S256698

SUPREME COURT NO.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GENTILE, JR., Defendant and Appellant.	)	Court of Appeal No.: E069088 Superior Court No.: INF1401840

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Graham A. Cribbs, Judge Presiding

PETITION OF APPELLANT FOR REVIEW AFTER THE PUBLISHED OPINION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, AFFIRMING THE JUDGMENT OF CONVICTION

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By appointment of the Court of Appeal under the Appellate Defenders, Inc. independent case system

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appellant Joseph Gentile, Jr. respectfully requests this Court grant review in the above-entitled case following the published opinion of the Court of Appeal, Fourth Appellate District, Division Two, affirming the judgment of the Superior Court of Riverside County.

The published Opinion of the Court of Appeal was filed on May 30, 2019. A copy of the Opinion is attached hereto as Appendix A.

The above May 30, 2019 published Opinion was filed following a prior grant of review and transfer order issued by this Court on March 13, 2019, in Case No. S253197. This Court's March 13, 2019 transfer order directed the Court of Appeal "to vacate its [November 15, 2018] decision and reconsider the cause in light of Senate Bill No. 1437 and the court's determination, in defendant's prior appeal, that it is probable the jury convicted defendant of murder on the theory that he aided and abetted Saundra Roberts in a target crime that, as a natural and probable consequence, resulted in her murder of the victim. (See People v. Gentile (Feb. 27, 2017, E064822) [nonpub. opn.], pp. 12-14.)" (S253197, 3/13/19 grant of review and transfer order.)

On June 13, 2019, appellant filed a petition for rehearing based on the Court of Appeal's May 30, 2019 published opinion.

On June 20, 2019, the Court of Appeal issued an order modifying the opinion and denying the petition for rehearing. A copy of this order is attached hereto as Appendix B.

Pursuant to California Rules of Court, rule 8.500, review is urged to settle several important issues of law.

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ISSUES PRESENTED FOR REVIEW

1. Does recently enacted Senate Bill No. 1437 ("SB 1437") and revised Penal Code section 188, subdivision (a)(3), eliminate second degree murder liability under the natural and probable consequences doctrine, does SB 1437 apply retroactively to cases not yet final on appeal, what is the applicable standard of review for prejudice when a jury is instructed on both a natural and probable consequences theory of liability and an alternative theory of liability that remains valid after the enactment of SB 1437, and was the instructional error in this case prejudicial?

2. Did the trial court prejudicially err by instructing appellant's jury on a breach of duty of care theory of liability for murder?

3. Did the trial court prejudicially err in not sua sponte instructing appellant's jury on the lesser included offense of involuntary manslaughter based on a misdemeanor battery theory?

4. Assuming the trial court did not err in instructing appellant's jury on a breach of duty of care theory of liability for murder, did the trial court prejudicially err in not also instructing his jury on the lesser included offense of involuntary manslaughter based on a breach of duty of care theory?

5. Did the trial court prejudicially err in submitting a verdict form on the prison prior allegation to appellant's jury during their deliberations on the murder charge and/or did defense counsel render ineffective assistance of counsel in failing to ensure appellant's jury was not told he had previously been sentenced to prison?

6. Does the cumulative prejudice from all the above errors violate appellant's rights to due process and a fair trial, requiring reversal of his second degree murder conviction?

STATEMENT OF CASE AND FACTS

Appellant adopts the procedural and factual background as set forth in the Court of Appeal's Opinion, except as noted in appellant's petition for rehearing regarding the factual and procedural errors contained in the current

opinion, as well as the omission of a discussion of the majority of the issues raised on appeal in the current opinion. (Appendix A pp. 1-12.)

INTRODUCTION

This case has a relatively complex procedural and factual history that is relevant to the issues herein upon which review is sought. The evidence at trial showed appellant, Sandra Roberts, and the victim were all together prior to the victim's death. The medical evidence revealed the victim was beaten to death with several weapons, including a golf club, a chair, and a beer bottle.

There were two different factual scenarios presented to the jury. The prosecution primarily argued appellant was the actual killer. On the other hand, appellant told police a dispute arose over a rape allegation levied by Roberts against the victim, appellant told police he punched the victim a few times, at which point Roberts then began striking the victim with some sort of club or other weapon. Appellant further told police he took the weapon away from Roberts and threw it to the ground, but she retrieved it and resumed hitting the victim. Appellant said he took the weapon away from Roberts a second time, threw it to the ground again, asked her what she was doing, and left. Appellant denied ever striking the victim with a weapon.

Appellant's jury found him guilty of first degree murder, but found it not true that appellant personally used a weapon, suggesting the jury found appellant was not the actual killer. In his first appeal, the Court of Appeal

reversed appellant's first degree murder conviction pursuant to *Chiu*[1] because appellant's jury was alternatively instructed on a natural and probable consequences theory of liability based on his commission of the target crime of felony assault, and the instructional error was not harmless beyond a reasonable doubt. The Court of Appeal declined to address any of the other issues raised by appellant in his appeal in light of the reversal under *Chiu*. (*People v. Gentile* (Feb. 27, 2007, E064822) [nonpub. opn.], as modified March 22, 2017 (*Gentile I*).)

Upon a remand to the Superior Court pursuant to *Chiu*, the prosecutor elected to accept a reduction to second degree murder rather than conduct a retrial and appellant was resentenced to a term of 15 years to life. Appellant then filed a second notice of appeal, raising the remaining issues left unresolved in his initial appeal. In addition, on October 24, 2018, appellant filed a request to allow supplemental briefing on the applicability of SB 1437 to this case, and also submitted a supplemental brief in conjunction with this request. On October 26, 2018, the Court of Appeal denied appellant's request to file a supplemental brief regarding SB 1437.

On November 15, 2018, the Court of Appeal filed an opinion rejecting all of appellant's remaining issues, with the exception of ordering a modification to the court facilities assessments imposed. (*People v. Gentile*

[1] *People v. Chiu* (2014) 59 Cal.4th 155 ("*Chiu*").

(Nov. 15, 2018, E069088) [nonpub. opn.] (*Gentile II*).) Within a footnote, the Court of Appeal addressed appellant's request for relief under SB 1437 as follows:

> "Prior to oral argument, defendant sought leave to file a supplemental brief to discuss whether Senate Bill 1437 applied to this case. That bill, when it becomes effective, will eliminate liability for murder based on the natural and probable consequences doctrine. (See § 188, subd. (a)(3), rev. eff. 1/1/19.) However, it does not preclude convictions for second degree murder where the defendant is an active aider-abettor. We denied defendant's request because he was, at a minimum, an active aider abettor, if not the actual killer, for which a reduction to second degree murder was appropriate, pursuant to *People v. Chiu* (2014) 59 Cal.4th 155, 166." (*Gentile II,* E069088, p. 3, fn. 2.)

Appellant then filed a petition for review raising all five of the issues (other than the court facilities assessment issue) rejected in *Gentile II*, and further sought review on appellant's entitlement to relief under SB 1437.

On March 13, 2019, in Case No. S253197, this Court granted review and transferred the matter back to the Court of Appeal "with directions to vacate its decision and reconsider the cause in light of Senate Bill No. 1437 and the court's determination, in defendant's prior appeal, that it is probable the jury convicted defendant of murder on the theory that he aided and abetted Saundra Roberts in a target crime that, as a natural and probable consequence, resulted in her murder of the victim. (See *People v. Gentile* (Feb. 27, 2017, E064822) [nonpub. opn.], pp. 12-14.)" (S253197, 3/13/19 grant of review and transfer order.)

Following this Court's grant and transfer order, both appellant and respondent filed supplemental briefs regarding the applicability of SB 1437 to this case. On May 30, 2019, the Court of Appeal filed its current published opinion. (Appendix A.)

On June 13, 2019, appellant filed a petition for rehearing on the grounds that: 1) the May 30, 2019 published opinion erroneously concluded SB 1437 did not eliminate second degree murder liability under the natural and probable consequences doctrine, and in reaching this conclusion erroneously analyzed revised Penal Code 189, subdivision (e), rather than revised Penal Code section 188, subdivision (a)(3); 2) the opinion misstated the factual and procedural history of the case with respect to the SB 1437 issue; and 3) the opinion omitted a discussion and resolution of all the remaining issues on appeal.

On June 20, 2019, the Court of Appeal issued an order modifying the opinion and denying the petition for rehearing. (Appendix B.)

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ARGUMENT

I

THIS COURT SHOULD GRANT REVIEW TO SETTLE IMPORTANT QUESTIONS OF LAW, NAMELY, WHETHER SB 1437 ELIMINATED SECOND DEGREE MURDER LIABILITY IN CALIFORNIA BASED ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, WHETHER SB 1437 APPLIES RETROACTIVELY TO CASES NOT YET FINAL ON APPEAL, IF SO WHAT IS THE APPLICABLE STANDARD OF REVIEW FOR PREJUDICE WHEN A JURY IS INSTRUCTED ON BOTH A NATURAL AND PROBABLE CONSEQUENCES OF THEORY OF LIABLITY AND AN ALTERNATIVE THEORY OF LIABILITY THAT REMAINS VALID AFTER THE ENACTMENT OF SB 1437, AND WAS THE INSTRUCTIONAL ERROR IN THIS CASE PREJUDICIAL

A. SB 1437 Eliminated Second Degree Murder Liability In California Based On The Natural And Probable Consequences Doctrine

Appellant's jury was alternatively instructed upon the following three alternative theories of liability: 1) appellant was the perpetrator of the murder; 2) appellant directly aided and abetted the murder; or 3) appellant aided and abetted the target crime of felony assault and the murder committed by his coparticipant was a natural and probable consequence of the assault. (See Appendix A pp. 12-13; 2 C.T. pp. 286-292, 301-302;[2] CALCRIM Nos. 400, 401, 402, 403, 875.) Appellant's jury was not instructed on a felony murder theory of liability. (*Ibid.*)

[2] The references to C.T. and R.T. herein are to the record on appeal from appellant's trial in original Court of Appeal Case No. E064822, which as set forth above culminated in the partial reversal under *Chiu.*

On September 30, 2018, the Governor signed SB 1437, eliminating liability for the crime of second degree murder in California based on the natural and probable consequences doctrine. (See Pen. Code, § 188, subd. (a)(3), as revised, eff. 1/1/19.)

On October 24, 2018 appellant sought leave to file a supplemental letter brief addressing the applicability of SB 1437 to this case, and submitted a supplemental letter brief along with this request. On October 26, 2018, the Court of Appeal denied appellant's request.

In its subsequent opinion filed November 15, 2018, the Court of Appeal addressed the SB 1437 issue as follows:

"Prior to oral argument, defendant sought leave to file a supplemental brief to discuss whether Senate Bill 1437 applied to this case. That bill, when it becomes effective, will eliminate liability for murder based on the natural and probable consequences doctrine. (See § 188, subd. (a)(3), rev. eff. 1/1/19.) However, it does not preclude convictions for second degree murder where the defendant is an active aider-abettor. We denied defendant's request because he was, at a minimum, an active aider abettor, if not the actual killer, for which a reduction to second degree murder was appropriate, pursuant to *People v. Chiu* (2014) 59 Cal.4th 155, 166." (*Gentile II,* E069088, p. 3, fn. 2.)

On March 13, 2019, in Case No. S253197, this Court granted review and transferred the matter back to the Court of Appeal "with directions to vacate its decision and reconsider the cause in light of Senate Bill No. 1437 and the court's determination, in defendant's prior appeal, that it is probable the jury convicted defendant of murder on the theory that he aided and abetted Saundra Roberts in a target crime that, as a natural and probable consequence,

resulted in her murder of the victim. (See *People v. Gentile* (Feb. 27, 2017, E064822) [nonpub. opn.], pp. 12-14.)" (S253197, 3/13/19 grant of review and transfer order.)

Following transfer from this Court, the Court of Appeal then filed its current published opinion holding appellant was not entitled to relief because SB 1437 did not eliminate second degree murder liability in California based on the natural and probable consequences doctrine. (Appendix A pp. 14-18.)

This Court should grant review.

In reaching its conclusion that SB 1437 did not eliminate second degree murder liability in California under the natural and probable consequences doctrine, the Court of Appeal relied exclusively upon Penal Code section 189, subdivision (e), and did not address Penal Code section 188, subdivision (a)(3). (Appendix A pp. 14-18.)

This analysis was misplaced because Penal Code section 189, subdivision (e), is the revised felony murder rule, whereas Penal Code section 188, subdivision (a)(3), is the revised law that eliminated second degree murder liability under the natural and probable consequences doctrine. Moreover, the Court of Appeal's erroneous analysis has resulted not only in an incorrect affirmance of appellant's second degree murder conviction based on the natural and probable consequences doctrine, but has also generated a very substantial amount of confusion throughout

California regarding the appropriate interpretation and application of SB 1437 such that review is important and necessary in order to clarify the correct application of this groundbreaking new law.

Recently revised Penal Code section 189, subdivision (e), provides:

> "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:
>
> "(1) The person was the actual killer.
>
> "(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
>
> "(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Pen. Code, § 189, subd. (e), eff. 1/1/19.)

Penal Code section 189, subdivision (a), includes the list of applicable underlying felonies for purposes of the felony murder rule, and includes "arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289." (Pen. Code, § 189, subd. (a).)

Aggravated assault is not an enumerated felony for purposes of the felony murder rule. (Pen. Code, § 189, subd. (a).) In other words, aggravated assault is not "a felony listed in subdivision (a)," and thus Penal Code section 189, subdivision (e), does not apply to this case. As also noted, appellant's jury was not instructed upon a felony murder theory.

Revised Penal Code section 188, subdivision (a)(3), provides:

"Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Pen. Code, § 188, subd. (a)(3).)

As noted, by its terms, revised Penal Code section 189, subdivision (e), does not apply to this case as appellant was not tried upon a felony murder theory and aggravated assault is not "a felony listed in subdivision (a)" of section 189.

Thus, this leaves the remainder of Penal Code section 188, subdivision (a)(3), as the applicable provision herein, which provides "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Pen. Code, § 188, subd. (a)(3).)

Pursuant to the plain language of this provision, to be convicted of murder a defendant must act with malice aforethought, and malice shall not be imputed to a person based solely on his or her participation in a crime. As a result, a defendant can no longer be convicted of second degree murder under the natural and probable consequences doctrine; rather, to be convicted of murder outside of the context of the revised felony murder rule, a defendant must personally act with malice aforethought.

This interpretation of this new law is also fully consistent with the legislative history underlying the enactment of SB 1437. As stated by the Legislature in enacting SB 1437: "Except as stated in subdivision (e) of Section 189 of the Penal Code (the revised first degree felony murder rule), a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea." (Stats. 2018, c. 1015. S.B. 1437 § 1(g).) The express purpose of SB 1437 was also to revise both the felony murder rule and the natural and probable consequences doctrine. (Stats. 2018, c. 1015. S.B. 1437 § 1(f).)

Ultimately, in enacting SB 1437, the Legislature eliminated murder liability under the natural and probable consequences doctrine via revised Penal Code section 188, subdivision (a)(3), and limited the felony murder rule via revised Penal Code section 189, subdivisions (e) and (f).

For all of the above reasons, this Court should grant review in order to clarify whether SB 1437 eliminated second degree murder liability in California under the natural and probable consequences doctrine for purposes of both appellant's conviction in this case, as well as all other cases throughout California that involve this important new law.

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B. SB 1437 Should Be Deemed To Apply Retroactively To Cases Not Yet Final On Appeal

This Court should also grant review to determine whether SB 1437 and the ameliorative changes to Penal Code sections 188 and 189 apply retroactively to cases such as this one that are currently pending on direct appeal. (See *In re Estrada* (1965) 63 Cal.2d 740 ("*Estrada*").)

Thus far, two panels of the Court of Appeal have determined SB 1437 does not apply retroactively to cases not yet final on direct appeal, and the lone avenue of relief under this new law is proceeding in the Superior Court via the filing of a petition under Penal Code section 1170.95. (*People v. Martinez* (2019) 31 Cal.App.5th 719, 724-728; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147-1158; see also *People v. Carter* (2019) 31 Cal.App.5th 831, 835 [agreeing with *Martinez* and *Carter* without further analysis].)

The Court of Appeal in this case assumed SB 1437 did apply retroactively to cases not yet final on appeal, and addressed the SB 1437 issue on the merits. (Appendix A p. 18.)

This Court should grant review to settle this important question of law and determine whether the ameliorative changes to Penal Code sections 188 and 189 apply to cases not yet final on direct appeal under the *Estrada* rule, or whether the only recourse available to such defendants is via the petition procedure set forth in Penal Code section 1170.95.

C. When A Jury Is Alternatively Instructed Upon A Now Invalid Natural And Probable Consequences Theory Of Murder Liability And A Remaining Valid Theory, Review For Harmless Error Under *Chapman, Guiton,* and *Green* Is Appropriate

This Court should grant review to determine the appropriate standard of review applicable when, as in this case, a jury was instructed upon a theory of liability that has been abrogated by SB 1437, and was also instructed upon an alternative theory of liability that remains valid in the wake of SB 1437.

SB 1437 is not clear regarding the appropriate standard of review and remedy. For defendants who proceed in the Superior Court via the petition procedure set forth in Penal Code section 1170.95 and are deemed eligible for relief, the remedy appears to be vacating the murder conviction and resentencing the defendant on the underlying felony in a felony murder case or the underlying target offense in a natural and probable consequences case. (Pen. Code, § 1170.95, subds. (d)(3), (e), eff. 1/1/19.)

At the same time, appellant notes the usual remedy on direct appeal when, as in this case, the jury is instructed on alternative theories of liability and one of those theories is later deemed invalid based on a change in the law, is for reversal of the defendant's conviction under the *Chapman/Guiton/Green* standard of review unless the record affirmatively demonstrates beyond a reasonable doubt all twelve jurors relied upon a legally valid theory. (See *People v. Chiu, supra,* 59 Cal.4th at pp. 159, 167-168, 176; *People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1203; see also

Chapman v. California (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-71.)

Appellant urges the above standard of review set forth in *Chiu, Chun, Chapman, Guiton*, and *Green* appears most appropriate herein.[3] Applying this standard, reversal of appellant's second degree murder conviction is required.

D. The Instructional Error In This Case Was Not Harmless Beyond A Reasonable Doubt

This case is unique in terms of the prejudice analysis under *Chapman/Guiton/Green* because the Court of Appeal has in effect already performed it. In his initial appeal in Case No. E064822, petitioner asserted his jury was improperly permitted to convict him of first degree murder under the prosecution's alternative natural and probable consequences theory of liability in violation of *Chiu*, and the error was prejudicial because the record does not demonstrate the jury relied only upon a legally valid theory of liability. (See E064822 AOB pp. 17-32.) The Attorney General conceded error under *Chiu*, and further conceded the error was not harmless beyond a reasonable doubt

[3] This Court currently has the following related question under review: "Is error in instructing the jury on both a legally correct theory of guilt and a legally incorrect one harmless if an examination of the record permits a reviewing court to conclude beyond a reasonable doubt that the jury based its verdict on the valid theory, or is the error harmless only if the record affirmatively demonstrates that the jury actually rested its verdict on the legally correct theory?" (*People v. Aledamat* (S248105, rvw. granted 7/5/18.)

because the record did not demonstrate the jury relied only upon a legally valid theory. (See E064822 Resp. Brief pp. 16-19.) The Court of Appeal agreed, holding the error in instructing appellant's jury on the erroneous natural and probable consequences theory was not harmless beyond a reasonable doubt based on the record. (Appendix A p. 2.)

On remand due to the *Chiu* error, the prosecution elected to accept a reduction in the offense to second degree murder, rather than conducting a retrial. (Appendix A p. 2.) Because the prosecution elected not to conduct a retrial, the record underlying appellant's conviction remains exactly the same. Because the record remains the same, the result should necessarily have been the same, i.e., it cannot be concluded beyond a reasonable doubt the jury relied only upon a legally permissible theory in finding appellant guilty, rather than the erroneous natural and probable consequences theory. Thus, appellant's remaining second degree murder conviction should also be reversed in light of SB 1437.

In ruling otherwise, the Court of Appeal stated:

> "At a minimum, after reviewing the record, we conclude that defendant in this case was a direct or active aider and abettor. … Even if the jury believed defendant's testimony -- that after his own beating of the victim he left the scene when Roberts began beating the victim with a deadly or dangerous weapon—the killing would have been the result of defendant's aggravated assault committed while directly aiding or abetting Roberts' assault with a deadly weapon.
>
> "In other words, he directly aided and abetted the murder of the victim by beating and now stands properly convicted of second degree murder. We addressed the problematic instruction that allowed the jury to

find him guilty of first degree murder under the natural and probable consequences theory in *Gentile I.* The People thereafter accepted a reduction of degree to second degree murder, obviating any prejudice from the erroneous instruction. The amended provisions of section 189, subdivision (e), did not prohibit this result, and the conviction for second degree murder is commensurate with defendant's culpability and conforms with the legislative intent underlying Senate Bill No. 1437 and the holding of *Chiu*. As an active aider-abettor, or as the actual killer, no resort to the natural and probable consequences theory applies. The theory of vicarious liability was only required to support the first degree murder conviction, which is no more." (Appendix A p. 17; Appendix B p. 1.)

Appellant respectfully urges the Court of Appeal's analysis of this issue was both incorrect and illogical. Indeed, under *Chiu*, appellant could have been properly convicted of first degree murder as either a direct aider and abettor (or "active aider-abettor" as the Court of Appeal referred to it), or as the actual killer. (See *People v. Chiu, supra,* 59 Cal.4th at p. 166 [observing the direct perpetrator may still be convicted of first degree premeditated murder and noting the Court's decision also does not affect an aider and abettor's liability for "first degree premeditated murder based on direct aiding and abetting principles"].)

By previously reversing his conviction under *Chiu*, the Court of Appeal necessarily found appellant may have been convicted under a natural and probable consequences theory. The same holds true under SB 1437, and reversal is similarly warranted -- if SB 1437 is retroactive to cases on direct appeal and if the same *Chapman/Green/Guiton* standard applies. The Court of Appeal's opinion completely misstates the SB 1437 analysis, as well as the applicable analysis and reasoning in *Chiu*.

As also noted, the amended provisions of Penal Code section 189, subdivision (e), do not apply to this case, and the applicable provision is Penal Code section 188, subdivision (a)(3). Finally, a killing that was the result of appellant's committing or aiding and abetting the commission of an aggravated assault, used to potentially be murder under the natural and probable consequences doctrine, but is no longer either first or second degree murder in light of SB 1437.

For all of the above reasons, this Court should grant review.

Alternatively, appellant requests this Court again grant review and transfer the matter to the Court of Appeal for further consideration of the issue on the merits pursuant to California Rules of Court, rule 8.500, subdivision (b)(4).

II

THIS COURT SHOULD GRANT REVIEW TO SETTLE IMPORTANT QUESTIONS OF LAW, NAMELY, TO CLARIFY WHEN IT IS APPORPRIATE TO INSTRUCT ON A BREACH OF DUTY OF CARE THEORY OF LIABILITY FOR MURDER, AND TO DETERMINE WHETHER THE TRIAL COURT PREJUDICIALLY ERRED IN THIS CASE BY INSTRUCTING APPELLANT'S JURY ON A BREACH OF DUTY OF CARE THEORY OF LIABILITY FOR MURDER

A. Introduction

As noted, the evidence in this case indicated that either appellant or Roberts may have killed the victim. There were no other eyewitnesses to the actual killing. The bloody items collected by police at the scene, as well as the

testimony of the examining medical personnel, indicated the victim was severely beaten to death using multiple weapons including a golf club, a chair, and a beer bottle. (See 1 R.T. pp. 110, 169-172; 2 R.T. pp. 456-457; 3 R.T. pp. 504, 519-522, 575, 581.)

Roberts testified she did not strike the victim in any manner, and claimed she left the victim alone with appellant. (See 2 R.T. pp. 273-274, 315.) Appellant, on the other hand, told both police and witness Sullivan that he initially punched the victim a few times, but then he stopped after the victim apologized, at which point Roberts then began striking the victim with some sort of club or other weapon. (See 2 R.T. pp. 403-406, 410-411; 1 C.T. pp. 198-200, 206, 214, 227.) Appellant further told police he took the weapon away from Roberts, and threw it to the ground, but she retrieved it and resumed hitting the victim. (1 C.T. pp. 198, 214.) Appellant said he took the weapon away from Roberts a second time, threw it to the ground again, asked her what she was doing, and left. (1 C.T. pp. 198, 203, 210-211, 214-215, 218.) Appellant denied ever striking the victim with a weapon. (1 C.T. p. 227.)

The prosecutor primarily argued appellant was the direct perpetrator of the murder, but alternatively argued that even if the jury believed appellant's version of the events and concluded Roberts committed the murder, appellant was still guilty. (See 4 R.T. pp. 738, 750, 753-755, 757-758.)

Appellant's jury found it was not true that appellant personally used a deadly and dangerous weapon. (1 C.T. pp. 249-250.)

This Court should grant review to determine whether appellant's conviction should be reversed because the trial court prejudicially erred in alternatively instructing his jury on a failure to rescue/breach of duty of care theory of liability for murder.[4]

B. The Trial Court Prejudicially Erred By Instructing Appellant's Jury On A Failure To Rescue/Breach Of Duty Theory Of Liability For Murder

Appellant's jury was instructed on both direct perpetrator and aiding and abetting liability. (2 C.T. pp. 286-292; 301-302; CALCRIM Nos. 400, 401, 402, and 403.) Appellant's jury was instructed on first and second degree malice aforethought murder using a modified version of CALCRIM No. 520, which after setting forth the general principles of law applicable to malice aforethought murder, provided in pertinent part as follows:

"*A person has a legal duty to rescue the person to whom a duty is owed.*"

[4] As noted, the Court of Appeal considered and rejected this issue in its opinion filed on November 15, 2018. (*Gentile II*) However, following this Court's March 13, 2019 grant of review and transfer order on the SB 1437 issue, the Court of Appeal's subsequent opinion omitted a discussion of this and all the other remaining issues raised on appeal. Appellant then filed a petition for rehearing noting this omission, and requesting that the Court of Appeal include its prior resolution of these issues within the current opinion. However, the Court of Appeal denied this request. Thus, by necessity, appellant will address these additional issues in the context of the decision in *Gentile II.*

"If you conclude that the defendant owed a duty to rescue, and the defendant failed to perform that duty, his failure to act is the same as doing a negligent or injurious act." (2 C.T. pp. 295-296, emphasis added; CALCRIM No. 520.)

During the jury instructions conference, the prosecutor specifically stated he was relying on this theory, advising both the court and counsel:

"That is the -- the -- his statement, if the jury chooses to believe that, is that he hit the victim first, at which point [Roberts] then takes a sledgehammer, according to him, or a golf club, whatever they want to -- and then starts hitting the victim. He then takes it upon himself to take that instrument, throw it down. He says he's [sic] does this twice. People can argue that his omission to act a third time or to seek help, because he's already aware of [Roberts'] conduct, is by fact facilitating that conduct by not doing anything further and therefore his action of omission is aiding and abetting the death of Bill Saavedra." (3 R.T. pp. 669-670.)

During closing argument, the prosecutor specifically relied upon and argued this theory as a basis for finding appellant guilty, arguing:

"Now if you want to give him every benefit of the doubt and you want to accept his statements, you can do that. You're the jury, you are entitled to do that. But when you do that, you have to measure against, like I said, the evidence. His actions according to his statement is that he set the chain of events in motion by hitting this man. That's his statement. He hits him three

or four times. He starts the violence. According to him, Saundra Roberts then acts on her own to continue the violence. He then, according to him, acts as a savior for this person not once but twice. He knows exactly what Saundra Roberts is going to do, and he's acted to stop it. But then he says, you know what? I'm not going to do it anymore and he leaves. Knowing full well based on his statement what Saundra Roberts is going to do to this man. He's aided and abetted Saundra Roberts by not continuing what he was doing before which was stopping this beating. He by his omission to act has made an act to allow Saundra Roberts to kill this person. Because those are his words. He knows exactly what Saundra is going to do and he allows her to do and then he just leaves, when he acted or he said he acted to stop it twice. That -- you don't get to do that. He's assumed a duty at that point." (4 R.T. pp. 757-758.)

The trial court's instruction on this breach of duty of care theory of liability, and the prosecutor's reliance upon it, was erroneous. (See *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 [a trial court has a sua sponte duty to correctly instruct on the law]; Pen. Code, § 1259.)

For example, it has been recognized on multiple occasions in a criminal context that a parent has a legal duty to furnish necessary clothing, food, and medical attention to his or her child. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 134-138; *People v. Burden* (1977) 72 Cal.App.3d 603, 614.) This duty of care of a parent to a child has been imposed by our

Legislature and is codified within Penal Code section 272, subdivision (a)(2). (Pen. Code, § 272, subd. (a)(2).)

In *Oliver*, the Court of Appeal observed: "Generally, one has no legal duty to rescue or render aid to another in peril, even if the other is in danger of losing his or her life, absent a special relationship which gives rise to such duty." (*People v. Oliver* (1989) 210 Cal.App.3d 138, 149.) Further, "'[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.' (Rest.2d Torts, § 314.)" (*Ibid.*)

This Court most recently addressed the law regarding a legal duty in a criminal context in *People v. Heitzman* (1994) 9 Cal.4th 189, 197-199 ("*Heitzman*"), where this Court interpreted the crime of elder abuse in violation of Penal Code section 368. This Court held that Penal Code section 368, which in relevant part "makes it a felony for any person to willfully permit the infliction of pain or suffering on an elder," could constitutionally apply to those who had assumed the "special relationship" of being a *caretaker* on behalf of the elder, but not to any other individuals. (*Id.* at pp. 199-215, emphasis added.)

None of the above cases provide support for a murder conviction on a breach of duty of care theory under the circumstances of the case at bar.

As set forth above, almost all of the cases that have ever imposed criminal liability based on a failure to act are cases involving either a

parent/child or an elder/caretaker special relationship. Not only is there a common law basis to impose such liability under these circumstances, but California statutes expressly impose such a duty upon parents of minor children and caregivers for the elderly. No such special relationship or statutory duty existed in the case at bar.

It also appears the only California case that has ever imposed criminal liability based on a failure to rescue theory of liability is *Oliver*, in which the Court of Appeal approved of an involuntary manslaughter conviction due to the criminal negligence of a woman who brought the victim to her house, provided him with paraphernalia to use heroin, and then willfully failed to seek medical attention for the victim after he overdosed. (*People v. Oliver, supra,* 210 Cal.App.4th at pp. 143, 148-149.)

In finding an involuntary manslaughter conviction permissible in *Oliver*, the Court of Appeal relied exclusively on civil tort liability. (See *People v. Oliver, supra,* 210 Cal.App.4th at pp. 147-149.) Citing only a legal commentator, the Court of Appeal further held that "the rules governing the imposition of a duty to render aid or assistance as an element of civil negligence, are applicable to the imposition of a duty *in the context of criminal negligence*." (*Id.* at pp. 148-149, emphasis added.)

It is not at all clear *Oliver* was correctly decided as a matter of criminal law because it relied only on civil tort law and strayed beyond the duty of care recognized in all other criminal cases that were founded upon both the

common law and statute. However, even assuming it was correctly decided, it would authorize at most a criminal conviction for involuntary manslaughter based on a criminal negligence theory. Indeed, it is one thing to impose civil tort liability for negligence, it is another to impose criminal penalties for negligence, and it is another thing entirely to impose liability for murder, which by law cannot be based upon negligence.

To hold otherwise would potentially lead to absurd results, as virtually any civil tort could form the basis of a murder conviction, a result so dramatically and fundamentally at odds with our established legal system that it would be unreasonable to conclude our Legislature intended such a result without ever having said so.

For all of the above reasons, appellant urges he could not lawfully be convicted of murder based on a breach of a duty of care theory, and the court's instructions permitting him to be convicted of murder upon that theory were erroneous.

The Court of Appeal in this case determined "the use of the bracketed language in CALCRIM No. 520 was inappropriate without additional instructions defining the nature of the duty and explaining the People's burden of proving the same." (*Gentile II*, p. 17.) However, the Court of Appeal further held "the People did not rely on a theory that the death was caused by defendant's breach of a legal duty to rescue," and the prosecutor's closing argument urging that if they believed appellant's version of the facts

appellant was still guilty because he had breached a duty was only a suggestion appellant had breached "a *moral* duty," not a legal duty. (*Gentile II*, pp. 17-18.)

Appellant respectfully urges the Court of Appeal's resolution of this issue is contrary to the record. The word "moral" does not appear anywhere in the record on appeal in this case. Moreover, as noted, the prosecutor stated during the jury instructions conference it was relying on a breach of duty care theory of liability in the event the jury believed appellant's version of the facts (3 R.T. pp. 669-670), the trial court instructed appellant's jury on a breach of duty of care theory of liability for murder (2 C.T. pp. 295-296), and the prosecutor argued to appellant's jury during closing argument that appellant was guilty of murder even under his version of the facts based on his assumption of a duty and his failure to act to save the victim. (4 R.T. pp. 757-758).

The Court of Appeal further held "to the extent defendant now objects to the court's modification of CALCRIM No. 520, his claim of error is forfeited by failing to object in the trial court." (*Gentile II*, p. 19.) Appellant respectfully urges this finding of forfeiture is also misplaced because the challenged instructions pertained to the requisite elements for conviction of murder, and encompassed a specific theory of criminal liability for murder, and thus fell well within the trial court's sua sponte duties to correctly instruct on the law. (See *People v. Montoya, supra,* 7 Cal.4th at p. 1047;

Pen. Code, § 1259.) However, to the extent an objection to the breach of duty of care instructions was required, the issue should nevertheless be resolved on its merits because under those circumstances appellant received the ineffective assistance of counsel. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Pope* (1979) 23 Cal.3d 412, 421-424.)

Finally, appellant urges because the instructional error pertained to the requisite elements necessary for a conviction of murder, the error was also of federal constitutional magnitude requiring review under the *Chapman* standard for federal constitutional errors (see *Neder v. United States* (1999) 527 U.S. 1, 15-19 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Flood* (1998) 18 Cal.4th 470, 475, 504; U.S. Const., Amends. V, VI, XIV), and the error was not harmless beyond a reasonable doubt based on the evidence, and particularly in light of the jury's rejection of the personal weapon use allegation as to appellant, which indicates the jury did not find appellant was the actual killer, and likely did rely on the erroneous breach of duty of care alternative theory of liability they were given.

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III

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT APPELLANT'S JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER BASED ON A MISDEMEANOR BATTERY THEORY

As noted, appellant's version of the events was that he punched the victim a few times, but he did not strike the victim with a weapon, and did not kill the victim. The prosecution argued even if the jury believed appellant's version of the events, appellant set in motion a chain of events that culminated in the victim's death. The jury rejected the personal weapon use allegation as to appellant, indicating the jury gave credence to appellant's version of the events and was not convinced appellant was the actual killer.

This Court should grant review to determine whether under these circumstances, the trial court prejudicially erred in failing to sua sponte instruct appellant's jury on the lesser included offense of involuntary manslaughter based on a misdemeanor battery theory. (See *People v. Breverman* (1998) 19 Cal.4th 142, 154-155 [sua sponte duty to instruct on all applicable lesser included offenses]; *People v. Lee* (1999) 20 Cal.4th 47, 60-61 [involuntary manslaughter may be based on a misdemeanor committed with criminal negligence]; *People v. Brothers* (2015) 236 Cal.App.4th 24, 33-34 [involuntary manslaughter may also be based upon the commission of an inherently dangerous assaultive felony committed

without malice]; *People v. Fuentes* (1946) 74 Cal.App.2d 737, 741-742 [defendant who punched the victim was clearly guilty of battery].)

IV

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER ASSUMING THE TRIAL COURT DID PROPERLY INSTRUCT APPELLANT'S JURY ON A BREACH OF DUTY OF CARE THEORY OF LIABILITY, THE TRIAL COURT PREJUDICIALLY ERRED IN FAILING TO INSTRUCT APPELLANT'S JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER BASED ON A BREACH OF DUTY OF CARE

As set forth above, the prosecution relied upon and the instructions given appellant's jury permitted him to be convicted of murder based upon a breach of duty of care theory of liability for not rescuing the victim.

To the extent a breach of duty of care theory was legally permissible at all in this case, this Court should grant review to determine whether appellant's conviction should be reversed because the trial court prejudicially erred in not instructing his jury with CALCRIM No. 582 and permitting his jury to convict him of the lesser included offense of involuntary manslaughter on this breach of duty of care theory. (*People v. Breverman, supra,* 19 Cal.4th at pp. 154-155 [sua sponte duty to instruct on lesser included offenses]; CALCRIM No. 582 [setting forth instructions on involuntary manslaughter based on a failure to rescue]; *People v. Oliver, supra,* 210 Cal.App.4th at pp. 143, 148-149 [finding a conviction of involuntary

manslaughter was supported by the evidence of defendant's failure to rescue the victim].)

V

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER THE TRIAL COURT ERRED AND APPELLANT'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY PERMITTING APPELLANT'S JURY TO BE SENT A VERDICT FORM ON THE BIFURCATED PRISON PRIOR ALLEGATION

Prior to trial, appellant moved to bifurcate his prison prior allegation, and his request was granted by the trial court. (1 R.T. p. 30.)

However, the jury was erroneously given a verdict form asking them to determine whether appellant had following his 2006 conviction and prison sentence, remained free of prison custody and the commission of another felony for a period of five years subsequent to the conclusion of his prison term. (See 1 C.T. p. 247.)

Jury deliberations began on September 22, 2015, during which time the jury asked whether fists are considered a deadly weapon and requested a transcript of appellant's police interview. (1 C.T. pp. 232-236.)

On September 23, 2015, at 10:39 a.m., just minutes before returning their verdict on the murder charge, the jury submitted the following question:

"In reference to the finding on the prior felony conviction, when was the conclusion of his term in custody?" (1 C.T. p. 237 [minute order]; 2 C.T. p. 317 [jury question #3].)

At 11:21 a.m., the trial court brought the jury into the courtroom, told the jury that accusation had been given to them by mistake, and told the jury to ignore that accusation. (1 C.T. p. 237; 4 R.T. pp. 815-817.)

At 11:34 a.m., the jury came back into the courtroom and their verdict on the murder charge was read. (1 C.T. p. 237; 4 R.T. pp. 818-819.)

Defense counsel subsequently moved for a new trial, arguing in part the error in submitting the prison prior allegation to appellant's jury warranted a new trial. Defense counsel further noted one of the reasons appellant elected not to testify was so his jury would not be aware of his prior convictions. (2 C.T. p. 336; 4 R.T. pp. 830, 833, 836-837.)

Appellant requests this Court grant review to determine whether the trial court denied appellant his right to a fair trial by submitting this prison prior allegation to the jury during their deliberations on the murder charge, and/or whether defense counsel rendered ineffective assistance of counsel by failing to ensure the verdict forms given the jury did not include this allegation. (See *People v. Thompson* (1980) 27 Cal.3d 303, 314 [other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact"]; *People v. Ochoa* (1998) 19 Cal.4th 353, 426-427 [the trial court has a responsibility to provide the jury with appropriate verdict

forms]; *Strickland v. Washington, supra,* 466 U.S. at pp. 684-687 [defendant also has the right to effective representation by his trial counsel]; U.S. Const., Amends. V, VI, XIV.)

VI

THIS COURT SHOULD GRANT REVIEW TO SETTLE AN IMPORTANT QUESTION OF LAW, NAMELY, WHETHER THE CUMULATIVE PREJUDICE OF ALL THE ABOVE ERRORS DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION

Appellant urges that to the extent any of the above errors does not on its own require reversal, the cumulative effect of all of them does. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 [the cumulative effect of a series of trial errors may require reversal].) The combined effect of multiple trial court errors violates the due process right to a fair trial where it renders the resulting criminal trial fundamentally unfair. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-303 [93 S.Ct. 1038, 35 L.Ed.2d 297]; see also *Parle v. Runnels* (2007) 505 F.3d 922, 927; U.S. Const., Amends. V, VI, XIV.)

Based upon the overall weakness of the prosecution's case, coupled with the myriad instructional errors affecting virtually all of the prosecution's alternative theories of liability except for the direct perpetrator theory that the jury appears to have rejected, it is impossible to conclude with any reasonable degree of certainty that all twelve jurors

found appellant guilty under any legally appropriate theory, and further impossible to conclude the jury would not have convicted appellant of involuntary manslaughter had the court also not erred in failing to give the jury those options.

Thus, appellant respectfully requests this Court grant review to determine whether the cumulative prejudice from all the above errors requires reversal of his conviction.

CONCLUSION

For the reasons set forth above and in the interests of justice, appellant respectfully requests this Court grant his petition for review.

Dated: July 3, 2019

/s/ Eric R. Larson
Eric R. Larson
Attorney for Defendant and
Appellant Joseph Gentile

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court rule 8.504, I, Eric R. Larson, hereby certify that according to the Microsoft Word computer program used to prepare this document, appellant's Petition for Review contains a total of 8,176 words.

Executed this 3rd day of July, 2019, in San Diego, California.

/s/ Eric R. Larson
Eric R. Larson, #185750

APPENDIX A (COURT OF APPEAL OPINION)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GENTILE, JR., Defendant and Appellant.	E069088 (Super.Ct.No. INF1401840) OPINION

APPEAL from the Superior Court of Riverside County. Graham A. Cribbs, Judge. Affirmed.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Gentile, Jr.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles Ragland, Lynne McGinnis, and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Joseph Robert Gentile of first degree murder in connection with the 2014 beating death of Guillermo Saavedra by means of using a golf club, wooden chair, and a beer bottle. The prosecution's main witness testified upon a grant of use

immunity, but, depending on which statements the jury believed, she may have actively participated in the beating using those implements. The jury found untrue an allegation that defendant used a deadly or dangerous weapon, and he was sentenced to 25 years to life.

We reversed that conviction for instructional error pursuant to the Supreme Court decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), because the jury was instructed it could convict defendant under a natural probable consequences theory, one of two theories supported by the evidence, and remanded the matter for the People to decide whether to accept a reduction to second degree murder, or to retry defendant for first degree murder under theories other than natural and probable consequences. (*People v. Gentile* (Feb. 27, 2017, E064822) [nonpub. opn.](*Gentile I*).)

On remand, the People accepted the reduction to second degree murder and defendant was resentenced to an indeterminate term of 15 years to life. Defendant appealed again, raising the issues we had left undecided in the first appeal, affirming the judgment as modified by reducing court facilities assessments. (*People v. Gentile* (Nov. 15, 2018, E069088 [nonpub. opn.](*Gentile II*).) Defendant then petitioned for review arguing that he was entitled to a reversal of his murder conviction pursuant to Senate Bill No. 1437.

The California Supreme Court granted review and transferred the case back to us with directions to vacate our decision filed on November 15, 2018 in defendant's second appeal, and to reconsider the cause in light of Senate Bill No. 1437, and our

determination in the defendant's first appeal that it was probable the jury convicted defendant of murder on the theory he aided and abetted Saundra Roberts in a target crime that, as a natural and probable consequence, resulted in her murder of the victim. (See *Gentile I*, *supra*, E064822, pp. 12-14.)

After reconsidering the matter in light of Senate Bill No. 1437, we again affirm.

BACKGROUND

We take the facts from our previous opinion[1], *Gentile I, supra,* E064822, pages 3-11, with additions based on subsequent procedural history:

Objectively Established Facts

The undisputed facts show that prior to June 21, 2014, Guillermo Saavedra lived in the back of the La Casita restaurant in Indio, acting as property caretaker and handyman. On June 23, 2014, at 7:30 a.m., the owner of the property and his son happened to drive past the restaurant and noticed the lights were on, which seemed unusual. They entered the restaurant when Saavedra did not respond and found Saavedra laying on the floor, dead. Outside, in the parking lot, they found Saavedra's cell phone. The police were contacted.

When they arrived at the restaurant, the police found the victim's body, along with a broken chair, a golf club, a wooden stick with blood, and a broken bottle near the body. The victim's cell phone was found in the grass just north of the building. Investigators

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[1] In a separate section we address the various statements of the witnesses because the divergent accounts of the offense led to the competing theories of defendant's liability for murder.

documented three sets of bloody footprints, at least one of which was a shoeprint, and one of which appeared to have been made by a sock or bare foot. Detectives also collected surveillance videos from the Royal Plaza Inn and from the nearby laundromat. The police obtained and executed various search warrants after viewing evidence on the surveillance tapes of the nearby Royal Plaza hotel and the laundromat. After reviewing those surveillance videos, police officers visited the areas and found a sock on a bush at the property located between the hotel and the laundromat. The sock appeared to have a reddish-brown substance on it.

Also undisputed are certain movements by defendant and his estranged wife, Saundra Roberts, captured on the surveillance videos. At 1:03 a.m. on June 22, 2014, the defendant approached the night entrance of the Royal Plaza Hotel in Indio and pressed the buzzer. Defendant then went to the door of the hotel manager's apartment, seeking to rent a room. He appeared intoxicated, so the manager declined to rent him a room, although defendant and Roberts were regular tenants, renting a room from her two or three times per month.

The hotel manager also managed the coin-operated laundry located near the hotel. Surveillance video from that location showed Roberts talking with her on-again-off-again boyfriend, Stephen Gardner. Gardner had been contacted by Roberts, who asked him to bring a pair of shorts, a shirt and socks to the laundromat. Roberts sounded panicked, so Gardner thought she was in trouble. He took the clothes to the laundromat where he

found Roberts with defendant, which made him angry. The defendant appeared to be wet, and his hands were red.

The victim suffered multiple fractures of his ribs, collarbone, and parts of the spinal structure, as well as lung hemorrhage. The injuries would have required significant blunt force. From the nature of the injuries, the pathologist opined that multiple blunt impact injuries caused the death. The pathologist also noted that the victim had coronary disease that may have led to heart failure, as a result of the beating. The injuries to Saavedra were probably inflicted with fists, a golf club, a beer bottle, and a chair. The pathologist described the cause of death as a heart attack caused by multiple blunt force injuries.

DNA testing of the blood on the sock and the head of the broken golf club matched the victim, Saavedra. There was also DNA that was consistent with defendant's profile as a minor contributor on the sock, as well another person's DNA, which the analyst could not identify due to the complex nature of the mixture. A cigarette butt recovered at the scene contained a mixture of Roberts' and Saavedra's DNA. A second cigarette butt had only one DNA profile, belonging to Saavedra, while a third butt had defendant's DNA on it. Swabs from the golf club head were analyzed and found to contain a mixture of two persons' DNA, but the profile belonging to Saavedra was the only one that could be identified. The swab from the golf club grip had DNA from three people.

In Court and Out of Court Statements

Roberts gave various accounts of the events. At trial, she testified that she called defendant for help moving from Stephen Gardner's residence on Friday, June 21, 2014, so defendant sent a young man with a truck to move her belongings. She was moving her belongings to the restaurant at which Saavedra, her dear friend, worked security and lived. The restaurant was her "safe house" when she was "at odds" with Gardner. Roberts wanted to introduce defendant to Saavedra because Saavedra wanted to meet defendant. Saavedra wanted to meet defendant because they both had backgrounds serving in the Marines. Later, Edward Cordero, one of defendant's house mates, dropped defendant off at the restaurant.

At the restaurant, the three people drank many beers and martinis over the evening. At one point, Roberts went out to purchase more alcohol, and when she returned, the defendant and Saavedra were still in conversation. At some point, the two men raised their voices at each other, but they did not fight. Eventually, Roberts felt both drunk and like a third wheel, so she left the two men and went to her homeless camp to sleep it off. When she left, there had not been any fighting.

In this version, Roberts indicated that she awoke at around 1:00 or 1:30 a.m., and went to a nearby AM/PM store to buy cigarettes; when she came out she saw defendant across the street at the Royal Plaza Inn hotel. She saw him walk through the parking lot and was curious why he had not gone home. Defendant told her he was trying to get a

room at the hotel but was unsuccessful. Defendant was dressed in the same clothes he had worn earlier but his clothes appeared wet.

For this reason, Roberts contacted Gardner and asked him to bring her some clothes at the laundromat. Gardner was unaware that Roberts wanted the clothing for defendant, so he was surprised and angry to see defendant at the laundromat when he showed up with the items. Gardner brought a pair of shorts, a tie-dyed tee shirt, and a single sock.[2] Later, Roberts went to Gardner's place but he ran her off because he was angry. She went back to her homeless camp to sleep and that was the last she saw of defendant or Gardner.

Prior to trial, Roberts gave three other and different statements during interviews with police. In the first pretrial statement, Roberts testified she was living at the restaurant where Saavedra worked, although her relationship with the victim was purely platonic. She did not mention defendant sending a young man with a truck to move her to the restaurant. On Saturday, the defendant called her and wanted to meet with her and get a room with her, although she said it had been 16 months since she had been with defendant.[3] In this version, Roberts indicated she went to Saavedra's place, spoke of the martinis she had made, and discussed how defendant and Saavedra talked about their

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[2] Gardner had left one sock in his van when he delivered the clothing.

[3] There is actually some corroboration for this statement, because the hotel manager testified that defendant had contacted her earlier on June 21, 2014, to reserve a room for the night. However, the hotel manager indicated that defendant and Roberts were regular customers.

military backgrounds. She described how she went out to buy more alcohol, and that the next morning, when she saw defendant, he told her he had gotten to a brawl.

A few days after giving her first statement to police, Roberts was interviewed again; this time, the officers wanted her to focus on the events of Saturday. Roberts again told the officers defendant had called her that day, and that she spoke to him in the morning; when she met up with him, defendant was drunk, belligerent, and not himself. After ditching defendant following a trip to her storage unit, she met up with him again at the Jack-in-the-Box, where they got into an argument and went their separate ways. However, she went with defendant to the Royal Plaza Inn that Saturday before noon. Then she was dropped off at the La Casita restaurant in a white car. Saavedra had talked to defendant and invited him over, so defendant showed up at the restaurant at about 8:00 p.m., but Saavedra was not there. Roberts and defendant went to the store to purchase beer and got into another argument. Roberts returned to the restaurant without defendant, and Saavedra had returned. Saavedra told her they should go get the defendant if he were drunk, so Roberts went back and told defendant that Saavedra wanted to meet him.

In this second interview, Roberts repeated the information about Saavedra and defendant discussing their military service, Vietnam in particular, when she went out to purchase more alcohol. When she returned, their voices were raised, but they were not physical. Roberts left to go to her camp, and defendant stayed at the restaurant. She awoke at around 1:30 or 2:00 a.m. to go to the AM/PM market, where she saw defendant across the street at the Royal Plaza hotel. His clothes were soaking wet, he told her he

could not find his phone, and said something about getting into a fight. Specifically, Roberts reported that he had said he had been in a bad fight and that he might have killed the man, that he had hurt him pretty bad. He also said he needed clothes. Also, during this second interview, Roberts stated defendant smelled like blood and that she thought she saw blood on his shoes. However, defendant was wearing sandals, according to the surveillance videos.

Roberts was interviewed a third time after the defendant's arrest. She told officers she had spoken by telephone with Charolette Sullivan, a long-time friend of defendant's and hers. In this interview, officers were again trying to clarify the events of Saturday, June 21, 2014. In this statement, Roberts told officers she had wanted to keep Saavedra's place a secret from defendant, although at trial she stated she wanted to keep it secret from Gardner.

Defendant asked his brother for a ride, but his brother declined. According to the brother's statement to police (which the brother refuted at trial), defendant told his brother he had done something bad and needed to leave. Defendant called his house-mate and coworker Susan Champion that he was leaving and would not be returning, although she denied this at trial. On Sunday, June 22, 2014, defendant asked his housemate and coworker Edward Cordero for a ride to Imperial Beach. Cordero frequently gave rides to defendant, who did not have a car. Cordero dropped defendant off at Imperial Beach and returned a short time later.

Defendant's longtime friend, Charolette Sullivan lived in Imperial Beach, and had invited defendant to visit over the Fourth of July weekend. However, defendant called to ask if he could come down earlier, and, when Sullivan agreed, defendant arrived that same day. Defendant appeared to be sad, and his hands appeared swollen, but he did not immediately mention being in a fight with anyone. He attributed the swelling to arthritis.

Eventually, defendant disclosed to Sullivan he had gotten into a fight with someone and had hit him, but that when the victim apologized, defendant stopped. However, afterwards, defendant stated that Roberts picked up some kind of club and started swinging at the man. Later, Roberts also called Sullivan, and more or less confirmed the defendant's version. Roberts told Sullivan that Saavedra had raped her and that defendant was upset about it. Roberts said that both defendant and Saavedra got really drunk and were talking about Marines stuff when Roberts mentioned to defendant that Saavedra had raped her in that same restaurant. Roberts indicated that she left, and when she did, the defendant and Saavedra got into a fight. Roberts indicated she went back later and bleached everything.

On June 28, 2014, police executed a search warrant of the residence of Sullivan, where they arrested defendant. In the garage where defendant was staying, there was a blue backpack and beach bag, along with a piece of paper that had writing on it. In the backpack, officers found a tie-dyed tee shirt and four Hawaiian shirts.

Following his arrest, defendant was interviewed. In the interview, defendant described how Cordero had dropped him off at the La Casita restaurant to meet Roberts,

where there was a man (the victim) defendant did not know. Roberts had told defendant she was staying at the restaurant in exchange for watching the restaurant. Roberts told defendant that the other man present had been raping her. The man admitting raping Roberts and said he was sorry. Defendant struck the man three or four times in the face, using his hands. Roberts then said that the man would never rape her again and began hitting the victim with a club or what appeared to the defendant to be a sledgehammer. Defendant took the object away from Roberts, but she retrieved it and resumed hitting the victim. Defendant took the weapon away a second time, threw it on the ground, asked her what she was doing, and then left. Defendant denied ever striking the victim with a weapon.

Legal Proceedings

Defendant was charged with one count of premeditated murder (Pen. Code, § 187, subd. (a))[4], along with personal use of a deadly weapon (§ 12022, subd. (b)(1)), and one prison prior. (§ 667.5, subd. (b).) Following a jury trial, defendant was convicted of first degree murder, but the jury did not make a true finding as to the weapon use allegation. The prison prior was dismissed, and defendant was sentenced to an indeterminate term of 25 years to life in prison. He appealed.

On February 27, 2017, in *Gentile I,* we reversed the conviction for first degree murder based on the California Supreme Court case of *People v. Chiu* (2014) 59 Cal.4th 155, and remanded the matter to the trial court for the People to elect whether to retry

[4] All further statutory references are to the Penal Code unless otherwise indicated.

defendant or accept a reduction in the degree of the offense, without reaching the remaining issues. On remand, the People accepted the reduction to second degree murder, and defendant was resentenced to an indeterminate term of 15 years to life. Defendant objected because there were five issues unaddressed.

Defendant filed his second appeal, raising the issues that had been left undecided in *Gentile I*. On November 15, 2018, we affirmed the judgment, but modified the sentence to reduce the court facilities assessments that were imposed. (*Gentile II, supra,* E069088.) Defendant petitioned the California Supreme Court for review, seeking a determination that the provisions of Senate Bill No. 1437 applied retroactively to cases not final on appeal.

On March 13, 2019, the Supreme Court granted review, transferred the matter to this court with directions to vacate our decision and reconsider the cause in light of Senate Bill No. 1437 (eff. Jan. 1, 2019) and our holding in the first appeal that it was probable the jury convicted defendant of murder on the theory that he aided and abetted Saundra Roberts in a target crime that, as a natural and probable consequence, resulted in her murder of the victim.

DISCUSSION

In the first appeal, defendant relied on *Chiu, supra,* 59 Cal.4th 155, to argue that his first degree murder conviction should be reversed because the jury was instructed on an impermissible natural and probable consequences theory of liability. At trial, the jury had been instructed that it could convict defendant of first degree murder if it concluded

defendant directly committed the murder, or if it found he aided and abetted the perpetrator (Roberts) in committing the murder. As to this second theory, the jury was further instructed that he could be convicted of first degree murder if he committed an aggravated assault on the victim (former § 245, subd. (a)(1)), while the coperpetrator committed an assault with a deadly weapon, and the victim died as a natural and probable consequence of the assault with a deadly weapon. (*Gentile I, supra,* E064822, p. 12.) We agreed this was error in reversing and remanding. We are now charged with determining whether the same error requires reversal of the second degree murder conviction. We conclude the second degree murder conviction is proper.

In *Chiu,* the Supreme Court held that a defendant cannot be found guilty of first degree murder under the natural and probable consequences theory of accomplice liability. (*Chiu*, *supra*, 59 Cal.4th p. 166.) However, the Supreme Court did not hold that an aider or abettor could never be convicted of murder; it simply limited liability for first degree premeditated murder to offenders whose convictions were based on direct aiding and abetting principles. (*Ibid.*) As for aiders and abettors convicted under the natural and probable consequences theory, the Court held that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder. (*Ibid.*)

Based on the reasoning of *Chiu*, we agreed that reversal was required in *Gentile I*, because the jury instructed on alternative theories of liability, one of which was improper: On one hand, according to the instructions and Roberts' testimony, the jury could

conclude the defendant directly and personally killed the victim and that Roberts was an accomplice after the fact. (*Gentile I, supra,* E064822, p. 11.) On the other hand, the jury could conclude defendant committed an aggravated assault while aiding and abetting Roberts' assault with a deadly weapon, the natural and probable consequences of which was to cause the victim's death. (*Id.,* at p. 12.) Reversal was required because we could not discern whether the conviction was based on a valid or invalid theory.

In the meantime, after the decision in *Gentile I*, and before *Gentile II* was decided, the Legislature passed Senate Bill No. 1437, amending the provisions of section 189 to add subdivision (e), in response to *Chiu*. After we filed our opinion in *Gentile II*, defendant requested by letter that we allow supplemental briefing on the retroactive applicability of Senate Bill No. 1437, which had not yet gone into effect, to his second degree murder conviction. (See *In re Estrada* (1969) 63 Cal.2d 740, 742; see also, *People v Martinez* (2019) 31 Cal.App.5th 719, 728.) We treated the letter as a petition for rehearing, but we declined the request as premature because Senate Bill No. 1437 would not go into effect until January 2019.

The amendment to section 189 provides, "(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a

major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

In adopting this amendment, the Legislature indicated its purpose: "This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree, or the person was a major participant in the underlying felony and acted with reckless indifference to human life." (Stats. 2018, ch. 1015, Sen. Bill No. 1437.) It only intended to prohibit murder convictions where the participant was not the actual killer or a direct aider or abettor of the murderer. (*Ibid.*)

In construing the amendment, we follow well settled principles governing statutory interpretation. """Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. [Citation.]"" [Citations.]" (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) If the language is clear and unambiguous, then we need go no further. (*Ibid.*) """We select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' [Citation.]"

(*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 741.) Defendant does not argue that the terms of the amendment are vague or ambiguous, so we do not tarry there.

In his supplemental letter brief, defendant argues that the amendment to section 189, "has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine." We disagree. This argument proposes a construction of section 189, subdivision (e), which is contrary to the plain language of the statute, misconstrues the holding in *Chiu*, and would lead to absurd results.

As indicated, *Chiu* made clear that second degree murder liability is proportional to the culpability of an aider and abettor under the natural and probable consequences doctrine. (*Chiu*, *supra,* 59 Cal.4th at p. 166.) Additionally, the plain language of section 189, subdivision (e), expressly provides for murder liability in situations in which the defendant is the actual killer, or where the defendant was a "major participant" within the meaning of section 190.2, subdivision (d). That subdivision authorizes imposition of the death penalty or imprisonment for life without possibility of parole for "every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons."

Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment

expressly provides for both first and second degree murder convictions under appropriate circumstances. Defendant's construction would therefore conflict not only with the plain language of the statute, but also with the holding of *Chiu*, which also held that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Chiu, supra,* 59 Cal.4th at pp. 166-167, citing *People McCoy* (2001) 25 Cal.4th 1111, 1117–1118.) Considering the statement in *Chiu,* holding that under the natural and probable consequences theory, punishment for second degree murder is commensurate with a defendant's culpability, neither the Supreme Court nor the Legislature intended to relieve an aider-abettor entirely of liability for murder.

At a minimum, after reviewing the record, we conclude that defendant in this case was a direct or active aider and abettor. He actually delivered serious blows with his fists and feet to the victim at the urging of Roberts, and in one statement expressed fear that he may have killed the victim. His hands were swollen when he arrived in Imperial Beach, consistent with a beating by fists. Even if the jury believed defendant's testimony—that after his own beating of the victim he left the scene when Roberts began beating the victim with a deadly or dangerous weapon—the killing would have been the result of defendant's aggravated assault committed while directly aiding or abetting Roberts' assault with a deadly weapon.

In other words, he directly aided and abetted the murder of the victim by beating and now stands properly convicted of second degree murder. We addressed the problematic instruction that allowed the jury to find him guilty of first degree murder

under the natural and probable consequences theory in *Gentile I.* The People thereafter accepted a reduction of degree to second degree murder, obviating any prejudice from the erroneous instruction. The amended provisions of section 189, subdivision (e), did not prohibit this result, and the conviction for second degree murder is commensurate with defendant's culpability and conforms with the legislative intent underlying Senate Bill No. 1437 and the holding of *Chiu*.

The People argue that defendant is not entitled to have the merits of a Senate Bill No. 1437 claim in this appeal because he must first raise that claim in the trial court by way of a petition pursuant to Penal Code section 1170.95. There is some support for this petition. (See *People v. Carter* (2019) 34 Cal.App.5th 831,835; *People v. Anthony* (2019) 32 Cal.App.5th 1102,1147; *People v. Martinez* (2019) 31 Cal.App.5th 719, 724-728.)

However, none of those decisions were the result of a transfer from the California Supreme Court with directions to reconsider the cause in light of Senate Bill No. 1437. For this reason, as well as reasons of judicial economy, we reach the merits and confirm our prior conclusion in this case (*Gentile II*, E069088, p. 3, fn. 2), that defendant was, at a minimum, an active aider-abettor who is not entitled to vacation of his murder conviction.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.

APPENDIX B (ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING)

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GENTILE, JR., Defendant and Appellant.	E069088 (Super.Ct.No. INF1401840) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT

The court has reviewed the petition for rehearing filed June 13, 2019. The petition is denied. The opinion filed in this matter on May 30, 2019 is modified as follows:

1. On page 17, at the end of the second full paragraph, which extends to page 18, add the following:

   As an active aider-abettor, or as the actual killer, no resort to the natural and probable consequences theory applies. The theory of vicarious liability was only required to support the first degree murder conviction, which is no more.

There is no change in the judgment.

CERTIFIED FOR PUBLICATION

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.

Eric R. Larson, #185750
330 J Street, # 609
San Diego, CA 92101
Larson1001@yahoo.com

Court of Appeal No.: E069088
Superior Court No.: INF1401840

DECLARATION OF SERVICE

I, Eric Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101. I further declare I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 3rd day of July, 2019, I caused to be served the following:

APPELLANT'S PETITION FOR REVIEW

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

Joseph Gentile, #AY3628
CMC East Facility A2144
P.O. Box 8101
San Luis Obispo, CA 93409

Arnold Lieman (trial atty)
78446 Platinum Dr
Palm Desert, CA 92211

I further declare that on this same date I electronically served a copy of the above-referenced document to the following parties:

Appellate Defenders, Inc.
eservice-court@adi-sandiego.com

Office of the Attorney General
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Riverside County District Attorney
Appellate-unit@rivcoda.org

Superior Court of Riverside County
appealsteam@riverside.courts.ca.gov

Fourth District Court of Appeal, Div. 2
Served via True Filing

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 3, 2019, at San Diego, California.

/s/ Eric R. Larson
Eric R. Larson