In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **JOSEPH ROBERT GENTILE, JR.,** Defendant and Appellant.	Case No. S256698

Fourth Appellate District Division Two, Case No. INF1401840
Riverside County Superior Court, Case No. E069088
The Honorable Graham Anderson Cribbs, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED FOR REVIEW

I. 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?

II. Was it prejudicial error to instruct the jury in this case on natural and probable consequences as a theory of murder?

INTRODUCTION

Appellant was tried for murder as either a direct perpetrator and aider and abettor in the blunt-force killing of Guillermo "Bill" Saavedra in the La Casita restaurant in Indio. The jury was instructed that, if it found appellant guilty of murder, it had to further find he committed the offense willfully, deliberately, and with premeditation to convict him of first degree murder; otherwise the murder could only be of the second degree. The jury convicted appellant of first degree murder.

On appeal, appellant contended for the first time that the trial court had erroneously instructed the jury on a natural and probable consequences theory of liability for murder, in violation of *People v. Chiu* (2014) 59 Cal.4th 155, decided a year prior to appellant's trial. Evidently overlooking the jury's finding of deliberate and premeditated murder, the parties agreed on *Chiu* error, and the court of appeal reversed appellant's first degree murder conviction. It remanded the matter to the trial court, which reduced appellant's conviction to second degree murder upon the People's assent, and resentenced him accordingly.

In a second appeal that followed, the court of appeal affirmed appellant's second degree murder conviction and sentence. Appellant petitioned this Court for review, arguing that recently-enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) required his second degree murder conviction be vacated. This Court 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.

Reconsidering the matter, the court of appeal rejected appellant's claim to relief under Senate Bill No. 1437 and affirmed the judgment. This Court granted appellant's ensuing petition for review, on the two issues stated above.

On the first issue presented, Senate Bill No. 1437's text and its accompanying statement of legislative intent show that its amendment to Penal Code section 188 was intended to, and did, eliminate the natural and probable consequences doctrine as a basis for murder liability in California.[1] It did this by abolishing, as a basis for murder, the vicarious liability integral to that doctrine, and requiring instead that the prosecution prove malice as an element of murder for all principals, including aiders and abettors, except as specified under the felony murder rule as stated in section 189.[2]

Regarding the second issue presented, appellant was not prejudiced by the natural and probable consequences instruction. Appellant's jury was instructed that it could not find appellant guilty of first degree murder unless it found he personally committed the murder willfully, deliberately, and with premeditation. The jury's first degree murder finding thus establishes that it found appellant committed the murder intentionally and with premeditation—and, therefore, with malice aforethought. The record thus establishes beyond any

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[1] All statutory references herein are to the Penal Code.

[2] This case does not involve felony murder. Appellant was not charged with or tried for felony murder, and the jury was not instructed on it. (1 CT 90; 2 CT 286–298; 4 RT 717–727.)

reasonable doubt that the jury did not rely on the natural and probable consequences doctrine.

STATEMENT OF THE CASE AND FACTS

I. EVIDENCE PRESENTED AT TRIAL

In the evening of Saturday, June 21, 2014, appellant was visiting his ex-wife Saundra Roberts and the victim Guillermo "Bill" Saavedra, whom appellant had just met for the first time, at the La Casita restaurant in Indio. (1 CT 194–195; 1 RT 216, 266–269.) Saavedra lived and worked at the restaurant as a security guard and caretaker, and Roberts, homeless at the time, occasionally stayed with him. (*People v. Gentile* (February 27, 2017, E064822 [nonpub. opn.]) (*Gentile I*), at 3, 5; *People v. Gentile* (May 30, 2019, E069088 [nonpub. opn.] (*Gentile III*), at 3, 6; 2 RT 238–240, 256.) Appellant and Saavedra both had military backgrounds, and over the course of the next few hours, appellant, Saavedra, and Roberts drank beer and martinis. (*Gentile III*, *supra*, E069088, p. 6; 2 RT 268–272.)

At approximately 1:03 a.m., a surveillance camera at the nearby Royal Plaza Inn videotaped appellant wandering the motel premises. (*Gentile III*, *supra*, E069088, p. 4; 2 RT 437–438, 444.) Appellant tried to rent a motel room, but Sylvia Sicre, the general manager, refused his request because "he didn't look right. There was something wrong with him." (*Gentile III*, p. 4; 2 RT 432, 437–440, 444.) Appellant appeared drunk and was slurring. (*Gentile III*, p. 4; 2 RT 279, 446–447.)

Approximately 25 minutes later, appellant was caught on a second surveillance videotape, this time from outside the Coin

Laundry, a laundromat next to the Royal Plaza Inn. (*Gentile III*, *supra*, E069088, pp. 4–5; 2 RT 286–287, 369, 440–441.) The videotape shows appellant with Roberts, both of whom are then joined by Steve Gardner, Roberts's on-again, off-again boyfriend. (*Gentile III*, pp. 4–5; 2 RT 289–290, 368–369.) Roberts had telephoned Gardner, and sounding "extremely panicked," had asked him to bring a shirt, shorts, and socks to the laundromat. (*Gentile III*, pp. 4–5, 7; 2 RT 361–365, 373, 378, 380–381.) Upon arrival, Gardner learned that the clothes were for appellant. (*Gentile III*, pp. 4–5, 7; 2 RT 364, 381.) He gave appellant the clothes, save for one sock. (*Gentile III*, pp. 4–5, 7; 2 RT 366, 369–371.) Gardner observed that appellant "looked wet," like he had "just been . . . to the pool or something," with "dried off, stringy hair." (*Gentile III*, pp. 4–5; 2 RT 367, 374.) Appellant's hands, particularly his knuckles, were noticeably red. (*Gentile III*, pp. 4–5; 2 RT 367, 374–375. 377.)

Saavedra's deceased body was found inside the La Casita restaurant the next evening (Monday, June 23, 2014), alongside a broken chair, a broken bottle, and a broken golf club head with Saavedra's blood on it. (*Gentile III*, *supra*, E069088, pp. 3–5; 1 RT 96–98, 112; 3 RT 520–522.) He had been beaten to death by fists or instruments. (*Gentile III*, p. 5; 3 RT 583, 586.) He had multiple fractured chest ribs and associated hemorrhages of the chest wall, as well as a left pulmonary hemorrhage; multiple fractured posterior ribs; multiple fractured vertebrae; a fractured collarbone; a fractured scapula; and numerous bruises and abrasions. (*Gentile III*, p. 5; 3 RT 566–579.) He had suffered a

heart attack as a result of the beating, which was listed as a contributing cause of death. (*Gentile III*, p. 5; 3 RT 586–589.)

Appellant's DNA was on a cigarette butt at the scene. (*Gentile III*, *supra*, E069088, p. 5; 3 RT 516–519.) Also at the scene were three bloody footprints, one of which appeared to have come from a sock or a bare foot. (*Gentile III*, pp. 3–4; 1 RT 131–136, 139–141, 144–145.) An investigating detective, later retracing appellant's steps as shown on the Coin Laundry surveillance videotape, found inside a bush a sock with dried blood on it. (*Gentile III*, p. 4; 1 RT 182.) Saavedra's DNA was on it. (*Gentile III*, p. 5; 3 RT 507–510.) DNA consistent with appellant's was on it as well, to a statistical frequency of one in 1,300. (*Gentile III*, p. 5; 3 RT 507, 513.)

The day following the murder (Sunday, June 22, 2014), appellant went to Imperial Beach in San Diego, where he stayed in a detached garage belonging to his friend Charlotte Sullivan. (*Gentile III*, *supra*, E069088, pp. 9–10; 1 RT 218–219, 225; 2 RT 398–399, 461–462.) Sullivan noted that appellant's hands were swollen, which appellant said was because of arthritis. (2 RT 401.)

Appellant, who had worked at Gold Coast Metal for the past five years, stopped attending work, and Susan Champion, appellant's housemate in Indio, promptly gave his room to someone else. (1 RT 202–206; 2 RT 417–420.) Investigators later testified at trial that Ray Madick, appellant's supervisor at Gold Coast Metal, stated that he had "no idea" why appellant was suddenly absent from work, and that Champion, appellant's

housemate, said that appellant had told her he was "not returning" to the residence. (2 RT 385–387, 426–428.)

Appellant was arrested in Sullivan's garage in Imperial Beach on June 28, 2014. (*Gentile III*, *supra*, E069088, pp. 10; 2 RT 461–463.) He admitted being with Roberts and Saavedra at the La Casita restaurant, to beating Saavedra with his fists to the point Saavedra was on the floor, and that he "might've kicked" him. (*Gentile III*, pp. 10–11; 1 CT 194–195, 198–199, 206, 214, 227.) He claimed, however, that he had done so only because Roberts had accused Saavedra of raping her, and that, when Saavedra was on the floor, Roberts beat him persistently with a golf club.[3] (*Gentile III*, pp. 11; 1 CT 197–199, 203, 206, 214, 217, 227–228.) According to appellant, Roberts repeatedly rebuffed appellant's efforts to stop her from beating Saavedra, so appellant left the restaurant and walked straight home. (*Gentile III*, p. 11; 1 CT 198, 203, 208, 214, 218–221, 227.) He did not mention being at the Royal Plaza Inn, meeting with Roberts and Gardner outside the Coin Laundry, or receiving a change of clothes from Gardner.

Saundra Roberts testified at trial under a grant of immunity. (*Gentile III*, *supra*, E069088, pp. 6–7; 2 RT 236–237.) She testified that, in the evening of Saturday, June 21, 2014, she, appellant, and Saavedra, her "very dear friend" whom appellant had just met for the first time, drank beer and martinis at the La Casita restaurant. (*Gentile III*, p. 6; 2 RT 265–272, 299–300,

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[3] Appellant stated he originally recalled Roberts beating Saavedra with a sledgehammer, not a golf club. (1 CT 198–199.)

310–311, 314–315.) Having drunk too much, and feeling like a "third wheel" because appellant and Saavedra kept talking about their military experiences, Roberts left the restaurant and went to sleep at her nearby campsite. (*Gentile III*, p. 6; 2 RT 271–274, 315.) She awoke at around 1:00 a.m. and biked to a nearby convenience store for beer and cigarettes. (*Gentile III*, p. 6; 2 RT 274–275, 315.) She saw appellant walking in the parking lot of the Royal Plaza Inn, across the street. (*Gentile III*, p. 6; 2 RT 275–276, 315–316.) She approached appellant, who told her he had tried, unsuccessfully, to get a room at the motel. (*Gentile III*, pp. 6–7; 2 RT 277–278.) Appellant was drunk and soaking wet, as if he had "dived in the pool or something." (*Gentile III*, p. 7; 2 RT 279–280, 304, 316.) Appellant told Roberts that he "had gotten . . . in a really bad fight," that he "might have killed" Saavedra, and that he had "hurt him pretty bad." (*Gentile III*, p. 9; 2 RT 318–319, 324.) Roberts telephoned Gardner and asked him to bring a change of clothes. (*Gentile III*, p. 7; 2 RT 280–81.) She and appellant met Gardner in the front of the Coin Laundry, and after Gardner gave appellant the clothes he had brought, Roberts returned to her camp. (*Gentile III*, p. 7; 2 RT 281–284, 290–292, 304.)

Charlotte Sullivan, at whose home appellant stayed in Imperial Beach prior to his arrest, testified that Roberts told her after appellant's arrest that Roberts, appellant, and Saavedra had been drinking together the night of the murder. (2 RT 403–404, 406–407.) According to Sullivan, Roberts told appellant that Saavedra had raped her previously and that appellant and

Saavedra then got into an altercation. (2 RT 404, 411.) At this point, Roberts left the restaurant, and she (Roberts) returned later and "bleached everything and cleaned up a mess." (2 RT 404, 411.) Sullivan also testified that appellant told her that Roberts had told him that Saavedra had raped her, which made him upset, and that he then hit Saavedra, which was then followed by Roberts beating Saavedra with the golf club. (2 RT 405, 410–411.)

An investigating officer testified that Robert Gentile, appellant's brother, told him that appellant had said to him after the murder that appellant had "done something bad and needed to leave." (2 RT 391.)

II. RELEVANT JURY INSTRUCTIONS AND FINDINGS

The prosecution charged appellant with first degree murder committed willfully, deliberately, and with premeditation. (1 CT 90; § 187, subd. (a).) The prosecution alleged as a sentence enhancement that appellant had personally used a deadly or dangerous weapon in committing the murder. (1 CT 90–91; §§ 1192.7, subd. (c)(23); 12022, subd. (b).)

The trial court instructed the jury on direct aiding and abetting, and on the natural and probable consequences doctrine, identifying assault with a deadly weapon other than a firearm as the intended target crime. (2 CT 286–292; 4 RT 717–722; CALCRIM Nos. 400–403.) The trial court also instructed the jury on first or second degree murder with malice aforethought. (2 CT 295–296; 4 RT 723–725; CALCRIM No. 520.) That instruction

defined both express malice and implied malice. (4 RT 724–725; CALCRIM No. 520.)

The trial court then instructed the jury on first degree murder, as follows:

> The defendant has been prosecuted for first degree murder under the theory: (1) premeditation and deliberation.
>
> You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder.
>
> The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death.
>
> [¶] . . . [¶]
>
> The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, First or Second Degree Murder With Malice Aforethought.
>
> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

(2 CT 297–298; 4 RT 725–727; CALCRIM No. 521.)

During closing arguments, the prosecutor framed the issue before the jury as "not the who, but was it first or second degree

murder. Was this premeditated and deliberate and willful." (4 RT 755; see 4 RT 792 [prosecutor's rebuttal argument that "[t]he issue that you have to decide was it first or second. The People's theory, it was first degree murder"].) The prosecutor's primary theory of guilt at trial was that appellant killed Saavedra willfully, deliberately, and with premeditation because appellant saw Saavedra as "competition" for Roberts's affections, and "decide[d] to take [him] out" by beating him to death. (4 RT 757.)

The jury convicted appellant of first degree murder "as charged [in] the information." (1 CT 250; 4 RT 819.) The jury found not true the deadly or dangerous weapon sentence enhancement allegation. (1 CT 249; 4 RT 820.)

Appellant filed a motion for a new trial, contending that the jury's not true finding on the deadly or dangerous weapon sentencing enhancement allegation required reducing his conviction to voluntary manslaughter. (2 CT 336; 4 RT 837.) At the ensuing hearing, appellant's counsel acknowledged that appellant had been "convicted of first degree murder under the theory of premeditation and deliberation." (4 RT 832.) The trial court rejected appellant's motion for a new trial, finding "more than sufficient evidence to prove the required acts and findings in order to sustain a conviction of first degree murder. . . ." (4 RT 837, 844.)

III. APPELLATE PROCEEDINGS

On direct appeal, appellant contended that the trial court committed *Chiu* error in instructing the jury on the natural and probable consequences doctrine as a theory of murder liability.

(See *People v. Chiu*, *supra*, 59 Cal.4th 155 [first degree premeditated murder may not be premised on natural and probable consequences doctrine].) Appellant had not sought clarification of or otherwise objected to the trial court's instructions at trial, despite *Chiu* having been decided more than a full year before his trial. (3 RT 668–680 [settling of jury instructions].) Nevertheless, and in apparent oversight of CALCRIM No. 521, which had informed the jury that it could not find appellant guilty of first degree murder absent a finding that he had acted willfully, deliberately, and with premeditation, the People conceded error on the mistaken basis that the record did not affirmatively show that the jury rested its first degree murder verdict on a valid ground; i.e., that the jury did not rely on the natural and probable consequences doctrine. (Respondent's Brief, E064822, 16–19.) Accepting that concession, the court of appeal reversed appellant's first degree murder conviction, and on remand, the People elected to reduce appellant's murder conviction and resulting sentence to second degree murder. (*Gentile I*, *supra*, E064822, pp. 11–14; *People v. Gentile* (November 15, 2018, E069088) [nonpub. opn.] (*Gentile II*), p. 2.)

Appellant appealed again, raising six issues he had raised in the first appeal that had been left unresolved. (*Gentile II*, *supra*, E069088, pp. 2–3.) The court of appeal affirmed appellant's conviction and sentence, with modifications to certain fees and assessments imposed. (*Gentile II*, pp. 12–32.) Appellant petitioned this Court for review, arguing that recently-enacted

Senate Bill No. 1437 required his second degree murder conviction be vacated. (*Gentile III*, *supra*, E069088, p. 2.) This Court granted review and transferred the case back to the court of appeal with directions to vacate its November 15, 2018, decision (*Gentile II*), and reconsider the cause in light of Senate Bill 1437. (*Gentile III*, pp. 2–3.)

In supplemental briefing, appellant argued that Senate Bill No. 1437's amendment to section 188 operated to abolish the natural and consequences doctrine as a basis for murder liability in California. He also argued that, under *In re Estrada* (1965) 63 Cal.2d 740, the changes effected by Senate Bill No. 1437 applied to him on direct appeal. Finally, he argued, with no reference to CALCRIM No. 521, which had been given at his trial, that "the record did not demonstrate beyond a reasonable doubt the jury relied only upon a legally valid theory," and that his second degree murder conviction must be reversed. The People argued that the petition procedure set forth in newly-enacted section 1170.95, enacted as part of Senate Bill No. 1437, was the exclusive means by which appellant could seek relief under Senate Bill No. 1437.

The court of appeal rejected appellant's claim that Senate Bill No. 1437 abolished the natural and probable consequences doctrine as a basis for murder liability, and it affirmed his conviction and sentence. (*Gentile III, supra,* E069088, at pp. 12–18.) In so holding, however, the court of appeal apparently misconstrued the statutory basis for appellant's claim, as well as the nature of the changes effected by Senate Bill No. 1437.

Specifically, the court did not address newly-enacted section 188, subdivision (a)(3), which now provides that, "[e]xcept 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." (§ 188, subd. (a)(3).) Instead the court of appeal focused exclusively on recently-enacted section 189, subdivision (e), which delineates the reach of *felony* murder. (*Gentile III,* pp. 14–18; see § 189, subd. (e); *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, fn. 9 [noting that the court in *Gentile III* "appear[ed] to have misread section 189, subdivision (e)" in transposing it to the natural-and-probable-consequences context; "[a]lthough that provision authorizes a conviction for murder when the defendant, although acting without malice, was a major participant in certain underlying felonies and acted with reckless indifference to human life, it does so solely in the context of the felony murder rule"].) Appellant in this case was not charged with felony murder, and the jury was not instructed on it.

Regardless, the court of appeal also rejected appellant's claim to relief under Senate Bill No. 1437 on the basis that the evidence—which showed he had "delivered serious blows [to Saavedra] with his fists and feet," had swollen hands afterwards, and had later expressed fear at having possibly killed Saavedra—established that he had been convicted as a direct aider and abettor: "[e]ven if the jury believed [appellant's statements regarding leaving the scene after punching Saavedra a few times, and while Roberts was beating him with a weapon,] the killing would have been a result of [appellant's] aggravated assault

committed while directly aiding and abetting Roberts' assault with a deadly weapon." (*Gentile III, supra,* E069088, at pp. 17–18.)

Finally, the court of appeal acknowledged that there was "some support" for the People's position that the section 1170.95 petition procedure was the exclusive remedy by which a defendant could seek relief under Senate Bill No. 1437. (*Gentile III, supra,* E069088, at p. 18, citing *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.) Distinguishing the instant case on the basis that it was the "result of a transfer from [this Court] with directions to consider the cause in light of Senate Bill No. 1437," however, and for "reasons of judicial economy," the court of appeal reached the merits of appellant's Senate Bill No. 1437 claim and determined he was not entitled to relief. (*Gentile III,* p. 18.)

On September 11, 2019, this Court granted appellant's petition for review.

ARGUMENT

I. SENATE BILL NO. 1437'S AMENDMENT TO SECTION 188 ELIMINATES THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE AS A BASIS FOR MURDER LIABILITY

Under the natural and probable consequences doctrine, one who aids and abets a crime is criminally liable not only for the crime aided and abetted, but any additional crime committed by a confederate that is a reasonably foreseeable consequence of the intended crime. Liability for the additional crime is vicarious in

nature, and the aider and abettor's intent or mental state with respect to it is immaterial.

In 2018, the California Legislature enacted Senate Bill No. 1437, which, among other things, added subdivision (a)(3) to section 188, which defines the element of malice for murder. Excepting felony murder (defined in section 189), section 188 now provides that, "in order to be convicted of murder, a principal in a crime shall act with malice aforethought." (§ 188, subd. (a)(3).)

By expressly requiring that a defendant have acted with malice in order to be convicted of murder (outside the context of felony murder, inapplicable here), Senate Bill No. 1437's amendment to section 188 has eliminated the natural and consequences doctrine as a basis for murder liability in California.

A. The Natural and Probable Consequences Doctrine and Its Basis in Vicarious Liability

In California, one who aids and abets another in the commission of an offense is guilty of that offense as a principal. (§ 31; see *People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [one who "aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts"], citation omitted; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122 [aider and abettor "'shares the guilt of the actual perpetrator'"], quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259.).) Such aider and abettor liability may take one of two forms. First, under direct aiding and abetting principles, an aider and abettor is guilty upon proof of "a crime committed by the direct perpetrator," the

aider and abettor's "knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends," and "conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225, citing *McCoy*, *supra*, 25 Cal.4th at p. 1117.) "'When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime."'" (*McCoy*, *supra*, 25 Cal.4th at p. 1118, quoting *Prettyman*, *supra*, 14 Cal.4th at p. 259.)

Second, under the natural and probable consequences doctrine, "'"[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."'" (*Chiu*, *supra*, 59 Cal.4th at p. 161, citations omitted.) "A nontarget offense is a 'natural and probable consequence' of the target offense if, judged objectively, the additional offense was reasonably foreseeable." (*Ibid.*, citation omitted.) The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense; rather, "liability '"is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."'" (*Ibid.*, citation omitted.)

"Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature." (*Chiu*, *supra*, 59 Cal.4th at p. 164, citing *People v. Garrison* (1989) 47 Cal.3d 746, 778; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; and *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1054; see *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 17 [liability for unintended crimes under the natural and probable consequences doctrine is "true vicarious liability"].) Such culpability "'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. . . . Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.'" (*Chiu*, *supra*, 59 Cal.4th at p. 164, quoting *People v. Canizalez* (2011) 197 Cal.App.4th 832, 852; see *id.* at p. 165 [aider and abettor liability under the natural and probable consequences doctrine "does not require assistance with or actual knowledge and intent relating to the nontarget offense, nor subjective foreseeability of either that offense or the perpetrator's state of mind in committing it"], citation omitted.)

B. *Chiu*'s Abolishment of the Natural and Probable Consequences Doctrine as a Basis for First Degree Premeditated Murder

In *People v. Chiu*, *supra*, this Court barred the use of the natural and probable consequences doctrine as a basis for first degree premeditated murder. (*Chiu*, *supra*, 59 Cal.4th at p. 166.) The *Chiu* court reasoned that the connection between the aider

and abettor's culpability and the perpetrator's premeditative state was "too attenuated" for such liability, given the "uniquely subjective and personal" nature of premeditation. (*Id*. at pp. 164–165.) Furthermore, the doctrine's principal rationale—"deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing"—was adequately served by holding such aiders and abettors liable for second degree murder. (*Id*. at pp. 165–166.)

The *Chiu* court made clear that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles," under which "the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*Chiu*, *supra*, 59 Cal.4th at pp. 166–167, citation omitted.) Because "[a]n aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation," such aider and abettor, "having formed his own culpable intent," has therefore "act[ed] with the mens rea required for first degree murder." (*Id*. at p. 167, citation omitted.)

C. Section 188, as Amended by Senate Bill No. 1437, Now Requires Malice Aforethought for All Principals to Murder, Outside of Felony Murder

Senate Bill No. 1437, which came into effect on January 1, 2019, significantly changed California law as it relates to felony murder and the application of the natural and probable consequences doctrine to murder. Intended to "more equitably sentence offenders in accordance with their involvement in homicides" and to ensure that "a person should be punished for his or her actions according to his or her own level of individual culpability," Senate Bill No. 1437 amended section 188 by adding a requirement that, except in the case of felony murder, all principals to murder must act with express or implied malice to be convicted of that crime. (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 1, subds. (b), (d), § 2.)

Section 187 provides that "[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought." (§ 187, subd. (a).) Section 188 defines the offense element of "malice." (§ 188.) As amended by Senate Bill No. 1437, that section now provides as follows:

> (a) For purposes of Section 187, malice may be express or implied.
>
> (1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.
>
> (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

> (3) *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.
>
> (b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

(§ 188, italics added.)

Senate Bill No. 1437 also amended section 189 by adding a requirement that, to be guilty of murder under a felony murder theory, the defendant must have been the actual killer, a direct aider and abettor who acted with an intent to kill, or a major participant in the underlying felony who acted with reckless indifference to human life. (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.) Finally, the new legislation also established an attendant procedure for defendants already convicted of felony murder or murder under a natural and probable consequences theory to seek relief under Senate Bill No. 1437 and obtain resentencing. (§ 1170.95; Stats. 2018, ch. 1015, § 4.)

D. Adding the Malice Aforethought Requirement to Section 188 Eliminated the Natural and Probable Consequences Doctrine as a Basis for Murder Liability by Abolishing the Vicarious Liability Integral to It

Whether Senate Bill No. 1437 eliminated the natural and probable consequences doctrine as a basis for murder liability in

California is a matter of statutory interpretation, the resolution of which hinges on "familiar principles." (*People v. Colbert* (2019) 6 Cal.5th 596, 603.) This Court's "fundamental task . . . is to determine the Legislature's intent" so as to effectuate the purpose of the law. (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141, citations and internal quotation marks omitted.) Because the statutory text itself is generally the best and most reliable indicator of legislative intent (*People v. Pennington* (2017) 3 Cal.5th 786, 795), the inquiry begins with an examination of the words of the statute, "'affording them their ordinary and usual meaning and viewing them in their statutory context.'" (*Colbert*, *supra*, 6 Cal.5th at p. 603, citation omitted.) Courts must take the text "as it was passed into law, and must, if possible without doing violence to the language and spirit of the law, interpret it so as to harmonize and give effect to all its provisions." (*People v. Garcia* (1999) 21 Cal.4th 1, 14.)

Where the statutory text is unambiguous, the statute's plain meaning governs. (*Colbert*, *supra*, 6 Cal.5th at p. 603; see *People v. Licas* (2007) 41 Cal.4th 362, 367 ["If there is 'no ambiguity or uncertainty in the language, the Legislature is presumed to have meant what it said,' and it is not necessary to 'resort to legislative history to determine the statute's true meaning'"], citation omitted.) To the extent statutory text is ambiguous, this Court may look to extrinsic interpretive aids, including the ostensible objects to be achieved and the legislative history. (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369.) Ultimately, this Court will adopt "the construction that comports most closely with the

apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*Ibid.*, citations and internal quotation marks omitted.) A trial court's interpretation of a statute is a question of law that is reviewed de novo. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.)

The text of and legislative history behind Senate Bill No. 1437 confirm that it was intended to, and did, eliminate the natural and probable consequences doctrine as a basis for murder liability in California. That doctrine imposes vicarious liability on an aider and abettor for any crime that occurs as a reasonably foreseeable consequence of a crime directly aided and abetted. (*Chiu*, *supra*, 59 Cal.4th at pp. 161, 164–165.) Because that "nontarget" offense is unintended, the aider and abettor's mental state with respect to that offense is irrelevant, and his or her culpability for that offense hinges instead on whether it was objectively reasonably foreseeable. (*Ibid.*)

However, and save for specified instances of felony murder, Senate Bill No. 1437 now "requires [for murder] 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, § 1, subd. (g).) To this end, section 188, subdivision (a)(3), now expressly provides that, with the exception of felony murder, one must act with malice aforethought to be guilty of murder. (§ 188, subd. (a)(3).) As a result, the prosecution must prove malice as an element of murder for *all* principals, including aiders and abettors, except as specified under the felony murder rule as stated in section 189.

(See *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103, review granted Nov. 13, 2019, S258175.)

By expressly requiring that a principal have acted with malice aforethought to be guilty of murder, section 188, subdivision (a)(3) has abolished the vicarious liability integral to the natural and probable consequences doctrine as it relates to murder, eliminating that doctrine as a basis for murder liability in California. (See *People v. Verdugo* (2020) 44 Cal.App.5th 320, 323 [stating that Senate Bill No. 1437 eliminated the natural and probable consequences doctrine as it relates to murder); *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134 [same]; *D.W. v. Superior Court* (2019) 43 Cal.App.5th 109, 113 [same].)

II. APPELLANT WAS NOT PREJUDICED BY THE TRIAL COURT'S NATURAL AND PROBABLE CONSEQUENCES INSTRUCTION, AS THE RECORD ESTABLISHES HE WAS CONVICTED OF DELIBERATE AND PREMEDITATED MURDER—AND, THEREFORE, MURDER WITH MALICE AFORETHOUGHT

The trial court instructed the jury on two legally valid theories of murder (direct perpetration and direct aiding and abetting), and on one theory that is now legally invalid under Senate Bill No. 1437—the natural and probable consequences doctrine. In cases of "alternative-theory error" such as this, 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." (*People v. Aledamat* (2019) 8 Cal.5th 1, 3, 13.)[4]

The error in this case was harmless beyond a reasonable doubt. The jury was instructed it could not find appellant guilty of first degree murder unless it found he committed the murder willfully, deliberately, and with premeditation. Substantial evidence showed, and the prosecution argued, that appellant committed deliberate and premeditated murder and as such was guilty of first degree murder. The jury's ensuing first degree murder verdict therefore establishes beyond doubt that appellant was guilty of deliberate and premeditated murder—and, therefore, murder committed with malice aforethought. The jury therefore did not rely on the natural and probable consequences doctrine, rendering that instruction harmless.

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[4] Importantly, and as discussed below, the trial court's instructions relating to the natural and probable consequences doctrine were not erroneous at the time of appellant's trial because they permitted jury reliance on the doctrine for second degree murder only, and not first degree, premeditated murder, which would have constituted *Chiu* error. (See discussion at pp. 29-31, *post*; and see p. 31, fn. 5; *People v. Stevenson* (2018) 25 Cal.App.5th 974, 983–984.) *Aledamat*'s standard of review for erroneous instruction on a legally invalid theory typically applies where the instruction was erroneous at the time it was given. Here, because the record affirmatively meets that standard, respondent does not argue that a different standard should apply in cases where the instruction given was on a theory of liability correct at the time, but abrogated by subsequent legislation.

A. The Jury Instructions and Jury Verdict Establish That the Jury Did Not Rely on the Natural and Probable Consequences Doctrine but Found That Appellant Committed Murder with Deliberation and Premeditation

The prosecution charged appellant by information with first degree murder committed willfully, deliberately, and with premeditation. (1 CT 90; Penal Code, § 187, subd. (a).) The trial court, after instructing the jury on direct aiding and abetting (2 CT 287–288; 4 RT 718; CALCRIM No. 401) and the natural and probable consequences doctrine (2 CT 289–292; 4 RT 719–722; CALCRIM Nos. 402–403), instructed the jury on first or second degree murder with malice aforethought, committed as a direct perpetrator. (2 CT 295–296; 4 RT 722–725; CALCRIM No. 520.) The last sentence of that instruction explicitly stated that any finding of murder was to be second degree murder unless the prosecution proved it was of the first degree:

> If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521.

(2 CT 296; 4 RT 725.) The court then instructed the jury, pursuant to CALCRIM No. 521, that the jury must find that appellant acted willfully, deliberately, and with premeditation in order to convict him of first degree murder; otherwise the murder could only be of the second degree:

> The defendant has been prosecuted for first degree murder under the theory: (1) premeditation and deliberation.

> You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder.
>
> The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the acts that caused death.
>
> [¶] . . . [¶]
>
> The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, First or Second Degree Murder With Malice Aforethought.
>
> The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder.

(2 CT 297–298; 4 RT 725–727; CALCRIM No. 521.) The jury convicted appellant of first degree murder as charged. (1 CT 250; 4 RT 819.)

Jurors are presumed to understand and follow trial court instructions (*People v. Frederickson* (2020) 8 Cal.5th 963, 1026), and there is nothing in the record to suggest the jury did not do so in this case. The trial court's instructions to the jury, combined with the jury's first degree murder finding, therefore establish beyond any doubt that the jury convicted appellant of willful, deliberate, and premeditated murder. He was thus

convicted of murder with malice aforethought. (See *People v. Clark* (2016) 63 Cal.4th 522, 624 ["The mental state required to support a finding of first degree premeditated murder is 'a deliberate and premeditated intent to kill with malice aforethought'"], quoting *People v. Hart* (1999) 20 Cal.4th 546, 608.) The jury therefore did not rely on the natural and probable consequences doctrine in convicting appellant. He was not prejudiced. (See *People v. Stevenson*, *supra*, 25 Cal.App.5th at pp. 983–984 [no error or prejudice in issuing natural and probable consequences instruction where "the jury was required to find that each defendant committed the crimes with the required deliberation and premeditation before it could find that defendant guilty of first degree murder"].)

Confirming the lack of prejudice is that there is no reasonable likelihood the jury convicted appellant of first degree murder based on someone else's mental states of intent and premeditation. In *Chiu*, the trial court instructed the jury that it could find Chiu guilty of first degree murder as an aider and abettor if it found that "the perpetrator"—who the evidence showed was someone other than Chiu—had committed the murder willfully, deliberately, and with premeditation. (*Chiu*, *supra*, 59 Cal.4th at p. 161, italics added.) Because of this, the jury's first degree murder verdict did not necessarily establish that Chiu himself had acted with the requisite deliberation and premeditation. (*Chiu*, *supra*, 59 Cal.4th at pp. 160–161, 167–168.) As such, it was possible the jury had erroneously convicted Chiu of that offense as an aider and abettor under the natural

and probable consequences doctrine, and reversal was therefore required. (*Ibid*; *Stevenson*, *supra*, 25 Cal.App.5th at p. 983 [instruction in *Chiu* erroneously "allowed the jury to find an aider and abettor guilty of first degree murder based on the perpetrator's premeditation and deliberation"].)

Similarly, in *In re Loza* (2018) 27 Cal.App.5th 797, the court's jury instructions left open the possibility that Loza had been convicted of first degree murder as an aider and abettor under the natural and probable consequences doctrine. Loza was tried along with three co-defendants. (*Loza*, *supra*, 27 Cal.App.5th at pp. 804–805.) The court instructed the jury that it had to find, for first degree murder, that "the defendant" had a deliberate and premeditated intent to kill. (*Ibid*.) However, it also instructed the jury that "[t]he word 'defendant' applies to each defendant unless you are instructed otherwise," and that, "[t]o constitute a deliberate and premeditated killing, *the slayer* must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, decides to and does kill." (*Ibid*.) Because "the jury could have interpreted the word 'defendant' to mean any of the four defendants," the jury's first degree murder verdict did not necessarily establish that Loza himself had possessed the intent and premeditation required for first degree murder. (*Ibid*.) Accordingly, it could not be established beyond a reasonable doubt that the jury had not relied on the natural and probable consequences doctrine in convicting Loza of first degree murder, requiring reversal. (*Ibid*.)

In contrast, in *Stevenson*, *supra*, in which the defendant was tried with two co-defendants, the court found no prejudice—and, indeed, no *Chiu* error—where the instructions made clear to the jury that it could not find any particular defendant guilty of first degree murder unless it found he personally committed the murder willfully, deliberately, and with premeditation. (*Stevenson*, *supra*, 25 Cal.App.5th at pp. 978, 984.) There, the trial court instructed the jury with CALCRIM No. 521 as follows:

> "A defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. A defendant acted *willfully* if he intended to kill. A defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. A defendant acted with *premeditation* if he decided to kill before completing the acts that caused death. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

(*Id*. at pp. 981–982.) Under that instruction, "'the jury was required to find that each defendant committed the crimes with the required deliberation and premeditation before it could find that defendant guilty of first degree murder." (*Id*. at p. 984.) Because of this, no *Chiu* error occurred, as the jury instructions did not permit the jury to base a first degree murder verdict on the natural and probable consequences doctrine. (*Ibid*.)

As in *Stevenson*, the jury instructions in this case did not permit a first degree murder verdict based on the natural and probable consequences doctrine, refuting any potential of

prejudice. The trial court's instruction based on CALCRIM No. 521 was in all material respects identical to the one given in *Stevenson*. (See 2 CT 297–298; 4 RT 725–727; *Stevenson*, *supra*, 25 Cal.App.5th at pp. 981–982). That instruction made explicit that the jury could not convict appellant of first degree murder without finding that he committed the murder willfully, deliberately, and with premeditation. Furthermore, appellant was the only defendant on trial, and the instruction referred specifically to him, as either "the defendant" or "he." (2 CT 297–298; 4 RT 725–727.) The instruction's repeated use of the male pronoun underscores the absence of error in this case, as the only other possible participant in the crime—Roberts—was female. As there was only one defendant on trial, and only one male participant in the crime, CALCRIM No. 521, as given here, required the jury to find that appellant personally committed the murder willfully, deliberately, and with premeditation in order to convict him of first degree murder. In light of the presumption that the jury understood and followed the instructions, its verdict finding appellant guilty of first degree murder necessarily establishes that it did not convict appellant based on the natural and probable consequences doctrine.

Finally, the prosecutor's comments during closing argument made clear that whether appellant was guilty of first degree murder as opposed to second degree murder hinged on whether he committed the murder willfully, deliberately, and with premeditation. (See *People v. Canizales* (2019) 7 Cal.5th 591, 613 [court may consider arguments of counsel in assessing prejudicial

effect of instructional error]; *People v. Hughes* (2002) 27 Cal.4th 287, 341 [same].) During closing argument, the prosecutor said, "The issue that you have to decide is not the who, but was it first degree or second degree murder. Was this premeditated and deliberate and willful." (4 RT 755.) The prosecutor argued that appellant had murdered Saavedra willfully, deliberately, and with premeditation because he saw Saavedra as "competition" for Roberts and decided to "take him out." (4 RT 756–757.) In rebuttal, the prosecutor emphasized again that, "The issue that you have to decide was it first or second. The People's theory, it was first degree murder." (4 RT 792.) The jury was thus fully aware that, to convict appellant of first degree murder as it did, it first had to find that he committed the murder willfully, deliberately, and with premeditation.

The trial court's instructions, taken together with the jury's first degree murder verdict, establish beyond a reasonable doubt that the jury did not convict appellant based on the natural and probable consequences doctrine, but of willful, deliberate, and premeditated murder—and, hence, murder with malice aforethought. Indeed, appellant's trial counsel acknowledged in a hearing on appellant's post-verdict motion for a new trial that appellant had been "convicted of first degree murder under the theory of premeditation and deliberation." (4 RT 832.) Appellant

was not prejudiced by the natural and probable consequences instruction.[5]

B. Substantial Evidence Showed That Appellant Murdered Saavedra with Deliberation and Premeditation

The jury's finding of intent and premeditation was fully consistent with the trial evidence, which substantially showed that appellant was guilty of Saavedra's deliberate and premeditated murder as a direct perpetrator, a direct aider and abettor, or both. It was undisputed that appellant beat Saavedra; he admitted punching Saavedra multiple times, sending him to the floor, and to possibly kicking him. (1 CT 198–199, 206, 214, 227.) He claimed he left the beating early, but—and as shown by the bloody footprint at the scene, as well as the bloody sock found in the area appellant had traversed following the murder—he was there long enough to get Saavedra's blood on him.[6] (See 4 RT

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[5] Indeed, because the instructions in this case did not permit a first degree murder conviction without a finding that appellant had acted willfully, deliberately, and with premeditation in committing murder, there was no *Chiu* error in the first place. (See *Stevenson*, *supra*, 25 Cal.App.5th at pp. 983–984 [no *Chiu* error where jury was instructed it had to find each defendant had committed murder willfully, deliberately, and with premeditation in order to convict that particular defendant of first degree murder].) The People's concession otherwise in the court of appeal, and that court's finding of *Chiu* error, was regretfully in error.

[6] That bloody sock had Saavedra's DNA on it to a statistical frequency of one in quintillions, and appellant's DNA to a

(continued…)

755 [prosecutor's closing argument that appellant "didn't just leave," but was "there long enough to have the blood of the victim on him"].) He claimed to investigators he had walked straight home upon leaving the beating, but surveillance cameras caught him wandering the parking lot of the Royal Plaza Inn and a nearby laundromat later the evening of the murder. (*Gentile III*, *supra*, E069088, pp. 4–5; 1 CT 218–221; 2 RT 286–287, 369, 437–438, 440–441, 444.) There was "something wrong" with him: he was drunk and slurring, and he appeared wet, as if he had just been in a pool, prompting a "panicked" call from Roberts to Steve Gardner, asking for a change of clothes for appellant. (*Gentile III*, pp. 4–5; 2 RT 289–290, 361–365, 367–369, 373–374, 378, 380–381 432, 437–440, 444, 446–447.) His hands, particularly his knuckles, were noticeably red and swollen. (*Gentile III*, pp. 4–5; 2 RT 367, 374–375. 377, 401.) Saavedra's blunt force injuries were multiple and extensive. (*Gentile III*, p. 5; 3 RT 566–579.) Thus, even discounting Roberts' trial testimony that she had left appellant and Saavedra alone the night of the murder and that appellant had told her in the parking lot afterwards that he "might have killed" him (*Gentile III*, p. 9; 2 RT 318–319, 324), the evidence showed—and a reasonable juror could have found—that appellant did not merely hit Saavedra a few times and then leave the scene as he had claimed, but had beat him in a substantial

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(…continued)
statistical frequency of one in 1,300. (*Gentile III*, *supra*, E069088, p. 5; 3 RT 507–513.)

and prolonged manner consistent with deliberation and premeditation.

The jury, moreover, was instructed that there could be more than one cause of death and that an act or omission "causes death if the death is the direct, natural, and probable consequence of [it] and the death would not have happened without the act or omission." (2 CT 272, 296; 4 RT 710–711, 725; see CALCRIM Nos. 240, 520.) A forensic pathologist testified that Saavedra had been killed by a multiple-blunt-force-impact beating. (*Gentile III*, *supra*, E069088, p. 5; 3 RT 583, 586–589.) While the pathologist noted that certain injuries were more likely to have been caused by an instrument (such as Saavedra's fractured scapulae, clavicle, and top left anterior rib), she testified that other internal injuries, such as his multiple broken ribs and fractured vertebrae, could have been inflicted without the use of a weapon or instrument. (3 RT 577–581.) There was no testimony suggesting that a beating by instrument was the sole cause of or otherwise indispensable to the killing; to the contrary, the pathologist testified that Saavedra had been killed by multiple blunt force injuries delivered by fist *or* instrument. (3 RT 583–586.) Hence a reasonable juror could have credited appellant's claim that he did not use an instrument in beating Saavedra (hence the jury's not true finding on the dangerous and deadly weapon sentence enhancement allegation) and yet found that he, acting alongside someone else (such as Roberts), deliberately and with premeditation administered a substantial and prolonged beating by fist or foot that proximately caused Saavedra's

death—and as such was a direct perpetrator to the murder, a direct aider and abettor to it, or both.[7]

Furthermore, the jury could have reasonably credited Roberts' testimony and found, as her testimony had suggested and as the prosecution had argued at trial, that appellant was the sole perpetrator of Saavedra's premeditated murder, notwithstanding its not true finding on the deadly or dangerous weapon sentencing enhancement. (See 4 RT 757 [prosecutor's closing argument that appellant intentionally beat Saavedra to death while alone with him because he saw Saavedra as "competition" for Roberts]; 1 CT 249 [not true sentence enhancement allegation finding].) This is because that not true finding may have been the product of compromise, lenity, or mistake. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 207

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[7] As the court of appeal in this case stated in rejecting appellant's claim for relief under Senate Bill No. 1437:

> At a minimum . . . [appellant] 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 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 [appellant'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 and abetting Roberts' assault with a deadly weapon.

(*Gentile III*, *supra*, E069088, p. 17.)

["Where a jury's findings are irreconcilable, we normally attribute such tensions to compromise, lenity, or mistake, and give effect to all of the jury's findings"]; *People v. Avila* (2006) 38 Cal.4th 491, 600 ["'If a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both'"].) The evidence thus substantially showed in multiple respects that appellant, acting as a direct perpetrator, a direct aider or abettor, or both, murdered Saavedra with intent and premeditation—and, therefore, malice aforethought.

C. Appellant's Contentions Do Not Raise a Reasonable Doubt as to the Harmlessness of the Error

Appellant sets forth a number of contentions that he claims cut against a finding of harmlessness. (Opening Brief on the Merits (OBM) 35–40.) None reasonably suggest jury reliance on the natural and probable consequences doctrine.

Appellant contends, first, that the court of appeal' finding of prejudice from the alleged *Chiu* error necessarily establishes prejudice for purposes of Senate Bill No. 1437, as that prejudice finding establishes that the jury may have relied on the natural and probable consequences doctrine. (OBM 35–37.) He also contends that "nothing in any of the jury's verdicts . . . show the error was harmless beyond a reasonable doubt." (OBM 37.) However, neither the parties before the court of appeal nor that court addressed the trial court's instruction to the jury, pursuant to CALCRIM No. 521, that the jury could not find appellant guilty of first degree murder without a finding that he had

committed the murder willfully, deliberately, and with premeditation. That instruction—which appellant does not address in his opening brief—establishes beyond any doubt that the jury found that appellant committed the murder willfully, deliberately, and with premeditation. The jury did not rely on the natural and probable consequences doctrine. (Section II.A, *ante*.)

Appellant contends that the jury's question to the court, submitted during deliberations, regarding whether fists can be considered a "deadly weapon" indicates it was contemplating the natural and probable consequences doctrine, given that the target offense identified was that of assault with a deadly weapon. (OBM 37–38; 1 CT 235; 2 CT 289–292; 4 RT 719–722.) But it is unlikely, if not implausible, that the jury was considering that question in connection with the natural and probable consequences doctrine. That doctrine, if applied, would have entailed appellant directly aiding and abetting another person—i.e., a direct perpetrator—in committing assault with a deadly weapon, the natural and probable consequence of which was Saavedra's murder. For the jury to consider appellant's fists as a "deadly weapon" for purposes of the target offense of assault, in contrast, would have necessitated appellant himself acting as a direct perpetrator in that assault, rendering the doctrine inapposite. Furthermore, and in any event, there is another, far more likely explanation for the jury's question, which was simply to determine whether appellant's fists constituted a deadly weapon for purposes of the deadly or dangerous weapon sentence

enhancement allegation. In keeping with the trial court's answer that fists do not constitute a deadly weapon, that sentence enhancement allegation was later found not true by the jury. (1 CT 235, 249; 4 RT 820.)

Appellant claims the prosecutor's references during closing argument to his statements to the police, as well as the jury's request during deliberations for a copy of those statements, suggest jury reliance on the natural and probable consequences doctrine. (OBM 38–40.) But the prosecutor did not reference those statements solely in the context of that doctrine, and that doctrine in any event was not central to the prosecution's principal theories of guilt at trial. The prosecutor's primary theory was that appellant was the sole direct perpetrator of Saavedra's premeditated murder, beating Saavedra to death because he viewed him as "competition" for Roberts and had "every motive to make sure [Saavedra] was no longer in [Roberts's] life." (4 RT 746, 753, 755–757; see 4 RT 771 [defense counsel's argument that "the theory . . . of the People doesn't hold up that my client committed this cold-blooded murder in a fit of rage because he was jealous of [Saavedra]"].) The prosecutor argued that Roberts's testimony pertinent to this theory—that Roberts had left appellant and Saavedra alone at the La Casita restaurant; that she saw appellant a few hours later in the parking lot of the Royal Plaza Inn, soaking wet as if he had just been in a pool; and that appellant told her that he had "gotten . . . in a really bad fight" with Saavedra and "might have killed" him—was credible because it "match[ed] up with the

objective evidence" at trial, including, in particular, the surveillance videotapes showing appellant and Roberts in the parking lot following the murder. (4 RT 745.) In contrast, during his rebuttal argument, the prosecutor encouraged the jury to examine appellant's statements to the police (in which appellant claimed he hit Saavedra a few times and then went straight home after being unable to stop Roberts from beating him with the golf club) because those statements were all "lies" that were "discounted by the objective evidence in this case." (4 RT 792.)[8]

The prosecutor also argued that, even if appellant had not acted with an express intent to kill, he nonetheless murdered Saavedra with implied malice because he had, acting with a conscious disregard for human life, deliberately beat Saavedra, the natural and probable consequences of which were dangerous to human life. (See 2 CT 295–296 [trial court's jury instruction regarding implied malice]; 4 RT 754–755 [prosecutor's implied malice argument].) In connection with that particular theory, the prosecutor argued that appellant's statements—in which he not only placed himself at the scene, but admitted to beating Saavedra—established implied malice, particularly in light of other evidence indicating that appellant was at the beating for a sustained period of time. (4 RT 754–755.)

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[8] The prosecutor argued, "Ladies and gentlemen, I would ask for you to have that entire statement of the defendant read to you if you can because in it are an air of contradiction, lies. Everything is discounted by the objective evidence in this case." (4 RT 792.)

Finally, the prosecutor also argued that appellant's statements, even if believed, showed that he had aided and abetted Saavedra's murder by not stopping Roberts from killing Saavedra with the golf club even though appellant had instigated the beating, was alongside Roberts when she beat Saavedra with the golf club, was fully aware of Roberts's intent to kill Saavedra, and had the power or the ability to stop or prevent it. (4 RT 757–758.) While unclear, this argument appears more consistent with direct aider and abettor liability than liability under the natural and probable consequences doctrine, as its focal point is not appellant's aiding and abetting the target offense of assault with a deadly weapon, but his failure to stop or otherwise withdraw from an imminent murder he knew would occur as a result of the beating he had instigated. (See 4 RT 758 [prosecutor's argument that appellant "aided and abetted Saundra Roberts by not . . . stopping this beating," despite "set[ting] the chain of events in motion" and "know[ing] exactly what [she] is going to do"]; 2 CT 286–287 [jury instruction on direct aider and abettor liability]; CALCRIM No. 401 [withdrawing from offense directly aided and abetted requires "do[ing] everything reasonably within his or her power to prevent the crime from being committed"].) Regardless, even if this argument somehow alluded to the natural and probable consequences doctrine—a phrase the prosecutor did not mention in closing—it was harmless beyond a reasonable doubt, given the evidence at trial and the jury's finding, inherent to its first degree murder verdict, that appellant committed deliberate and premeditated murder. (Sections II.A–B, *ante*.)

Appellant next contends that the evidence in this case was conflicting and unclear, suggesting jury reliance on the natural and probable consequences doctrine. (OBM 38–39.) As detailed *ante*, however, substantial evidence was presented that supported the jury's finding, necessary to its first degree murder verdict, that appellant murdered Saavedra willfully, deliberately, and with premeditation as a direct perpetrator, a direct aider and abettor, or both. (Section II.B, *ante*.)

Finally, appellant contends that the jury's not true finding on the deadly or dangerous weapon sentence enhancement allegation suggests jury reliance on the natural and probable consequences doctrine. (OBM 40.) But the jury could have found that appellant was the sole perpetrator of the murder while simultaneously rejecting, as a result of compromise, lenity, or mistake, the prosecution's deadly or dangerous weapon sentence enhancement allegation. (*Gonzalez*, *supra*, 5 Cal.5th at p. 207; *Avila*, *supra*, 38 Cal.4th at p. 600.) Alternatively, and more likely, the jury could have found that appellant's beating Saavedra by fist or foot was a substantial and proximate cause of Saavedra's death, rendering appellant guilty of first degree murder as either a direct perpetrator, a direct aider and abettor, or both, particularly in view of the trial court's instruction that there could be multiple causes of death, as well as the fact that there was no evidence at trial that a beating by instrument was indispensable to Saavedra's death. (2 CT 272, 296; 3 RT 583–586; 4 RT 710–711, 725; CALCRIM Nos. 240, 520.)

D. Even if the Record Indicates Possible Prejudice, Appellant May Not Obtain Relief on Direct Appeal but Must Seek Relief under Penal Code Section 1170.95

The record establishes beyond any doubt that appellant was not prejudiced by the trial court's natural and probable consequences instruction. (Section II.A–C, *ante*.) But even if he might have been prejudiced on the current record, Senate Bill No. 1437 does not entitle him to relief on direct appeal. This is because, in addition to circumscribing the reach of felony murder and eliminating the natural and probable consequences doctrine in connection with murder (as detailed in section I.B–C, *ante*), Senate Bill No. 1437 established a separate and exclusive mechanism by which a defendant may seek to vindicate a claim for relief under Senate Bill No. 1437. Importantly, relief under that mechanism is not automatic, but may be dependent upon the presentation of new or additional evidence and further factfinding by the trial court. Reversing a murder conviction based on the closed record inherent to a direct appeal, on the other hand, negates this essential aspect of Senate Bill No. 1437. (See *People v. Soto* (2018) 4 Cal.5th 968, 983 [statutory language should be interpreted to give significance to every word, phrase, or sentence in pursuance of its legislative purpose].)

In addition to amending sections 188 and 189 as discussed *ante*, Senate Bill No. 1437 enacted section 1170.95. (Stats. 2018, ch. 1015, § 4.) That section sets forth a procedure by which a defendant convicted of murder under a felony murder or a natural and probable consequences theory may seek to have that

conviction vacated and obtain resentencing. (§ 1170.95.) That procedure requires that the defendant file a petition in the trial court that includes, inter alia, a declaration that he or she satisfies the following requirements for relief:

> (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.
>
> (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.
>
> (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.

(§ 1170.05, subds. (a)(1)–(3), (b)(1)(A).)

Upon receipt of the petition, the trial court must determine whether the petition includes all information required by section 1170.95, subdivision (b)(1), and if so, whether the defendant has made a prima facie case for relief. (§ 1170.95, subds, (b)(2), (c).) If the court determines the petitioner has made this prima facie showing, it must issue an order to show cause and hold a hearing to determine whether to vacate the murder conviction—i.e., whether the defendant is, in fact, entitled to relief under Senate Bill No. 1437—and, if so, to resentence the defendant. (§ 1170.95, subds. (c), (d)(1), (e).) At this hearing, the prosecution bears the burden to prove beyond a reasonable doubt that the defendant is ineligible for resentencing—such as, for example, by establishing beyond a reasonable doubt that the defendant could still be convicted of murder, even under current sections 188 or 189 as

amended by Senate Bill No. 1437. (§ 1170.95, subd. (d)(3).) At this hearing, the prosecutor and the defendant "may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).)

Section 1170.95 therefore makes clear that relief under Senate Bill No. 1437 is not automatic or otherwise categorical, but may be determined on an individualized basis after the presentment of new or additional evidence by the parties and upon further factfinding by the trial court. In a direct appeal, in contrast, the parties generally may not introduce new or additional evidence, and the courts' evaluation of any issues or claims are limited to the record on appeal, as preserved at trial. (See, e.g, *In re Zeth S.* (2003) 31 Cal.4th 396, 405 [absent exceptional circumstances, "'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration'"]; *People v. Jenkins* (2000) 22 Cal.4th 900, 952–953 [appellate court "'generally is not the forum in which to develop an additional factual record'"], citation omitted.)

Because of this, numerous courts of appeal have held, correctly, that a murder defendant may not seek relief under Senate Bill No. 1437 in a direct appeal, but must employ the procedure set forth in section 1170.95. (See, e.g., *People v. Cervantes* (2020) 46 Cal.App.5th 213, 221 ["Because Cervantes's entitlement to relief will depend on the presentation of new evidence and the resolution of factual issues, the superior court, not the appellate court, is the proper first venue for his claim"];

People v. Munoz (2019) 39 Cal.App.5th 738, 752–753 [allowing relief under Senate Bill No. 1437 on direct appeal "would bypass the section 1170.95 fact finding process that is, in most cases, a predicate to relief under Senate Bill 1437"]; *In re R.G.* (2019) 35 Cal.App.5th 141, 151 [relief under Senate Bill No. 1437 not available on direct appeal; in the absence of a petition filed pursuant to section 1170.95, such relief is "premature"]; *People v. Martinez* (2019) 31 Cal.App.5th 719, 727 ["Providing the parties with the opportunity to go beyond the original record in the petition process, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials"]; see also *People v. Rodriguez Garcia* (2020) 46 Cal.App.5th 123, 181–182 [defendant must employ petition procedure set forth in section 1170.95 in seeking relief under Senate Bill No. 1437]; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1112–1114 [same]; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147–1158 [same].)

The instant case exemplifies how new or additional evidence may be determinative of a defendant's claim for relief under Senate Bill No. 1437. Appellant claims the jury's not true finding on the deadly or dangerous weapon sentencing enhancement allegation suggests that he was not a direct perpetrator,

rendering more likely jury reliance on the natural and probable consequences doctrine. (OBM 40.) In a section 1170.95 proceeding, the prosecution would be able to present new or additional evidence tending to establish appellant's guilt as a direct perpetrator or direct aider and abettor notwithstanding his non-use of a deadly or dangerous weapon. For example, the prosecution could present additional testimony to show that Saavedra's internal injuries, including those thought to be more consistent with the use of a weapon or instrument (such as his fractured collarbone and scapula), could have been inflicted by other means not involving an instrument, such as appellant kicking or stomping on him as he lay on the floor, and more generally, to show that those and other injuries potentially inflicted by such means could have substantially contributed to Saavedra's death.[9] Such evidence would tend to establish appellant's guilt as a direct perpetrator or, at a minimum, a direct aider and abettor, and thereby support a finding by the trial court that appellant could still be convicted of murder under current law, rendering him ineligible for relief under Senate Bill No. 1437. (§ 1170.95, subds. (a)(3), (d)(3).)

For this reason, even if appellant might have been prejudiced on the current record, relief at this stage would be premature. To obtain relief, appellant must employ the petition

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[9] Such a scenario would be consistent with appellant's own admission that he "may" have kicked Saavedra when Saavedra was on the floor, and the evidence suggesting that appellant had Saavedra's blood on his feet after the murder. (1 CT 198–199, 206, 214, 227; 3 RT 507–513.)

process set forth in section 1170.95, which entitles the prosecution to present new or additional evidence in defense of the validity of appellant's conviction prior to any grant of relief.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court affirm the judgment.

Dated: May 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Century Schoolbook font and contains 12,155 words.

Dated: May 14, 2020

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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