IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH GENTILE, JR., Defendant and Appellant.	)	No. S256698

Fourth District Court of Appeal, Division Two, Case Nos. E069088/E064822
Riverside County Superior Court Case No. INF1401840
Honorable Graham A. Cribbs, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

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Joseph Gentile

By Appointment of The
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ISSUES PRESENTED FOR REVIEW

1. Does the amendment to Penal Code section 188 by recently enacted Senate Bill No. 1437 eliminate second degree murder liability under the natural and probable consequences doctrine? 2. Was it prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder?

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INTRODUCTION

This case has a somewhat complex procedural and factual history that is relevant to the issues under review before this Court. The evidence at appellant's trial showed that appellant Gentile, Saundra 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 that a dispute arose over a rape allegation levied by Roberts against the victim, that appellant had punched the victim a few times, but that Roberts then began striking the victim with some sort of club or other weapon. Appellant stated that 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. The Court of Appeal reversed appellant's first degree murder conviction pursuant to this Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 ("*Chiu*") 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. (*People v. Gentile* (Feb. 27, 2017, E064822) [nonpub. opn.], pp. 2-3, 11-14 ("*Gentile I*"), as modified Mar. 22, 2017.)

After Senate Bill No. 1437 ("SB 1437") was passed by our Legislature, and while his appeal remained pending on several other issues the Court of Appeal left unresolved in the first appeal, appellant requested permission to file a supplemental letter brief seeking relief under SB 1437. The Court of Appeal denied appellant's request to file supplemental briefing. In its subsequent opinion filed November 15, 2018, the Court of Appeal noted that "when it becomes effective, [SB 1437] will eliminate liability for murder based on the natural and probable consequences doctrine," but explained it denied appellant's request because appellant "was, at a minimum, an active aider and abettor for which a reduction to second degree murder was appropriate, pursuant to *People v. Chiu* (2014) 59 Cal.4th 155, 166." (*People v. Gentile* (Nov. 15, 2018, E069088) [nonpub. opn.] ("*Gentile II*").)

This Court then granted review and transferred the case 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 transfer order.)

Following transfer, the Court of Appeal filed a new opinion holding appellant was not entitled to relief because SB 1437 did not eliminate second degree murder liability under the natural and probable consequences doctrine, and because appellant suffered no prejudice based on the natural and probable consequences instruction given his jury since he was a direct or "active" aider and abettor.[1] (*People v. Gentile* (May 30, 2019, E069088) [nonpub. opn.], pp. 12-18 ("*Gentile III*"), as modified Jun. 20, 2019.)

[1] This opinion was originally certified for publication by the Court of Appeal, but was later ordered depublished by this Court.

This Court should now hold the Court of Appeal's analysis of both of these issues was erroneous, the amendment to Penal Code section 188 by recently enacted Senate Bill SB 1437 eliminates second degree murder liability under the natural and probable consequences doctrine, and it was prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder.

STATEMENT OF CASE

As noted in the above introduction and summary of the case, this case has a relatively complex and lengthy procedural history, much of which is also relevant to the issues currently under review before this Court. Some of the procedural history set forth in the Court of Appeal's most recent opinion is also incorrect. Appellant will set forth the pertinent portions of the procedural history of this case in detail below for purposes of both accuracy and completeness.

A jury previously found appellant guilty of first degree murder, while also finding it not true that appellant personally used a weapon in the offense. Upon direct appeal, appellant raised several arguments in support of a reversal of his first degree murder conviction, one of which was a claim of instructional error pursuant to this Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 ("*Chiu*").[2]

On February 27, 2017, the Court of Appeal filed an opinion reversing appellant's conviction in its entirety based on the *Chiu* error. (*People v. Gentile* (Feb. 27, 2017, E064822) [nonpub. opn.], pp. 11-15.) The Court of Appeal further stated that "[b]ecause remand for retrial is required due to that instructional error, we do not need to reach defendant's other

[2] Appellant's trial occurred more than one year after this Court's decision in *Chiu*, but there was no discussion of *Chiu* at his trial, and his jury was nevertheless instructed on a first degree murder theory under the natural and probable consequences doctrine.

points," and "[b]ecause retrial is required, we do not need to reach defendant's other claims of error." (*Id.* at pp. 11, 14.)

On March 13, 2017, the People filed a Petition for Rehearing, correctly noting that the appropriate remedy for the *Chiu* error was a limited reversal in which the People are given the option on remand of conducting a retrial or accepting a conviction of second degree murder. (See E064822, Attorney General 3/22/17 Pet. for Rehearing p. 4; *People v. Chiu, supra,* 59 Cal.4th at p. 168; see also E064822, AOB p. 32; ARB p. 8 [also requesting this same limited remedy for the *Chiu* error].)

On March 22, 2017, the Court of Appeal filed an Order Modifying Opinion And Denying Petition For Rehearing, with a Change In Judgment. The Order changed the prior disposition of the opinion for purposes of the *Chiu* error to now provide:

> "The conviction for first degree murder is reversed. The matter is remanded for the People to decide whether to accept reduction of count 1 to second degree murder, or to retry defendant for first degree murder under theories other than natural and probable consequences." (*People v. Gentile* (Mar. 22, 2017, E064822) [nonpub. opn.], order modifying opinion and denying rehearing, p. 1.)

On March 23, 2017, appellant filed a Petition for Rehearing, urging that in light of the change in disposition and the limited reversal required under *Chiu*, it was now appropriate and necessary to consider appellant's remaining contentions on appeal, which arguably entitled him to a complete reversal of his conviction. (E064822, Appellant 3/23/17 Pet. for Rehearing.)

On March 30, 2017, the Court of Appeal filed an Order denying appellant's Petition for Rehearing. (E064822, 3/30/17 Order.)

Upon a remand to the Superior Court pursuant to *Chiu*, the prosecutor elected to accept a reduction in the offense 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 on appeal the remaining issues left unresolved in his initial appeal. (*Gentile II, supra,* E069088, pp. 2-3.) In addition, on October 24, 2018, appellant filed a request to allow supplemental briefing on the applicability of recently enacted 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. (E069088, 10/26/18 Order.)

On November 15, 2018, the Court of Appeal filed its opinion, rejecting all of appellant's remaining issues, with the exception of ordering a modification to the court facilities assessments imposed. (*Gentile II, supra,* E069088.) 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, supra,* 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. (S253197, Pet. Rvw.)

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.)

On May 30, 2019, the Court of Appeal filed a new opinion. (*Gentile III, supra,* E069088.) In this opinion, the Court of Appeal declined to decide the issue of whether SB 1437 applies retroactively to cases not yet final on appeal under *In re Estrada* (1965) 63 Cal.2d 740, and instead opted to address the issue of appellant's entitlement to relief under this new law on the merits. (*Id.* at p. 18.) On the merits, the Court of Appeal held appellant was not entitled to relief because SB 1437 did not eliminate second degree murder liability under the natural and probable consequences doctrine, and because appellant suffered no prejudice based on the natural and probable consequences instruction given his jury since he was a direct or "active" aider and abettor.[3] (*Id.* at pp. 12-18.)

On June 13, 2019, appellant filed a petition for rehearing on the grounds that: 1) the May 30, 2019 opinion erroneously concluded SB 1437

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[3] In its discussion of the procedural history of this case within this opinion, the Court of Appeal stated appellant's request to file a supplemental brief seeking relief under SB 1437 was filed after the Court's opinion in *Gentile II*, it was treated as a petition for rehearing, and it was denied as premature because SB 1437 would not go in effect until January 2019. (*Gentile III, supra,* E069088, p. 14.) This is not accurate. As set forth above, appellant's request to file a supplemental brief under SB 1437 was made prior to both oral argument and the opinion in *Gentile II*, and there was thus no need to treat this request as a petition for rehearing. The *Gentile II* opinion additionally stated appellant's request to file a supplemental brief was denied "because he was, at a minimum, an active aider and abettor, if not the actual killer, for which a reduction to second degree murder was appropriate, pursuant to [*Chiu*]." (*Gentile II, supra,* E069088, p. 3, fn. 2.)

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 procedural history of the case with respect to the SB 1437 issue; and 3) the new opinion omitted a discussion and resolution of the six other issues raised on appeal.

On June 20, 2019, the Court of Appeal issued an order modifying pages 17 and 18 of the opinion regarding the issue of prejudice, and denied rehearing. (*Gentile III, supra,* E069088, as modified 6/20/19 on denial of rehearing.)

Appellant then filed a petition for review, and this Court granted review on the following two issues: 1. Does the amendment to Penal Code section 188 by recently enacted Senate Bill No. 1437 eliminate second degree murder liability under the natural and probable consequences doctrine? 2. Was it prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder? [4]

STATEMENT OF FACTS

Appellant adopts the factual background of appellant's trial as set forth in the Court of Appeal's opinion in *Gentile III.* (*Gentile III, supra,* E069088, pp. 3-11.)

Appellant additionally supplements this summary of the evidence at appellant's trial with the following Statement of Facts, which also includes citations to the record.[5]

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[4] This Court originally granted review on a third issue, namely, does Senate Bill No. 1437 apply retroactively to cases not yet final on appeal? By subsequent order filed October 30, 2019, this Court limited review and briefing to the above two issues.

[5] Unless otherwise noted, the citations to the Reporter's and Clerk's Transcripts within this brief are to the record on appeal in appellant's first appeal in Case No. E064822, which contains the transcripts from his trial.

Saundra Roberts was given use immunity regarding her testimony in this case. (2 R.T. pp. 236-237.) Roberts was previously married to appellant. (2 R.T. p. 238.) Roberts testified that in June of 2014, she was dating Stephen Gardner, and had been friends with Guillermo "Bill" Saavedra for about a year. (2 R.T. pp. 237-238, 256; see also 3 R.T. pp. 586, 597.) Saavedra both worked security and lived inside a restaurant called La Casita, and Roberts would sometimes stay there when she was fighting with her boyfriend Gardner. (2 R.T. pp. 237-240, 256, 295.)

Roberts testified that on Friday, June 20, 2014,[6] she had decided to move from Gardner's residence into the restaurant, and she called appellant for help with her move. Appellant sent a young man from his work with a truck to pick up both Roberts and her belongings from Gardner's apartment and move her into the restaurant. (2 R.T. pp. 240-244, 246-248, 301.) Roberts was drinking that day. (2 R.T. p. 255.) Roberts testified that at one point that day appellant called her and she made plans to meet with him. (2 R.T. pp. 252-256.) She and appellant had also been talking on the phone because they had plans to go to Charlotte Sullivan's house in San Diego for the Fourth of July weekend. (2 R.T. pp. 260-261.) Saavedra was also invited to go on this trip. (2 R.T. p. 293.)

Roberts had previously told Saavedra that appellant was a former Marine. (2 R.T. pp. 254, 262-263.) After she returned to the restaurant, appellant called Roberts. (2 R.T. pp. 257, 261-263.) Saavedra, who was also a former Marine, said he wanted to meet appellant and asked to speak to him on the phone. (2 R.T. pp. 255-256, 261-264.) Saavedra then invited appellant over to the restaurant. (2 R.T. pp. 264-266, 300, 310-311.)

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[6] Although the record contains some inconsistencies and Roberts sometimes testified the events at issue occurred on the night of Friday June 20 and early morning of Saturday June 21, the record as a whole indicates the events occurred on Saturday night June 21 and Sunday morning June 22. (See, e.g., 2 R.T. pp. 323-324.)

Edward Cordero testified he lived with and was friends with appellant, and he gave appellant a ride to the La Casita restaurant to meet Roberts. (1 R.T. pp. 211-217.)

Roberts testified that when appellant arrived, Saavedra was not there and the restaurant was locked, so Roberts and appellant walked to a store to purchase some alcohol. While doing that, they got into an argument. (2 R.T. pp. 266-267, 310, 312-313.) Roberts returned to the restaurant alone, but Saavedra, who had come back to the restaurant while she was gone, said he wanted to meet appellant, so she retrieved appellant and returned with him to the restaurant. (2 R.T. p. 314.)

Roberts, Saavedra, and appellant then talked and drank beer and martinis for at least three or four hours. (2 R.T. pp. 268-270, 314.) At one point while discussing the military and Vietnam, appellant and Saavedra had a "friendly argument," but "then it went back to laughing and Semper Fi and everything was cool." (2 R.T. pp. 270-271, 314-315.) Roberts went out and purchased more beer. (2 R.T. pp. 270-272, 314.) When she returned, their voices were elevated a little bit, but the conversation was still friendly and there was no violence. (2 R.T. pp. 272-273, 315, 322-323.) Roberts testified she began to feel like a "third wheel," and also felt like she had drunk too much, so she left the restaurant in order to go to sleep at a homeless encampment about a block away. (2 R.T. pp. 273-274, 315.)

Sylvia Sicre testified that in June of 2014, she worked as the general manager of the Royal Plaza Inn. (2 R.T. pp. 432-433.) Sicre testified that in the early morning hours of June 22, 2014, appellant, who was a "regular" at the hotel, approached the hotel office and tried to rent a room. However, Sicre refused to rent appellant a room that night because "he didn't look right." (2 R.T. pp. 437-440.) Surveillance video captured an image of appellant approaching the hotel office at around 1:04 a.m. on June 22,

2014, pressing the buzzer repeatedly, waving his hands towards Sicre, and waiting. (2 R.T. pp. 436-439, 444.)

Roberts testified she woke up at around 1:00 or 1:30 a.m., and decided to go buy more beer at the nearby AM/PM store. (2 R.T. pp. 274-275.) After she exited the store, she saw appellant across the street walking through the parking lot of the Royal Plaza Inn. (2 R.T. pp. 275-276.) She approached him on her bike. (2 R.T. pp. 276-277.) Appellant looked tired and drunk, appellant told her he had been trying to get a room at the hotel, and said he wanted to go home. (2 R.T. pp. 277-279.) Appellant did not have his phone with him. (2 R.T. p. 279.) Additionally, it appeared that appellant's face and shirt were soaking wet, as if he had jumped or fallen into the swimming pool. (2 R.T. pp. 279-280, 316.) Appellant was not wearing shoes. (2 R.T. p. 322.)

Upon being shown a transcript of her prior recorded statements to investigators, Roberts testified she told investigators that appellant appeared drunk, appellant said something about losing his phone, said he had gotten into a really bad fight, and said he needed a shirt and some shoes. (2 R.T. pp. 316-319.) Appellant also said he "might have killed a man" and he had "hurt him pretty bad." (2 R.T. pp. 318-319, 324.) Roberts recalled telling investigators she thought she saw mud or blood on appellant, and that she smelled blood. (2 R.T. pp. 320-321.) In the past, she had seen appellant get violent after drinking. (2 R.T. p. 323.)

Roberts testified that after seeing appellant by the pool, she called Gardner and asked him to bring over a shirt. (2 R.T. pp. 279-280.) She and appellant then met Gardner at a nearby laundromat. (2 R.T. pp. 280-282.) Gardner provided appellant a "tie-dye" T-shirt. (2 R.T. p. 328.) Roberts testified she then left. (2 R.T. pp. 282-285.)

Gardner testified Roberts called him, sounded panicked, and asked him to bring shorts, a shirt, and socks to the laundromat. (2 R.T. pp. 361-

364.) When he got there, he was surprised to find Roberts with appellant. (2 R.T. pp. 363-366.) Gardner testified appellant appeared to be wet, had some redness on his hands, and "appeared mean enough." (2 R.T. p. 367.) Gardner gave appellant a tie-dye shirt, a pair of shorts, and one sock, and then left. (2 R.T. pp. 366-367.)

Surveillance video captured an image of Roberts on her bicycle in front of the laundromat at 1:15 a.m. on June 22, 2014. (2 R.T. pp. 286-288.) The video also captured images of her with Gardner, of her with appellant and Gardner, and of appellant holding something in his hands, which Roberts testified were the clothes Gardner brought. (2 R.T. pp. 289-292, 368-371.)

Roberts testified she then went back to the homeless camp, slept for several hours, and woke up at daybreak the next morning. Later that afternoon, Roberts went back to the restaurant and knocked on the door, but nobody answered. (2 R.T. pp. 285, 292.) She then went to a nearby market, and the owner of the market, Gus, told her he had seen Saavedra earlier that afternoon. (2 R.T. pp. 285, 292-293, 299.)

Based in part on her prior statements to investigators, Roberts testified she could have been wrong about her dates, and that the events she testified to could have occurred on the night of Saturday, June 21, 2014 and the morning of Sunday, June 22, 2014, rather than on Friday, June 20, 2014, and Saturday, June 21, 2014. (2 R.T. pp. 323-324.)

Susan Campion testified she lived in the same house as appellant, and she was one of his coworkers at Gold Coast Steel. (1 R.T. pp. 198-201.) Campion testified appellant did not come home on Sunday, June 22, 2014. (1 R.T. p. 201.) Campion never saw appellant again, and her niece moved into appellant's room. (1 R.T. pp. 204-205.)

Cordero testified that on or about Sunday, June 22, 2014, appellant asked him for a ride to Imperial Beach in San Diego County, and Cordero drove him out there that day. (2 R.T. pp. 217-219, 222.)

Sullivan testified she and appellant had planned for him to come visit her in Imperial Beach during the 4th of July weekend in 2014. (2 R.T. pp. 398-400) One day in late June 2014, about a week before police came to her house and arrested appellant on June 28, 2014, appellant called her and asked if he could come out earlier than originally planned. When she agreed, he came out later that same day. (2 R.T. 398-400.) When he arrived, appellant appeared a little "sad," his hands were swollen, and he said he was suffering from arthritis. Upon his arrival, appellant did not mention anything about being in or witnessing a fight. (2 R.T. pp. 401-402.)

Manuel Franco, Jr., testified his family has owned La Casita restaurant since 1948, and Saavedra lived at the restaurant and provided security in exchange. (1 R.T. pp. 92-94.) At around 7:30 or 7:40 in the morning on June 23, 2014, Franco Jr. and his father were traveling past the restaurant, noticed the lights were on, and decided to investigate. (1 R.T. p. 96.) Inside, they found Saavedra's deceased body on the floor. (1 R.T. pp. 97-98.) Later, Franco Jr. found a cell phone in the parking lot. (1 R.T. pp. 98-99.) Franco Jr. additionally testified there was only one way in and out of the restaurant, and that when he and his father arrived, that door was locked. The only way to lock or unlock the door was with a key, which Saavedra had possessed. (1 R.T. 102-105.)

Officer Christopher Piscatella testified he responded to a call of a dead body at the restaurant at 7:54 p.m. on June 23, 2014. (1 R.T. pp. 106-107, 111-112.) Upon his arrival, Franco Jr. also pointed the officer towards a cell phone in the grass on the north side of the building. (1 R.T. pp. 108-109.) Inside, Officer Piscatella observed a broken chair, a golf club shaft, a

broken bottle near the deceased body, large amounts of blood, and some shoe prints. (1 R.T. p. 110.)

Deputy Coroner Darin Ball testified he responded to the restaurant on June 23, 2014. He estimated from the state of decomposition that the body had been there from one to five days. (2 R.T. pp. 448-451.) Ball testified the injuries he observed on the body were consistent with an assault using some sort of instrument. (2 R.T. pp. 452-457.) No keys were found in the victim's pockets. (2 R.T. p. 456.)

Forensic technician David Serna testified he observed and photographed Saavedra's body, which contained a lot of blood, as well as a "stick" containing blood, two overturned chairs containing blood, part of a golf club containing blood, a broken beer bottle containing blood, and some cigarette butts from an ashtray. (1 R.T. pp. 129-131, 136-138, 141.) Serna documented three sets of bloody footprints, at least one of which was a shoeprint and one of which appeared to be from a sock or a bare foot. (1 R.T. pp. 131-136, 139-141, 144-145.)

Detective Jeremy Hellawell testified that officers collected a beer bottle, cigarette butts from an ashtray, the shaft of a broken iron golf club, the head from the broken golf club, and the cell phone found outside the restaurant. (1 R.T. pp. 163-166, 169-172, 180-181.) Detective Hellawell also collected surveillance video from the Royal Plaza Inn and from the nearby laundromat. (1 R.T. pp. 174-179; 2 R.T. pp. 433, 440-444.)

Dr. Allison Hunt, a forensic pathologist, performed an autopsy on Saavedra on June 24, 2014. (3 R.T. pp. 559-562.) Saavedra was in an early state of decomposition at the time. (3 R.T. p. 564.) Dr. Hunt explained lacerations are created when a blunt object or a fist strikes a body, splitting the skin. (3 R.T. p. 567.) There was a one-inch V-shaped laceration to the right back of Saavedra's scalp that Dr. Hunt opined was likely caused either by a foreign object or by an un-braced fall. (3 R.T. pp. 567, 570.)

Saavedra's frenulum, which is a piece of skin under the tongue, was torn, causing a significant hemorrhage. (3 R.T. pp. 568-570.) A punch to the face could have caused this injury. (3 R.T. p. 570.) Saavedra's face and head had several more lacerations that could have been caused either by a fist or an object. (3 R.T. pp. 567-570.) Saavedra's chest and body had multiple bruises in various sizes, each of which could have been inflicted by fists or by an object. (3 R.T. pp. 571-574.) The third metacarpal of Saavedra's left hand had a bruise, which is usually caused by punching someone else. (3 R.T. pp. 571-573.)

Dr. Hunt testified Saavedra had significant hemorrhaging in his chest and back areas. (3 R.T. pp. 575-576.) His left clavicle was fractured, as were his left front first through fifth, seventh, and ninth ribs. (3 R.T. p. 575.) While ribs generally can be fractured with a forceful punch, the fractured left clavicle and the fractured first rib that lay underneath it required force that would be expected to come only from some sort of an object. (3 R.T. pp. 577-578.)

Dr. Hunt further testified that several of Saavedra's transverse processes, which are small fragments of bones that stick out on the side of his vertebrae, were fractured. (3 R.T. pp. 575-576, 579.) More often than not, such fractures are associated some sort of instrument. (3 R.T. pp. 579-580.) Saavedra's right posterior first through fourth ribs and front right sixth rib were also fractured, which would require a significant amount of force. (3 R.T. pp. 576-579.) Saavedra's right scapula was fractured, which required a direct blow with high force, and which Hunt opined was caused by a blunt object. (3 R.T. pp. 576, 580-581.)

Dr. Hunt testified Saavedra's suffered from both an enlarged heart and coronary artery disease. (3 R.T. p. 584.) There was a 75% stenosis, which is a significant blockage by plaque, in his left circumflex and a 50% stenosis in the right coronary artery. (3 R.T. pp. 584-585.) Such a

combination of an enlarged heart and plaque can cause sudden death. (3 R.T. p. 585.) There was also thrombosis in his left anterior descending coronary artery, which is a main artery of the heart, and which usually causes sudden death. (3 R.T. pp. 584-585.) Dr. Hunt opined the cause of Saavedra's death was multiple blunt impact injuries that caused a heart attack. (3 R.T. pp. 586-589.)

Raymond Madick testified he owned and operated Gold Coast Steel, and appellant worked for him as of June 20, 2014. (2 R.T. pp. 414-417.) Madick testified appellant began a vacation on Monday, June 23, 2014 that he had scheduled "months in advance." (2 R.T. pp. 417-419.) Detective Kelly Hawkins testified Madick told him on June 27, 2014 that Madick had no idea where appellant was, and that appellant had been scheduled to work Monday, June 23, 2014. (2 R.T. pp. 425-428.)

Officer Jesse Martin testified that on June 27, 2014, he went to Gold Coast Steel to look for appellant, and he also spoke with Campion. (2 R.T. pp. 383-384.) Campion was lucid but may have been drinking. (2 R.T. p. 385.) Campion said appellant told her he was not returning to the residence he shared with Campion. Campion said her adopted daughter was now living in his room. (2 R.T. pp. 386-387.)

Robert Gentile ("Robert"), appellant's younger brother, was contacted by police on June 27, 2014. Robert testified he told police the last time he had spoken to appellant was a day or two before appellant left on vacation, and at that time appellant had been looking for a ride to San Diego. (1 R.T. pp. 157-160.) Officer Steven Oehring testified Robert told him he had spoken to appellant by phone, and appellant said he had done something bad and needed to leave. (2 R.T. pp. 390-392.)

Sullivan testified that the day before appellant was arrested, he told her he had a problem and had gotten into a fight with another man. Appellant said he was drunk and Roberts said the other man had raped her,

which made him upset. Appellant said he punched the other man a couple times, but eventually the man apologized and appellant stopped hitting him. However, at that point, appellant said Roberts picked up a club and started hitting the man with it. (2 R.T. pp. 403-406, 410-411.)

Appellant was arrested at Sullivan's residence in Imperial Beach at approximately 3:35 a.m. on June 28, 2014. (2 R.T. pp. 461-464, 467; 3 R.T. pp. 595-597.) Inside of a backpack located near appellant's bed, a tie-dyed T-shirt was recovered. (2 R.T. pp. 464-465.) Detective Hawkins testified appellant's fingertips had some coloration. (3 R.T. pp. 599-600.) Additionally, there was some coloration at the base of his left ring finger and the base of his left pinky finger. (3 R.T. pp. 600-601.)

Police interviewed appellant following his arrest, and a recording of this interview was played for the jury. (3 R.T. pp. 601-602, 613-615; 1 C.T. pp. 176-229 [transcript].) During this interview, appellant said Cordero dropped him off at the La Casita restaurant in order to meet Roberts. (1 C.T. p. 194.) Appellant said that when he arrived, there was a man there appellant had not previously met. (1 C.T. pp. 194-195, 213.) Roberts told appellant she was staying at the restaurant in exchange for watching over the restaurant. (1 C.T. p. 195.) Eventually, Roberts told appellant the other man there had "been raping" her. (1 C.T. pp. 197, 207, 214, 217, 228.)

Appellant said he then punched the man three or four times in the face, but just with his hands. (1 C.T. pp. 198-199, 206, 214, 227.) However, Roberts then said the guy would never rape her again, and she began hitting him with what appeared to be a sledgehammer. (1 C.T. pp. 198-200, 206, 214, 217.) Appellant took the weapon away from Roberts, and threw it to the ground, but she retrieved it and resumed hitting the man. (1 C.T. pp. 198, 214.) Appellant said he then took the weapon away from Roberts a second time, threw it to the ground, asked her what she was doing, and then left the premises. (1 C.T. pp. 198, 203, 210-211, 214-215, 218.) Appellant

further said he had previously given his phone to Roberts. (1 C.T. p. 204.) Appellant denied ever striking the man with a weapon. (1 C.T. p. 227.)

Roberts testified that following appellant's arrest on June 28, 2014, she spoke "briefly" with Sullivan on the phone. (2 R.T. pp. 325-327.) Sullivan testified that the day after appellant was arrested, Roberts called her. (2 R.T. p. 402.) Sullivan testified Roberts said the man who was killed had raped Roberts, and appellant got upset about it. (2 R.T. pp. 403, 406-407.) Sullivan testified Roberts said appellant and the deceased person had been drinking a lot, they got into a fight, and Roberts left before anything else happened. (2 R.T. pp. 403-405.) Sullivan testified Roberts also said that she later went back, "bleached everything," and cleaned up the mess. (2 R.T. p. 411.)

Detective Hellawell testified that on July 1, 2014, he returned to the Royal Plaza Inn and searched the property for any kind of evidence. (1 R.T. p. 182.) From a bush near a driveway that separated the Royal Plaza Inn and the laundromat, the detective recovered a sock that appeared to have a reddish-brown substance on it. (1 R.T. pp. 182-188.)

DNA testing established there was blood on the sock consistent with Saavedra's DNA profile to a virtual statistical certainty. (3 R.T. pp. 471-472, 480-481, 486, 500-502, 505-516.) The sock also contained DNA consistent with appellant's DNA profile to a frequency occurring in 1 out of every 1,200 Caucasians. (3 R.T. pp. 472-476, 486, 505-516, 523-526.) A mixture of DNA consistent with Saavedra's and Roberts' DNA was found on a cigarette butt recovered from the scene. (3 R.T. pp. 477-478, 502-505, 517-518.) DNA consistent with Saavedra was found on another cigarette butt, and DNA consistent with appellant was found on a third. (3 R.T. pp. 477-478, 503, 518-519.) DNA from the blood on the head of the broken golf club recovered at the scene matched Saavedra. (3 R.T. pp. 471, 503-504, 519-522.)

ARGUMENT

I

THE AMENDMENT TO PENAL CODE SECTION 188 BY RECENTLY ENACTED SENATE BILL NO. 1437 ELIMINATES SECOND DEGREE MURDER LIABILITY UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

A. The Amendment To Penal Code Section 188 By Recently Enacted Senate Bill No. 1437 Eliminates Second Degree Murder Liability Under The Natural And Probable Consequences Doctrine

Appellant's jury was instructed upon the following three alternative theories of liability: 1) appellant was the direct perpetrator of the murder; 2) appellant directly aided and abetted the murder; or 3) appellant aided and abetted the target crime of felony assault in violation of former Penal Code section 245, subdivision (a)(1),[7] and the murder committed by his coparticipant was a natural and probable consequence of the assault.[8] (See *Gentile III, supra,* E069088, pp. 12-13; 2 C.T. pp. 286-292, 295-298, 301-302; CALCRIM Nos. 400, 401, 402, 403, 520, 521, 875.) Appellant's jury was not instructed on a felony murder theory of liability. (*Ibid.*)

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[7] In 2011, the Legislature amended Penal Code section 245 by deleting from subdivision (a)(1) the phrase "or by any means of force likely to produce great bodily injury," and by adding a new subdivision (a)(4) to section 245 which defined the offense of assault by force likely to produce great bodily injury. (Stats. 2011, ch. 183, § 1.) Appellant's jury was instructed with the former version, which contained both the deadly weapon other than a firearm and the by means of force likely to produce great bodily injury options. (2 C.T. pp. 301-302.)

[8] Regarding the natural and probable consequences theory of liability, appellant's jury was instructed with both CALCRIM Nos. 402 and 403. (2 C.T. pp. 289-292.) Because appellant was not separately charged with the target crime of aggravated assault in violation of former Penal Code section 245, subdivision (a)(1), his jury should not have been additionally instructed with CALCRIM No. 402.

The amendment to Penal Code section 188 enacted by SB 1437 eliminated all murder liability under the natural and probable consequences doctrine, and thus the above third alternative theory of liability upon which appellant's jury was instructed remains unlawful despite the prior reduction in his conviction to second degree murder.

Penal Code section 31, which governs aider and abettor liability, provides in relevant part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so committed." (Pen. Code, § 31.)

There are two distinct forms of culpability for aiders and abettors. First, an aider and abettor with the necessary mental state is guilty of the intended crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Second, under the natural and probable consequences doctrine, a person who knowingly aids and abets criminal conduct can be found guilty of not only the intended crime (the target offense), but also of any other crime the perpetrator actually commits (a nontarget offense), that is a natural and probable consequence of the intended crime. (*People v. Medina* (2009) 46 Cal.4th 913, 920; *People v. McCoy, supra,* 25 Cal.4th at p. 1117; *People v. Prettyman* (1996) 14 Cal.4th 248, 260-262.)

Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature. (*People v. Garrison* (1989) 47 Cal.3d 746, 778.) "'By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense.'" (*People v. Chiu, supra,* 59 Cal.4th at p. 164.)

Vicarious liability for unintended crimes under the natural and probable consequences doctrine is not expressly mentioned within Penal Code section 31. (*People v. Chiu, supra,* 59 Cal.4th at pp. 161, 164.) Rather, the natural and probable consequences doctrine of liability originated in the common law, and was first embraced by the California Supreme Court in 1907. (*People v. Prettyman, supra,* 14 Cal.4th at p. 260.) Prior to this Court's decision in *Chiu*, a defendant could be convicted of first degree murder under the natural and probable consequences doctrine. (See, e.g., *People v. Medina, supra,* 46 Cal.4th at pp. 917-921, 928; *People v. Prettyman, supra,* 14 Cal.4th at p. 258.)

In 2014, this Court decided *Chiu* and held, largely in furtherance of public policy considerations and with the goal of avoiding unfairness, that a defendant in California can no longer be convicted of first degree murder under the natural and probable consequences doctrine. (*People v. Chiu, supra,* 59 Cal.4th at pp. 164-167.)

Three years later, in 2017, the California Legislature adopted a continuing resolution calling for additional changes to the felony murder rule and the natural and probable consequences doctrine. (Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.) res. ch. 175.)

One year after that, the Legislature passed, and on September 30, 2018 the Governor signed, SB 1437, which amended Penal Code sections 188 and 189 for purposes of murder liability, and added Penal Code section 1170.95 providing a mechanism for potential relief in the Superior Court for defendants previously convicted of murder. (Stats. 2018, ch. 1015, §§ 2-4, eff. 1/1/2019.)

The uncodified section of SB 1437 stating the purpose of the legislation makes clear its applicability to the natural and probable consequences doctrine in murder cases: "There is a need for statutory changes to more equitably sentence offenders in accordance with their

involvement in homicides." (Stats. 2018, ch. 1015, SB 1437 § 1(b).) "It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability." (Stats. 2018, ch. 1015, SB 1437 § 1(d).) "Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015, SB 1437 § 1(e).) "It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, S.B. 1437 § 1(f).) "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, ch. 1015, S.B. 1437 § 1(g).)

In addition to reforming the law in felony murder cases, the clearly articulated purpose of SB 1437 was to recognize the penological unfairness of convicting and sentencing an aider and abettor to murder liability under the natural and probable consequences doctrine when the aider and abettor did not personally harbor malice aforethought.

Consistent with the above stated legislative intent, the Legislature amended Penal Code section 188, subdivision (a)(3), to abolish liability for murder under the natural and probable consequences doctrine, and to instead require a principal personally act with malice aforethought in order to be convicted of murder. (Pen. Code, § 188, subd. (a)(3), as revised, eff.

1/1/19 ["Except as stated in subdivision (e) of Section 189 (the revised first degree felony murder rule), 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."].)

The Legislature additionally amended Penal Code section 189 to significantly limit the applicability of the felony murder rule to cases in which the defendant was the actual killer; the defendant was not the actual killer, but, with the intent to kill, aided and abetted the actual killer; or the defendant was a major participant in the underlying felony and acted with a reckless indifference to human life, or the victim was a peace officer killed in the course of his or her duties. (Pen. Code, § 189, subds. (e), (f), as revised, eff. 1/1/19.)

The plain language of newly revised Penal Code section 188, subdivision (a)(3), compels the conclusion SB 1437 eliminated second degree murder liability under the natural and probable consequences doctrine.

"As in any case of statutory interpretation, our task is to determine afresh the intent of the Legislature by construing in context the language of the statute." (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159.) In determining such intent, the reviewing court begins with the language of the statute itself. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 73.) That is, the reviewing court looks first to the words the Legislature used, giving them their usual and ordinary meaning. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 90.) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.'" (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268.) When statutory language is ambiguous, the court must adopt the interpretation that best effectuates the legislative intent or purpose. (*Beal Bank, SSB v. Arter & Hadden, LLP*

(2007) 42 Cal.4th 503, 508.) Only when the statutory language is ambiguous, do courts consider secondary sources such as legislative history. (*Ibid.*) The proper interpretation of a statute is subject to de novo review by this Court. (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 311.)

In amending Penal Code section 188, subdivision (a)(3), to provide that except under the revised felony murder rule, "malice shall not be imputed to a person based solely on his or her participation in a crime," and to instead require that a principal in a crime must "act with malice aforethought" in order to be convicted of murder, the Legislature squarely abolished second degree murder liability under the natural and probable consequences doctrine.

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, ch. 1015, SB 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, ch. 1015, SB 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).

Other than the Court of Appeal in this case, numerous other Courts of Appeal have addressed this same issue, and all have interpreted SB 1437 as eliminating all murder liability under the natural and probable consequences doctrine. (See *People v. Lopez* (2019) 38 Cal.App.5th 1087,

1102-1103 & fn. 9 (rvw. granted 11/13/19, S258175) [SB 1437 eliminates liability for second degree murder under the natural and probable consequences doctrine]; *People v. Larios* (2019) 42 Cal.App.5th 956, 964 [in light of newly enacted Penal Code section 188, subdivision (a)(3), "we conclude the natural and probable consequences doctrine no longer may support a murder conviction"]; see also *People v. Verdugo* (2020) ___ Cal.App.5th ___, ___ (B296630, filed 1/15/20) [SB 1437 "amended the felony murder rule and eliminated the natural and probable consequences doctrine as it relates to murder"]; *People v. Lewis* (2020) ___ Cal.App.5th ___, ___ (B295998, filed 1/6/20) [SB 1437 "amended section 188 to eliminate liability for murder under the natural and probable consequences doctrine"]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1007-1008 [SB 1437 abrogated the continuing application of the natural and probable consequences doctrine to murder charges].)

For all the above reasons, and consistent with all the above authorities, this Court should hold that newly enacted Penal Code section 188, subdivision (a)(3), has eliminated second degree murder liability in California under the natural and probable consequences doctrine.

B. The Court Of Appeal's Opinion

In reaching its conclusion that SB 1437 did not eliminate second degree murder liability 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). (*Gentile III, supra,* E069088, pp. 14-18.)

This analysis was misplaced because Penal Code section 189, subdivision (e), is the revised felony murder rule which is inapplicable herein, whereas Penal Code section 188, subdivision (a)(3), is the new law that eliminated second degree murder liability under the natural and probable consequences doctrine.

As amended by SB 1437, Penal Code section 189, subdivision (e), now 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).)

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), has no application to this case. As also noted, appellant's jury was not instructed upon a felony murder theory.

Penal Code section 188, subdivision (a)(3), is instead the controlling provision in this case. As amended by SB 1437, 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).)

Because the "except as stated in subdivision (e) of Section 189" portion of the above statute is inapplicable herein, this leaves the remainder of Penal Code section 188, subdivision (a)(3), as the controlling provision, 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, when, as in this case, the felony murder rule does not apply, 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.

In addition to not addressing Penal Code section 188, subdivision (a)(3), the Court of Appeal below also misstated appellant's argument. In its opinion, the Court of Appeal described appellant's argument in his supplemental letter brief as a contention "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.'" (*Gentile III, supra,* E069088, p. 16.) The Court of Appeal then proceeded to reject this interpretation of Penal Code section 189, subdivision (e). (*Ibid.*)

However, as set forth in appellant's supplemental letter brief, as argued above, and as also set forth in appellant's petition for rehearing, appellant's contention was and is that revised Penal Code section 188,

subdivision (a)(3), has now eliminated liability for second degree murder under the natural and probable consequences doctrine. (E069088, 3/26/19 supplemental letter brief, pp. 2-3; E069088, 6/13/19 petition for rehearing, pp. 5, 8-13.)

The Court of Appeal's most recent opinion is also at odds with its prior opinion on this same issue. As noted above, in *Gentile II*, the Court of Appeal stated that SB 1437 "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.)" (*Gentile II, supra,* E069088, p. 3, fn. 2.)

Finally, appellant notes the Court of Appeal in *Lopez* appropriately recognized the current opinion in this case was erroneous because it applied revised Penal Code section 189, rather than section 188. (*People v. Lopez, supra,* 38 Cal.App.5th at p. 1103, fn. 9 (rvw. granted 11/13/19, S258175).)

For all the above reasons, the Court of Appeal erred in concluding SB 1437 did not eliminate second degree murder liability in California under the natural and probable consequences doctrine.

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II

IT WAS PREJUDICIAL ERROR TO INSTRUCT THE JURY IN THIS CASE ON NATURAL AND PROBABLE CONSEQUENCES AS A THEORY OF MURDER

As noted, appellant's jury was instructed upon the following three alternative theories of liability: 1) appellant was the direct perpetrator of the murder; 2) appellant directly aided and abetted the murder; or 3) appellant aided and abetted the target crime of felony assault in violation of former Penal Code section 245, subdivision (a)(1), and the murder committed by his coparticipant was a natural and probable consequence of the assault. (*Gentile III, supra,* E069088, pp. 12-13; 2 C.T. pp. 286-292, 295-298, 301-302; CALCRIM Nos. 400, 401, 402, 403, 520, 521, 875.)

As also set forth above, liability for murder under the natural and probable consequences doctrine has now been eliminated. Thus, appellant's jury was instructed upon two legally valid theories, and one legally invalid natural and probable consequences theory of liability.

When, as in this case, a jury is instructed on alternative theories of liability and one of those theories is legally invalid, the reviewing court must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, it determines the error was harmless beyond a reasonable doubt.[9] (*People v. Aledamat* (2019) 8 Cal.5th 1, 3; *People v. Chiu, supra,* 59 Cal.4th at pp. 167-168; *In re Martinez*

[9] This analysis is based upon the assumption the changes to the law enacted via SB 1437 apply retroactively to cases not yet final on direct appeal under *In re Estrada, supra,* 63 Cal.2d 740. As noted, the Court of Appeal below did not address this question and assumed retroactivity. (*Gentile III, supra,* E069088, p. 18.) To the extent SB 1437 does not apply retroactively to cases not yet final on direct appeal, then appellant's remedy would be via the Superior Court petition procedure set forth in Penal Code section 1170.95. Regardless, the Court of Appeal's prejudice analysis on this issue was incorrect.

(2017) 3 Cal.5th 1216, 1218, 1227; *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

Properly understood and applied, this case is also unique in terms of the prejudice analysis because the Court of Appeal has in effect already performed it in previously addressing the analogous instructional error under *Chiu*. In his initial appeal in prior Court of Appeal Case No. E064822, appellant 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*. Appellant further asserted the *Chiu* error was prejudicial because the record does not demonstrate beyond a reasonable doubt the jury relied only upon a legally valid theory of liability. (E064822, AOB, pp. 17-32.) The Attorney General conceded error under *Chiu*, and further conceded the error was prejudicial because the record did not demonstrate beyond a reasonable doubt the jury relied only upon a legally valid theory. (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. (*Gentile I, supra,* E064822, pp. 12-14 [holding that "[b]ecause it is probable that the jury convicted defendant on an unauthorized [natural and probable consequences] legal theory, we must reverse the conviction"].)

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. (See *Gentile III, supra,* E069088, p. 2; E069088 C.T. pp. 8-20; R.T. pp. 1-3.) 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 is necessarily the same, and it cannot be properly 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. (See also *People v. Aledamat, supra,* 8 Cal.5th at pp. 12-13 [recently clarifying the test for reversal set forth in *Chiu* was correct and the analysis in *Chiu* was an appropriate application of the general harmless beyond a reasonable test for all alternative-theory error cases].)

The Court of Appeal below erred in failing to again apply this test to the facts and law. Instead, in addressing the issue of prejudice, the Court of Appeal found the Legislature did not intend to relieve an aider and abettor of liability for second degree murder under the natural and probable consequences doctrine. (*Gentile III, supra,* E069088, p. 17.) The Court of Appeal further found "[a]t a minimum, after reviewing the record, we conclude that defendant in this case was a direct or active aider and abettor." (*Ibid.*) The Court of Appeal then stated the following:

> "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." (*Gentile III, supra,* E069088, pp. 17-18, as modified on denial of rehearing.)

The prejudice analysis conducted by the Court of Appeal in *Gentile I* was correct, the above was not. Contrary to the reasoning of the Court of Appeal, the Legislature did intend to relieve aiders and abettors of liability for murder under the natural and probable consequences doctrine. (Pen. Code, § 188, subd. (a)(3).) In addition, if defendant only aided and abetted an aggravated assault and Roberts committed the murder, appellant was prejudiced due to the natural and probable consequences instruction given his jury, and a conviction for second degree murder was not appropriate under SB 1437.

Consistent with both the correct legal analysis employed by the Court of Appeal in *Gentile I,* as well as the Attorney General's prior concession that the record does not demonstrate beyond a reasonable doubt the jury relied only on a legally permissible theory of liability rather than the erroneous natural and probable consequences theory, the error was prejudicial and appellant's murder conviction should be reversed.

Even considered anew, and for numerous reasons, the record herein does not establish the instructional error was harmless beyond a reasonable doubt.

First, there is nothing in any of the jury's verdicts to show the error was harmless beyond a reasonable doubt. (C.f. *People v. Chun* (2009) 45 Cal.4th 1172, 1204-1205 [alternative-theory instructional error can be found harmless beyond a reasonable doubt if the jury's verdict demonstrates the jury made the necessary finding].)

Second, during jury deliberations, the first question the jury asked the court was "are fists considered a deadly weapon?", and the trial court correctly responded they were not. (1 C.T. p. 235.) This question affirmatively indicates the jury may have been considering the erroneous

natural and probable consequences theory of liability during their deliberations, as assault with a deadly weapon was one of the two theories of assault they were instructed upon as target crimes under the impermissible natural and probable consequences theory. (See 2 C.T. p. 301 [aggravated assault target crime instruction given appellant's jury]; *People v. Aledamat, supra,* 8 Cal.5th at p. 12 [questions from the jury during deliberations regarding the legally erroneous theory can show the jury may have based its verdict on the erroneous theory rather than a correct one]; see also *People v. Chiu, supra,* 59 Cal.4th at pp. 167-168 [relying on questions from the jury during deliberations regarding the erroneous natural and probable consequences theory to find the error was not harmless beyond a reasonable doubt].)

Third, during their deliberations, the jury next asked for a copy of appellant's statement to the police. (1 C.T. p. 236.) This request indicates the jury was focusing on appellant's statement to the police, in which appellant admitted punching the victim several times, but said it was Roberts who struck the victim with the weapon and killed him, and which statement formed the factual basis for the erroneous natural and probable consequences theory. Thus, this request by the jury further supports the conclusion the jury may have relied on the erroneous natural and probable consequences theory. (See *People v. Canizales* (2019) 7 Cal.5th 591, 617 [a finding of prejudice supported by the fact that during deliberations the jury requested readback of testimony that "suggests the jurors at one point were focused on testimony that would have supported the [defense] theory"].)

Fourth, the evidence in this case was both conflicting and unclear. As stated by the Court of Appeal in *Gentile I*, "[w]hile the details of who did what to the victim were in conflict, the People's theory of the case was that defendant committed the murder, and that Roberts was an accomplice after the fact. However, the People acknowledge that, from the various accounts of

the events presented, there was evidence from which the jury could conclude that both defendant and Roberts inflicted blows on the victim which led to his fatal heart attack, and that the death was the natural and probable consequence of the target offense of aggravated assault." (*Gentile I, supra,* E064822, p. 12; see also 4 R.T. pp. 738, 742, 745-746, 750, 753-758 [prosecutor's closing argument primarily contending appellant was the actual killer and Roberts was an accessory after the fact, while also acknowledging the contrary evidence].) The prosecutor in fact conceded during closing argument there was no certainty as to exactly what occurred or who did what inside the restaurant when the victim was killed. (See 4 R.T. pp. 737, 750, 791.)

During the discussion regarding jury instructions, the trial court similarly observed, "the jury has a yeoman's task in this case of trying to figure out as best they can what transpired, what took place. [¶] This is a case wherein there were absolutely no eyewitnesses at all. There's certainly some circumstantial evidence close in time and so forth, yet no one knows what went on inside that building for whatever period of time it took for the deed to have been done." (3 R.T. p. 690.) At the time of sentencing, the trial court further observed this was "a close case." (4 R.T. p. 844.)

The conflicting and unclear evidence in this case further supports a finding of prejudice. (See *People v. Canizales, supra,* 7 Cal.5th at p. 616 [a finding of prejudice also supported by the fact there was "conflicting evidence" on a contested issue].)

Fifth, the prosecutor repeatedly argued in closing argument that appellant was guilty of murder even if the jury believed appellant's statement to the police. (See 4 R.T. pp. 738, 750, 753-755, 757-758 [prosecutor's closing argument]; see also 3 R.T. p. 669 [prosecutor also noting during his request for an instruction on a natural and probable consequences theory of liability that "I can argue that he's an aider and abettor based on the statement that he gave"].) The fact that the prosecutor expressly relied on this theory

during closing argument further supports a finding the error was not harmless beyond a reasonable doubt. (See *In re Martinez, supra,* 3 Cal.5th at pp. 1226-1227 [concluding the jury could have relied on the invalid theory where the prosecutor argued that theory to the jury at length during closing argument].)

Sixth, and perhaps most significantly, the jury in this case found it not true that appellant personally used a weapon in the commission of the murder. (1 C.T. p. 249.) This finding in turn suggests the jury found appellant was in fact not the direct perpetrator of the murder, and he was instead convicted under an aiding and abetting theory.

Seventh, the prosecutor did not expressly argue in favor of, and there was little to no evidence in support of, a theory that appellant was guilty of murder as a direct aider and abettor in that offense, i.e., the second legal alternative for conviction given appellant's jury. Rather, as noted above, the prosecutor primarily argued appellant was the direct perpetrator/actual killer, and the prosecutor alternatively argued appellant was still guilty of murder under the natural and probable consequences doctrine if he was not the actual killer based on his statements to police. In light of both the lack of argument by the prosecutor and evidentiary support for a finding appellant was guilty under the second direct aiding and abetting alternative, and given the jury's not true finding on the weapon use allegation suggesting the jury found appellant was not the actual killer, the record suggests appellant's jury likely relied on the erroneous natural and probable consequences doctrine in returning their verdict in this case.

In sum, the jury returned only a general verdict form finding appellant guilty of murder, and there is nothing in the record to conclusively demonstrate beyond a reasonable doubt appellant's jury found him guilty under a legally permissible theory of liability.

In fact, what is additionally contained in the record affirmatively suggests one or more of appellant's jurors likely relied on the impermissible

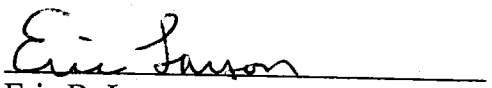
natural and probable consequences theory. In any event, because the record does not establish beyond a reasonable doubt all twelve members of appellant's jury found him guilty under a legally permissible theory, his conviction should be reversed under the recent amendment to Penal Code section 188.

CONCLUSION

For the foregoing reasons, and in the interests of justice, appellant respectfully requests his murder conviction be reversed.

Dated: 2/10/20

Respectfully submitted,



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Attorney for Defendant and
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Certificate of Word Count

Pursuant to California Rules of Court, rule 8.520(c)(1), I, Eric R. Larson, hereby certify that according to the Microsoft Word computer program used to prepare this document, Defendant's Opening Brief on the Merits contains a total of 12,275 words.

Executed this 10th day of February, 2020, in San Diego, California.

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Court of Appeal Nos.: E069088/E064822

DECLARATION OF SERVICE

I, Eric R. 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 that 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 10th day of February, 2020, I caused to be served the following:

DEFENDANT'S OPENING BRIEF ON THE MERITS

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:

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Arnold Lieman (trial atty)
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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:

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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 February 10, 2020, at San Diego, California.

Eric Larson

Eric R. Larson