issue that is addressed by the elements and exceptions to issue preclusion*. If the five elements set forth in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 (*Lucido*) are not met, then the prior factual finding was not litigated with the certainty and conclusiveness required for issue preclusion. (*City of Oakland v. Oakland Water-Front Co.* (1897) 118 Cal. 160, 221; *Kemp Bros. Construction, Inc. v. Titan Electric Corp.* (2007) 146 Cal.App.4th 1474, 1482; *see also People v. Garcia* (2006) 39 Cal.4th 1070, 1092 (conc. and dis. opn. of Chin, J.).)

And even if the five elements are met, the exceptions on which Mr. Curiel has relied address whether the first proceeding provided a "full and fair opportunity" to litigate the allegedly precluded issue. (*See, e.g.,* Appellant's Answer Br. on the Merits (AABM) 30-31; SPBD 16, 18) Thus, many opinions that discuss exceptions to issue preclusion have analyzed situations in which a party had an "opportunity" to raise issues, but that opportunity was not sufficiently full and fair – or in the Attorney General's language, sufficiently "adequate" – to invoke issue preclusion. (*See, e.g., Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 330-331 & fn.15; *Smith v. ExxonMobil Oil Corp., supra,* 153 Cal.App.4th 1407, 1416-1420; *Groves v. Peterson* (2002) 100 Cal.App.4th 659, 667-669.) Our Answer Brief on the Merits makes that showing for Mr. Curiel's case too.

In short, nothing in this Court's *Murray* decision changes the application of issue preclusion principles to this case. Conversely, applying the requirement of *foreseeability* that was highlighted in *Murray* makes for only one possible result here.

III. The State Public Defender's analysis of this Court's *Sargon* opinion warrants further elucidation specific to Freddy Curiel's case.

A. How *Sargon* would have applied to Mr. Curiel's particular case, had it existed in 2006.

The State Public Defender agrees with our Argument III on *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and *People v. Valencia* (2021) 11 Cal.5th 818 (*Valencia*) (SPDB 30), so we need not offer any further case-specific elaboration on that. However, the State Public Defender has added a discussion of *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*) (SPDB 28-39). Part of that discussion is case-specific (SPDB 35-39), and we agree with that too, but we consider it warranted to provide further case-related points.

Albeit in only a quick footnote, the Attorney General makes the same claim regarding the State Public Defender's *Sargon* argument as he did on our *Sanchez*/*Valencia* argument, that highly material changes between two proceedings in the caselaw governing the admissibility of evidence should be disregarded in determining whether issue preclusion should be applied to preclude the second proceeding. (Atty. Gen. Answer to Amicus Curiae, p. 17, fn.4; *see* RRB 20-22) There is no legal basis to disregard dispositive evidentiary changes of law in an issue preclusion analysis. As the State Public Defender points out, the issue preclusion question regarding change in law is "whether new laws or decisions have sufficiently 'shifted the legal terrain' as to render application of the doctrine inappropriate." (SPBD 12, 25, both quoting *California Hospital Ass'n v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 573 [also quoted in RRB 20]; *see also*

Restatement, § 28, subdivision (2), cited by this Court in *People v. Strong* (2022) 13 Cal.5th 698, 717 (*Strong*).)

The required "shift of legal terrain" was defined by this Court in *People v. Strong, supra,* 13 Cal.5th 698, another case in which this Court relied on the change of law exception to issue preclusion. This Court held in *Strong* that "[t]he integrity of the judicial system may ... be compromised by fastidiously minsisting on identical determinations even when a material change in law calls for a different outcome in a second proceeding. Concerns about judicial economy and vexatious litigation likewise have little purchase when there has been a significant change in the law that applies to determination of the relevant issue." (*Id*. at p. 717.) That analysis applies as much to a determinative change in evidentiary law as to a determinative change in elements of a crime, special circumstance, or civil liability requirement.

In Mr. Curiel's case, the key testimony of gang officer Det. Lodge to "support" his opinion that Freddy had an intent to kill would have been inadmissible under either *Sargon* or *Sanchez*/*Valencia*. We discussed *Sanchez*/*Valencia* in our Answer Brief on the Merits, so the discussion here will focus on *Sargon*.

Sargon, for the first time, imposed on California trial judges a "gatekeeping" role " 'to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.' " (*Sargon*, at p. 772, quoting *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 152 (*Kumho Tire*); *see also People v. Jones* (2013) 57 Cal.4th 899, 985 (conc. opn. of Liu, J.) ["[T]rial courts play a vital gatekeeping role when it comes to

expert testimony whose underlying conceptual or methodological basis has not been shown to be reliable."])

This Court's reliance on *Kumho Tire* in its *Sargon* opinion was particularly noteworthy, because *Kumho Tire* held that a trial court judge's "gatekeeping" role includes not only scientific evidence, but also nonscientific evidence. Evidence from gang officers testifying as experts is well within the latter category.

Prior to *Sargon*, it was accepted that "a gang expert may rely upon conversations with gang members, on his or her personal investigations of gang-related crimes, and on information obtained from colleagues and other law enforcement agencies." (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1121-1122.) Furthermore, the pre-*Sargon* "*Kelly*/*Frye* standard" did not apply to nonscientific testimony (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156), and there had been no authority to exclude gang expert testimony on methodological grounds if it complied with the *Hill* standard in the previous sentence.

Sargon changed all of that. As one Court of Appeal held, in applying *Sargon* to gang expert evidence:

> Expert opinion ... must not be speculative. Expert opinion has no value if its basis is unsound. [Citation to *Sargon*.] Expert opinion must have a logical basis. Experts declaring unsubstantiated beliefs do not assist the truth-seeking enterprise. [Citation.] This applies to all experts, including gang experts. [Citations, including a post-Sargon Court of Appeal opinion "striking gang enhancement supported only by gang expert's speculation"].)....
>
> The expert [in part] based his opinion "on the pattern of my observations about this gang, as well as [of Gonzalez] ...." It is insufficient for an expert simply to announce, "based on my experience and observation, X is true." This is

> the method of the Oracle at Delphi. It is the black box. This method cannot be tested or disproved—a feature convenient for would-be experts but unacceptable in court. " 'This "Field of Dreams" "trust me" analysis' " amounts only to a defective " 'faith-based prediction.' " (*Sargon, supra*, 55 Cal.4th at p. 766; see id. at p. 778 [excluding expert opinion that was " 'nothing more than a tautology' "].)

(*People v. Gonzalez* (2021) 59 Cal.App.5th 643, 649 [quoted in Aplt's Answer Br. on the Merits 61, fn.12, and quoted and cited in SPDB 28, 34-35, 36, 37, 38].)

Had Freddy Curiel's 2006 trial included a *Sargon* requirement that the trial court act as a "gatekeeper" for excluding methodologically deficient gang officer testimony, trial counsel would have been able to successfully object to the portions of Det. Lodge's testimony that were unfounded in relation to Freddy Curiel. If those objections had been overruled, original appellate counsel could have successfully argued *Sargon* error.

Four years before *Sargon*, the 2008 Court of Appeal opinion in Freddy Curiel's appeal rejected his appellate counsel's argument of insufficiency of evidence thus:

> 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 (Cal. Ct. App., Feb. 21, 2008, No. G037359, unpub.) 2008 WL 458520, at p. *20) (boldface added). Elsewhere in its opinion, the Court of Appeal held that "[t]his type of expert opinion testimony concerning gang culture has repeatedly been ruled admissible." (*Id*. p. *16.) This was the only evidence cited by the Court of Appeal to support a theory that Mr. Curiel had the intent to kill required for the gang special circumstance.

The boldfaced testimony above was a summary of Det. Lodge's opinions regarding the incident in this case based on his opinions of "gang culture," and in particular "Hispanic gangs." This testimony was previously summarized at AABM 54-60, and that summary applies and is adopted by reference here. Det. Lodge's extensive testimony was of a type that has been customary for prosecution gang experts, in particular, regarding the kinds of violence that gang experts often testify are endemic to their theory of a universal "gang culture." (*See, e.g.,* McGinnis & Eisenhart, "Interrogation Is Not Ethnography: The Irrational Admission of Gang Cops As Experts in the Field of Sociology" (2010) 7 Hastings Race & Poverty L.J. 111, 123-126.)

As particularly relevant to this discussion, Det. Lodge claimed sufficient expertise in these matters because he had investigated a large number of gang-related crimes and talked to a lot of members of unidentified gangs about their "philosophy and culture." (4RT 468-471.) He asserted that a "turf-oriented gang" defends its claimed territory by "violence and intimidation" (4RT 472-473), and that "most Hispanic gangs tend to be turf-

oriented gangs" (4RT 473) – i.e., that "most Hispanic gangs" defend their claimed territory by violence and intimidation. He offered opinion evidence of only three specific members of O.T.H. (*see* AABM 58) – the killer Hernandez, Freddy Curiel (by stipulation) and one Andrew Lopez (4RT 516-518). Since all had Hispanic names, including both defendants, the jury would have readily inferred O.T.H. was an "Hispanic gang," and thus it was a "turf-oriented gang" which by Det. Lodge's definition "defend[ed] its claimed territory by violence and intimidation" (*ante*).

And indeed, Det. Lodge testified that O.T.H. was a "turf-oriented gang," solely "based on [his] training and experience." (4RT 496) He opined that the two areas claimed by O.T.H. happened to be the two areas around the two shootings committed by Abraham Hernandez and alleged against Freddy Curiel. (*See* AABM 56 & fn.8.) (There was no evidence that Freddy was part of the other shooting, and there was no description of the getaway driver.)[1] Defense counsel interposed a

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[1] One might surmise the reason the jury divided 6-6 on the other shooting was that Hernandez had a getaway driver for the Cisneros shooting whom nobody could identify, but Mr. Curiel was with Hernandez on foot when the Tejada murder occurred a short while later, and some jurors accepted the prosecution's argument that those two people must have been the same. (*See* SPBD 44 [quoting the prosecution's argument {7RT 982} that Freddy Curiel and Abraham Hernandez "were out on the streets acting like the death [s]quad for O.T.H"].) However, it was clear that Hernandez had stopped somewhere in the time period between the two shootings (since he was in a car for one, and on foot walking from a 7-11 over a mile away for the other); most likely, at the house of Felix Robles and his uncle at 2126 S. Rene Dr. (*see* AABM 23) not far from the 7-11 (*see* 3 Trial CT 816), where Freddy testified Mr. Hernandez had turned up before

(continued...)

few objections to the foundation for Det. Lodge's opinion testimony (*see* 4RT 487-489, 491-492; 5RT 642), but in this trial six years before *Sargon*, they were overruled. Moreover, for reasons such as those in the footnote below (from an article written by a sitting judge concerned about the problem), this type of pre-*Sargon*/*Sanchez* expert testimony put defense counsel in an untenably difficult position to begin with.[2]

However, Det. Lodge offered no evidence relevant to Mr. Curiel's involvement in this case that would have survived a *Sargon* standard. The problem is the one described on pages 57-64 and footnote 12 of our Answer Brief on the Merits: There was no foundation for Det. Lodge's opinions that everything done by O.T.H. – and specifically by Freddy Curiel – conformed to his theories of "gang culture," "violent turf-oriented gangs," and "violent Hispanic turf-oriented gangs."

Det. Lodge actually never stated which gangs he was talking about when he described "gang culture." Based on our

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[1](...continued)
they walked over there together (5RT 680). There is no evidence that Freddy had been with Abraham Hernandez before that.

[2] "Such testimony circumvents the rules of evidence that would otherwise preclude the admission of that evidence. The defendant is then placed in the untenable position of having to defend against inadmissible evidence. If the defendant attempts to discredit that evidence, he runs the risk of emphasizing it to the jury. If, however, he fails to address the evidence, then it is considered by the jury, its credibility uncontested. When defendants are placed in this untenable position, it not only harms them, but it also damages the fundamental tenets of the criminal justice system, not the least of which is the presumption of innocence." (Nevin, "Conviction, Confrontation, and *Crawford*: Gang Expert Testimony As Testimonial Hearsay" (2011) 34 Seattle U.L. Rev. 857, 874.)

experience in reading judicial opinions and transcripts, his descriptions of "gang culture" seem to have been the type of violent mentality and activities one might have ascribed to violent members of the Crips, Bloods, Norteños, Sureños, or Orange County Asian gangs. Det. Lodge's experience with "Hispanic gangs" may have been largely with Sureños; at one point, he testified to having led a huge joint law enforcement operation to pursue the leader of the Mexican Mafia in Orange County (5RT 644-645). But he was never specific on which "Hispanic gangs" he was talking about; though if he had been, it likely would have become far clearer that he had no expertise specifically regarding "O.T.H." (whatever O.T.H. actually was).

As matters stood, Det. Lodge never testified to any experience with O.T.H. members specifically. The most Det. Lodge ventured to say about his experience with O.T.H. was that he had previously talked with members of O.T.H. (4RT 496, 501) He didn't say which members those were or how many, he never described anything they said, and he had never talked with Freddy Curiel (4RT 574). He testified that a gang called "Southside" was an "ally" with O.T.H., but he didn't explain, and defense counsel's objection based on insufficient foundation was overruled. (5RT 652-653) He also said he had testified as an expert in the trial of the co-defendant Hernandez (4RT 501-502), and he had talked to other detectives, seen police reports and reviewed crime reports regarding O.T.H. and its members (4RT 502); though again, he didn't say which members, or what he obtained from those hearsay reports and detectives. The only violent acts he attributed to alleged members of O.T.H. was the two murders in this case by Abraham Hernandez – but

Hernandez was a heroin addict (4RT 590-591) who also had been involved in other crimes involving groups, people and neighborhoods unrelated to Det. Lodge's testimony about O.T.H. (4RT 576-580), and as Det. Lodge agreed, drug addicts follow the drugs (4RT 591). The only other criminal acts Det. Lodge ascribed to O.T.H. were some graffiti. (4RT 507-508, 510)

In short, Det. Lodge offered no foundation that every member of O.T.H. thought and acted according to his theories of violent "gang culture" or "Hispanic gang culture," let alone that Freddy Curiel did so on this occasion.

In *People v. Ware* (2022) 14 Cal.5th 151 (*Ware*), this Court had much more and higher-quality evidence linking the defendant (Hoskins) not only to the specific gang at issue, a Blood gang, but also showing that he supported violence against his gang's rival Crips. Yet this Court still found insufficient evidence that Ware had the specific intent to kill anyone at all by finding insufficient evidence of a conspiracy to kill. (*Id.* at pp. 174-175.) Here, the foundation of Det. Lodge's theories that attributed the violence of "gang culture" and "Hispanic turf gangs" to Freddy Curiel were minuscule in comparison to the foundation for the expert's opinions in *Ware* which this Court held to be insufficient. While sufficiency and admissibility are not identical, opinion testimony that is part of legally insufficient evidence because it has no evidentiary value due to lack of foundation is also inadmissible for its same lack of evidentiary value. (*See People v. Prunty* (2015) 62 Cal.4th 59, 84-85 [insufficiency case, citing the

inadmissibility case of *Jennings v. Palomar Pomerado Health Systems* (2003) 114 Cal.App.4th 1108, 1117-1118].)[3]

Thus, Det. Lodge's testimony never included a foundation applicable specifically to Freddy Curiel that would have sufficed under a *Sargon* standard. For even if (*arguendo*) Det. Lodge was testifying accurately about some "Hispanic gangs" or the "gang culture" of some gang members, he offered no foundational evidence – other than his undefined "training and experience," with no evidence it materially included O.T.H. – that every member of *this* "Hispanic gang," O.T.H., acted in conformity with his view of "violent turf-oriented gang culture." And he certainly offered no foundational evidence that Freddy Curiel, as to whom there was no evidence of prior violence and who was well known as a non-troublemaker in that neighborhood (3RT 372-373; 5RT 616), acted in conformity in this case with this "violent gang culture" of "turf-oriented Hispanic gangs" or "gangs in general."

To summarize, the only evidence that could be claimed to support Freddy Curiel having an intent to kill was evidence that would have failed *Sargon*. Moreover, had *Sargon* existed at the time of trial in 2006, defense counsel would have had ample reason to offer it as a basis for objection.

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[3] *Ware* analogized and relied on the Ninth Circuit's opinion in *United States v. Garcia* (9th Cir. 1998) 151 F.3d 1243, which similarly had strong foundation linking the defendant to the gang as well as provocative acts on its behalf, but no substantial evidence that the defendant himself had an intent for anyone to be shot. (*See Ware*, 14 Cal.5th 151, 170.) We relied on *Garcia* in Argument IV of our Answer Brief on the merits (AABM 67-68).

For the reasons above, not only is this requirement of certainty not met, it is certain that the change of law did affect the result of the trial. It thus met this Court's standard for the change of law exception to issue preclusion, that "a material change in the governing law calls for a different outcome in a second proceeding," or that there "has been a significant change in the law that applies to determination of the relevant issue." (*People v. Strong, supra,* 13 Cal.4th 698, 717.) Under post-*Sargon* law, it would have been impossible for the prosecution to obtain a trial conviction based on legally sufficient evidence of intent to kill Cesar Tejada, as would be required for both premeditation/ deliberation and the gang special circumstance. Hence, under *Sargon* as under *Sanchez*/*Valencia*, there is no supported basis for the Attorney General to be claiming issue preclusion.

B. Racial, ethnic, and prejudicial implications of 2006 trial counsel's inability to invoke the 2012 *Sargon* opinion.

Before leaving this topic, Mr. Curiel wishes to point out the racial/ethnic implications of a gang officer making generalizations that persons of a particular racial or ethnic group act in a specified violent manner, without anything more to justify it other than "my training and experience," and then applying those generalizations to the defendant with no foundation. *Sargon*'s prohibition of expert testimony that fails a requirement of methodological reliability is particularly salient in this type of context.

Since there was no fact witness evidence that Freddy Curiel intended to kill anyone – let alone Cesar Tejada, the victim in Mr. Curiel's murder/special circumstance conviction, Mr. Curiel's conviction of first-degree murder with a gang special

circumstance was based on no more than this type of ethnically-based "expert" testimony about violent, "turf-oriented" gangs including "Hispanic gangs." Studies show that gang special circumstances are particularly susceptible to this type of race- or ethnically-based "expert" generalization:

> A model of the likelihood that the gang member special circumstance would be found or present reported that **Latinx defendants faced 7.8 times higher odds than other similarly situated defendants, and black defendants faced 4.8 times higher odds that other similar situated defendants**, even after controlling for culpability and year.

(Grosso, Fagan, Laurence, Baldus, Woodworth & Newell, "Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement" (2019) 66 UCLA L. Rev. 1394, 1435 [boldface added].) The above study –

> * * * employ[ed] sophisticated tools for reliably determining Latino ethnicity and examine[d] the racial effects of the radical expansion of death-eligible offenses in California. It [found] that individual special circumstances apply to defendants disparately by race and ethnicity, even after controlling for case culpability, victim race, and year. In particular, in cases with the aggravators of gang membership and drive-by shooting, the researchers find overwhelming discrimination against African American and Latino defendants, with the very largest disparities in application occurring in gang member aggravator cases [citation].

(Johnson, "The Influence of Latino Ethnicity on the Imposition of the Death Penalty" (2020) 16 Ann. Rev. of L. & Soc. Sci. 421, 424.)

As one would expect, this kind of bias is most profound in special circumstance cases. However, it is not thus limited:

> Researchers have found that white gang membership tends to be underestimated and undercounted, while the opposite is true for black and Latino youth. In 1997,

> California created a statewide database, called CalGang, and by 2012, according to documents obtained by the Youth Justice Coalition, there were more than 200,000 individuals named in it ..., including some as young as 10. Statewide, 66 percent were Latino, and one in 10 of all African-Americans in Los Angeles County between the ages of 20 and 24 were on the list....
>
> Roughly 7 percent of California's prison population, around 115,000 people, is serving extra time because of gang enhancements .... According to the California Department of Corrections and Rehabilitation, nearly half of those convicted with gang enhancements are serving an additional 10 years or more. Black and Latino inmates account for more than 90 percent of inmates with gang enhancements; fewer than 3 percent are white.

(Alarcón, "How Do You Define A Gang Member?" (May 27, 2015) *New York Times Magazine*, https://www.nytimes.com/2015/05/31/magazine/how-do-you-define-a-gang-member.html?_r=0.)

Even if unintentionally, gang officer testimony of this nature simultaneously plays on subconscious juror biases, while also tapping into fear and emotion (*see, e.g., People v. Albarran* (2007) 149 Cal.App.4th 214, 231, fn.17) – and all of this coming from an officer who is sworn "to protect and to serve," who would thus be viewed as presumptively authoritative. Without a *Sargon* gatekeeper, all of this dramatically increases the likelihood of wrongful conviction or oversentencing:

> There are ... three particular aspects of gang evidence that make it particularly important to apply [a *Sargon*-type] admissibility test. First, gang evidence is generally recognized as highly incendiary. Gang experts, then, present prejudicial evidence with an unearned aura of reliability. By allowing an expert to testify about gang membership, evidence that is already inflammatory, carries increased influence upon the jury. Second, beyond the

> regular tendency to over-credit an expert, juries may credit the testimony of a police officer gang expert in particular based on their status as a police officer. This increases the likelihood that the jury will see the evidence as "conclusive" or "infallible" based on who it is coming from, rather than the reliability or validity of the evidence. Third, gang expert evidence does not simply lack general acceptance--it lacks virtually any acceptance at all among scientists, placing it most appropriately in the category of "junk science." A University of Chicago study on gangs, which is the "most extensive review of literature on gangs to date" found that there are "few reliable research sources" provided to form a basis for gang expert testimony.

(Hayat, "Preserving Due Process: Require the *Frye* and *Daubert* Expert Standards in State Gang Cases" (2021) 51 N.M.L. Rev. 196, 225-226.)

Granted, a designated expert witness who is unqualified to render *any* opinions is subject to exclusion on that basis. But the *Sargon* problem here is not that the gang officer was unqualified to render any gang opinion at all. Rather, it is that under pre-*Sargon* law, he could offer his most damaging theories that the defendant acted according to "gang culture" based solely on catchphrases such as "my training and experience," "my conversations with other officers," "my review of reports," etc. "[T]he foundational requirement of *Gardeley* [*People v. Gardeley* (1996) 14 Cal.4th 605 {disappr'd by *Sanchez*, 63 Cal.4th 665}] is typically observed only in qualifying the expert. The assertions the expert actually makes on the stand may not reflect specific personal knowledge of the gang at issue, but law enforcement's hypotheses about the nature of gang culture in general." (McGinnis & Eisenhart, "Interrogation Is Not Ethnography," *supra*, 7 Hastings Race & Poverty L.J. 111, 118.)

After *Sargon*, evidence of this nature can be excluded because it has no evidentiary value, while at the same time being highly prejudicial. (*E.g., People v. Cardenas* (1982) 31 Cal.3d 897, 904-905; *People v. Ramirez* (2016) 244 Cal.App.4th 800, 822.) "The simple mention of gang affiliation is enough to prejudice a criminally accused person at trial. This is because gangs are particularly susceptible to labeling as deviant, regardless of their behavior. What's worse, officer gang expert testimony often encourages jurors to identify with and make decisions based on generalizations and gang-related stereotypes." (Hildebrand, "Racialized Implications of Officer Gang Expert Testimony" (2022) 92 Miss. L.J. 155, 191-193.)

The kinds of stereotypical generalizations by which gang officers could describe a violent "gang culture," then apply it to an individual defendant who was a gang member but not otherwise shown to be personally connected to a violent "gang culture," permeated Det. Lodge's testimony. But, the role of a trial court as gatekeeper of methodologically inadequate evidence was unavailable in a California trial six years before *Sargon*.

Nor was this problem limited to *Sargon*-violative testimony. Argument III in our opening brief discussed a similar issue with respect to *Sanchez*/*Valencia*-violative testimony, with the obvious problem that when a prosecution gang officer gave opinions based on hearsay such as unstated police reports, FI cards and conversations with other officers, the defense could not cross-examine or verify sources that were never identified, or determine whether they had any relevance to Freddy Curiel. (*See, e.g.,* Appellant's Answer Brief on the Merits (AABM) 57-58, 61-64, and authorities cited.)

Perhaps not surprisingly, the above is also how prosecutors were encouraged to try these kinds of cases:

> It is incumbent on the expert to explain in detail the bases of his or her opinion. And, as with any expert, the bases can be almost anything. Otherwise inadmissible evidence— hearsay, for instance—can be the proper basis for an expert's opinion. For example, experts can base their opinions on the defendant's statements, other gangsters' statements, the review of graffiti or photographs of graffiti, conversations with other police officers, the review of prior police reports, and centralized computer database records.
>
> Once the witness is qualified as a gang expert, the question becomes, "What is the proper subject matter for the expert?" The simple answer is, "All the juicy stuff." ... Remember, the expert is giving opinions. There are no "wrong" answers.

(Jackson, "Prosecuting Gang Cases: What Local Prosecutors Need to Know" (April-June 2008) Prosecutor, at pp. 32, 39-40.) That also describes Det. Lodge's pre-*Sargon*/ *Sanchez* testimony (except there were no statements from the defendant), with no original sources identified, and no specification of which gangs or "Hispanic gangs" were the focus of whatever he obtained.

Had *Sargon* and/or *Sanchez*/*Valencia* been the law, the prosecution's gang officer wouldn't have been able to put before the jury his overbroad ethnicity-based theories that all "Hispanic gangs are turf-oriented" and as such they all rely on violence and intimidation. One hopes *Sargon* and *Sanchez*/ *Valencia* are helping to reduce this kind of ethnic overgeneralization (and if not, there is always the RJA). In the meantime, this discussion further shows that *Sargon*, as well as *Sanchez*/*Valencia*, meet this Court's criteria for the change of law exception to issue preclusion in *Strong, supra,* 13 Cal.5th 698, 717.

IV. What is an "issue" for purposes of issue preclusion?

The State Public Defender's brief has also highlighted how the Attorney General is assuming as obvious a foundational matter that, on closer inspection, turns out to be far from obvious and in our view is in error. We pointed out the problem in our Answer Brief on the Merits, but perhaps with a little too much subtlety. The Attorney General's reply brief bypassed the matter. The State Public Defender's *amicus* brief followed the reasoning of our Answer Brief on the Merits, and framed the problem as we did, but also with a certain subtlety.

So we will be more explicit here: Before the Attorney General can claim that purported litigation of an issue in the original trial is categorically preclusive of Mr. Curiel's day in court on his new section 1172.6 remedy, the Attorney General should have to answer the question: **What is the issue** that is allegedly preclusive?

The Attorney General claims "the issue" that is allegedly preclusive is whether Mr. Curiel had intent to kill, which the Attorney General says was decided by the jury's special circumstance verdict. There are, however, at least two fundamental deficiencies in the Attorney General claiming that as the purportedly preclusive issue:

(1) Although the Attorney General wants to argue the jury instructions required a finding that Mr. Curiel had "intent to kill,"[4] the Attorney General cannot and does not argue that the instructions required a finding that Mr. Curiel had "intent to kill

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[4] We disagree that the instructions did so, but that disagreement is addressed in several arguments in our Answer Brief on the Merits. The point here is more foundational.

Cesar Tejada," the victim of the murder of which Mr. Curiel was convicted. However, only a verdict of intent to kill **Cesar Tejada** could be argued to be preclusive of Mr. Curiel's section 1172.6 petition addressed to his conviction for murder of Cesar. That failure of the Attorney General's description of the allegedly preclusive issue is relevant to Arguments IV and V in our Answer Brief on the Merits.

(2) Separately, there is a fundamental difference between the case – including its issues – as it was litigated at Mr. Curiel's 2006 trial, and the basic issue raised by Mr. Curiel's 2019 petition under Penal Code section 1172.6. The difference is logical, because the law governing the two proceedings is so much different: The first proceeding (the original trial) took place under laws that permitted a conviction of first-degree murder and a sentence of 50 years to life based on Freddy merely getting into an argument which included gang statements, while in the second proceeding (this petition), that kind of result is forbidden.

In that light, Mr. Curiel would characterize the issues he raised in both proceedings thus:

Issue in the *original* proceeding (trial): Was Mr. Curiel not guilty of a gang-related misdemeanor of disturbing the peace, from which Abraham Hernandez's murder of Cesar Tejada was a reasonably foreseeable consequence? Or, put more simply: Was Mr. Curiel not guilty of any crime at all under then-existing law?[5]

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[5] Defense counsel's argument toward that end was that prosecution's witness Raul Ramirez's testimony should not be credited for the prosecution's claim that Mr. Curiel was involved in a gang-related disturbance of the peace. (7RT 1024) Defense counsel did not argue that if Mr. Curiel was involved in a (continued...)

This is substantively how we framed the trial issue on pages 31-34 and 39-41 of our Answer Brief. It is also akin to the State Public Defender's framing on page 19 of her brief.

Issue in *this* proceeding: On the assumption Mr. Curiel was guilty of disturbing the peace, was he nonetheless not guilty under current law of his conviction for first-degree murder of Cesar Tejada? This is necessarily the issue in the current proceeding, since subdivision (a)(3) of section 1172.6 assumes guilt of a lesser crime from which a petitioner could have been found guilty of murder under pre-S.B. 1437 based on imputed malice (e.g. felony-murder, "natural and probable consequences").

Framed this way, these are dramatically different issues. In many ways, they are diametrically opposite from one another.

The legally required assumption in *this* proceeding is that Mr. Curiel was guilty of disturbing the peace; otherwise, he could not meet the requirement of section 1172.6, subdivision (a)(3). By contrast, Freddy's counsel in the *prior* proceeding argued that his client was not guilty of disturbing the peace – as he had to do, because otherwise his client would be found guilty of murder with a prison sentence of at least 50 years to life (as actually happened). The issue of what would happen if Freddy was guilty in the prior proceeding was simply not litigated by trial counsel. (*Compare Lucido v. Superior Court, supra,* 51 Cal.3d 335, 340 [element (2), the "actually litigated" element of issue preclusion].)

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[5](...continued)
gang-related disturbance of the peace, Hernandez's murder of Cesar Tejada was an unforeseeable result. Given the sweeping testimony of Det. Lodge, it would have been folly to do so.

The Restatement (2d) of Judgments recognizes that "[o]ne of the most difficult problems in the application of the rule of this Section [issue preclusion] **is to delineate the issue** on which litigation is, or is not, foreclosed by the prior judgment." (Restatement, *supra*, § 27, cmt. c, p. 252.) In explaining this, the Restatement continued:

> The problem involves a balancing of important interests: on the one hand, a desire not to deprive a litigant of an adequate day in court; on the other hand, a desire to prevent repetitious litigation of what is essentially the same dispute.

(*Ibid*.) In our view, particularly in light of the above, it cannot be plausibly argued that Mr. Curiel's 2019 section 1172.6 petition under *current* law, and assuming his *guilt under prior law*, is "repetitious litigation of what is essentially the same dispute" as was his 2006 trial under in which he maintained his completely *innocence under prior law*.

The Restatement (§ 27, cmt. (c), p. 252) then continued:

> When there is a lack of total identity between the particular matter presented in the second action and that presented in the first, there are several factors that should be considered in deciding whether for purposes of the rule of this Section the "issue" in the two proceedings is the same, for example: Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? How closely related are the claims involved in the two proceedings?

Virtually all of these factors weigh against deeming the issues in the two proceedings to be "the same." There is no

overlap between the argument that was advanced in the first proceeding and that to be advanced in the second, for the reasons *ante*, pp. 36-37. The new argument involves a completely different rule of law from that in the prior proceeding. Pretrial preparation and discovery relating to the matter presented in the first action could not reasonably be expected to have embraced the matter sought to be presented in the second, because nobody in the first action could have anticipated the existence of the second one 12+ years later. And for all of these reasons, the defendant's claims in the two proceedings are not related at all.

Yet even if one accepts the Attorney General's theory of how to define the "issue," it doesn't help him. For once the issue is defined, it still must be applied to each of the five elements of issue preclusion under the *Lucido*/*Strong* formulation, as well as any applicable exceptions.

Section 27 of the Restatement says the following about element (3) of issue preclusion, whether the issue was "necessarily decided in the former proceeding":

> The appropriate question ... is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 28 – for example, that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.

(*Id.*, cmt. j, p. 261; *see also, e.g., DeGuelle v. Camilli* (7th Cir. 2013) 724 F.3d 933, 935 (Posner, J.) [a " 'full and fair opportunity' to litigate the issue in the previous suit ... includes incentive—the parties could foresee that the same issue might

arise in a future litigation in which the winner would assert collateral estoppel"].)

Under this standard, the Attorney General cannot prevail either way. If "the issues" are defined as Mr. Curiel would (*ante*, pp. 36-37), then the issue in the second proceeding was not recognized by the defense as important in the first. But if "the issues" is defined as the Attorney General prefers ("Did Mr. Curiel intend to kill?," with no mention of whether he intended to kill *Cesar Tejada*), it was still not recognized by the defense as important in the prior proceeding – and furthermore, "there is a basis for an exception ... that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action" (Restatement, § 27, cmt. j, p. 261), since the second action wasn't foreseeable at all.

Which also returns us to the discussion *ante*, pp. 15-17, on how a proper application of issue preclusion requires that the allegedly precluded party must have been able to foresee in the first action that the issue in question could be precluded in the second action. Such foreseeability simply does not exist as to a second proceeding based on new legislative remedy, under a different body of law, that wouldn't be enacted until 12+ years after the first proceeding.

V. The "elephant in the room": Where' s the evidence?

The Attorney General has filed three briefs in this Court, and the State Public Defender has filed one. Probably to no one's surprise, we have agreed with the State Public Defender's analyses, and respectfully disagree with the Attorney General's.

But we also believe that the State Public Defender and the Attorney General have overlooked the "elephant in the room." We too may be guilty of not having fully grasped its importance; for while it is not technically at issue on a section 1172.6 petition, it still looms large in an issue preclusion analysis, as discussed below. So now, it's time to talk about the elephant:

Where is the evidence that would have supported a unanimous verdict beyond a reasonable doubt that Freddy Curiel had the intent to kill Cesar Tejada, the victim as to whom he was convicted of murder, based on currently applicable legal authority?

Answer: There was none. In three briefs now (opening, reply, and answer to amicus), the Attorney General hasn't pointed to any. The State Public Defender doesn't either.

In *People v. Ware, supra,* 14 Cal.4th 151, this Court had before it far more extensive evidence on both Hoskins's involvement with the 5/9 Brim Blood gang, and his support of violence against Crips including *post hoc* approval of a murder. Yet this Court held none of that evidence established Hoskins's participation in a conspiracy to kill anyone – and in particular, no evidence he was guilty with respect to any potential specific victim alleged in the conspiracy. (*Id*. at p. 175.) Given that the evidence of intent to kill was insufficient with such a significantly greater quantity and quality of evidence in *Ware*, we cannot see how the far lesser evidence in Mr. Curiel's case would

be sufficient under current law. The State Public Defender made a similar point about *Ware* on pages 37-38 of her *amicus* brief.

In *Ware*, the evidence related to a long-standing conspiracy by *other* members of 5/9 Brim; in our case, there is no such evidence, and there is no evidence of any prior violent activity by any member of O.T.H. at all – let alone Freddy Curiel. But the prosecution and its gang expert effected the same thing to get Freddy Curiel convicted of the charged murder of Cesar Tejada with a gang special circumstance by using Det. Lodge's theories of "gang culture" and "Hispanic gangs" as a sort of overriding gang conspiracy roughly akin to that in *Ware*, then attributing the behavior and thinking of these unidentified gang members to "O.T.H." and ultimately to Freddy Curiel. The kinds of risks of juror confusion this Court flagged in the last paragraph of Part II of *Ware* are so much more profound in a case like this one.

Why does it matter in this section 1172.6 case? The Attorney General seeks to wish away the problem by saying this isn't the right forum for an insufficiency of evidence claim. (RRBM 29-30, fn.6) If thus framed literally, his statement is perhaps true.

But the framing is wrong. The reason it matters in <u>this</u> forum is because we presume jurors followed their instructions. (*E.g., People v. Delgado* (1993) 5 Cal.4th 312, 331.) Thus, if the jury reached a verdict beyond a reasonable doubt without sufficient evidence to support it (here, a true verdict on the gang special circumstance for first-degree murder of Cesar Tejada), there must have been some other pathway by which the jury might realistically have reached that verdict. The existence of

such an "other pathway" is a recognized bases for issue preclusion not to apply. (*See, e.g.,* AABM 43-45, 50, 69-71)

Our Respondent's Brief provided five such pathways, in our Arguments I through V (with Argument I being divided into four subanalyses). OSPD has now added more. The Attorney General asks this Court to overlook all of them.

This is not to say that insufficiency of evidence is required to defeat issue preclusion; far from it. Indeed, none of the Arguments I through V in our Answer Brief on the Merits is based on insufficiency of evidence. Nor does an argument that the elements of issue preclusion are not met, or an exception applies, require insufficiency of evidence. An argument against issue preclusion simply contends that a party has a right to its day in court, which in a section 1172.6 case would require the prosecution to meet its burden of proving murder beyond a reasonable doubt under current law.

CONCLUSION

The State Public Defender has correctly described the effect of new judicial decisions and statutes that "sufficiently 'shifted the legal terrain' as to render application of [issue preclusion] inappropriate." (SPDB 12 [quoting *California Hospital Assn v. Maxwell-Jolly, supra,* 188 Cal.App.4th 559, 573] [case also cited at RRBM 20]. The State Public Defender also has thoroughly explained that the principles of California law governing issue preclusion are no different from the modern Restatement principles, and those principles support application of exceptions to issue preclusion as well as failure of its elements.

By contrast, the Attorney General simply says 'The prior verdict suffices, full stop.' As the State Public Defender correctly argues, the law of issue preclusion requires much more.

Respectfully submitted this 10th day of April, 2023.

By: Michelle Peterson

Michelle M. Peterson
Counsel for Appellant Freddy Curiel
Under Appointment by the Supreme Court

CERTIFICATION OF WORD COUNT

As counsel for the appellant, I certify that this brief contains 9,936 words according to the word count of the computer program used to prepare the brief.

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

Respectfully submitted this 10th day of April, 2023.

Michelle Peterson

Michelle May Peterson
Counsel for Appellant Freddy Curiel
Under Appointment by the Supreme Court

DECLARATION OF SERVICE BY MAIL AND E-SERVICE

I, MICHELLE MAY PETERSON, declare: I am an active member of the State Bar of California, over the age of 18 and not a party to this action. My address is P.O. Box 387, Salem MA 01970. On April 11, 2023, I submitted the foregoing ANSWER TO BRIEF OF STATE PUBLIC DEFENDER *AMICUS CURIAE*, in No. S272238, to TrueFiling for filing with this Court and e-service as stated below; and served paper copies to the other persons/ entities below by placing a copy in an envelope to the addresses below, deposited in the U.S. Mail, postage paid:

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I declare under penalty of perjury of the laws of the State of California that the above is true and correct. Executed this 11th day of April, 2023.

Michelle Peterson
Michelle May Peterson

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**

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/10/2023

Date

/s/Michelle Peterson

Signature

Peterson, Michelle (111072)

Last Name, First Name (PNum)

Michelle May Peterson

Law Firm