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 REPLY BRIEF ON THE MERITS

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By Appointment of The
Supreme Court Of California

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Appellant Joseph Gentile, Jr. files the following Reply Brief on the Merits to Respondent's Answer Brief on the Merits. The failure to respond to a particular argument should not be construed as a concession that respondent's position is accurate. It merely reflects appellant's view that the issue was adequately addressed in Appellant's Opening Brief on the Merits.

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INTRODUCTION

Respondent first concedes that the amendment to Penal Code section 188 by recently enacted Senate Bill No. 1437 ("SB 1437") eliminates all murder liability, including second degree murder liability, under the natural and probable consequences doctrine.

However, the Attorney General next argues the Attorney General's prior concession that the natural and probable consequences instruction given appellant's jury was prejudicial error under *People v. Chiu* (2014) 59 Cal.4th 155 ("*Chiu*") requiring reversal of appellant's first degree murder conviction, as well as the Court of Appeal's prior decision in Case No. E064822 holding the instructional error under *Chiu* was prejudicial and required reversal of appellant's first degree murder conviction (*People v. Gentile* (Feb. 27, 2017, E064822) [nonpub. opn.], pp. 2-3, 11-14 ("*Gentile I*"), as modified Mar. 22, 2017), were both incorrect. Respondent now argues for the very first time there was in fact no *Chiu* error at all, or any error was harmless beyond a reasonable doubt, because appellant's jury was instructed with the standard versions of CALCRIM Nos. 520 and 521 regarding first and second degree murder with malice aforethought committed as a direct perpetrator. It appears this argument is precluded by principles of forfeiture, issue preclusion, and law of the case. It also has no merit in any event.

Respondent additionally argues any error in instructing appellant's jury on a natural and probable consequences theory of liability was harmless beyond a reasonable doubt because there was substantial evidence appellant was guilty of the murder as either the direct perpetrator or a direct aider and abettor. However, the question is not whether there was substantial evidence to support a conviction under a legally valid alternative theory; respondent is applying the wrong standard of review, and under the correct standard of review, the instructional error was prejudicial because it cannot be determined

beyond a reasonable doubt that none of appellant's jurors relied on the natural and probable consequences theory in returning their verdict.

Finally, respondent argues that if there was prejudicial instructional error, appellant is not entitled to relief on direct appeal because the changes to the law of homicide enacted via SB 1437 do not apply retroactively to cases not yet final on appeal, and appellant must instead seek relief in the superior court under Penal Code section 1170.95. However, this argument ignores this Court's October 30, 2019 order in which this Court limited the issues to be briefed by the parties, and dismissed review on the question of whether SB 1437 applies retroactively to cases not yet final on appeal.

STATEMENT OF CASE AND FACTS

Respondent does not adopt the Court of Appeal's summary of the evidence, and respondent instead crafts its own Statement of Facts with various citations to the record and the Court of Appeal's prior Opinions. (Answer Brief pp. 13-18.)

Appellant maintains this Court should primarily rely upon the Court of Appeal's recitation of the evidence, which as stated in the Court of Appeal's prior Opinions, sets forth a summary of the "Objectively Established Facts" and otherwise appropriately summarizes the evidence. (*Gentile I, supra,* E064822, pp. 3-11; *People v. Gentile* (May 30, 2019, E069088) [nonpub. opn.], pp. 3-11 ("*Gentile III*") [adopting the Statement of Facts in *Gentile I*].)

Appellant further notes respondent's own recitation of the evidence is not an objective account of the trial evidence. For example, with respect to the evidence favorable to the prosecution, such as the testimony of Saundra Roberts who was granted use immunity and was the other person who may have committed the charged murder, respondent accepts and treats her trial testimony as unqualified fact, and also makes little to no mention of her prior inconsistent statements. (Answer Brief pp. 16-17.) On the other hand, with

respect to the evidence favorable to appellant, such as appellant's statements to police following his arrest, as well as the testimony of Charlotte Sullivan that as noted by the Court of Appeal more or less confirmed appellant's account of the events (see *Gentile III, supra,* E069088 p. 10; 2 R.T. pp. 403-406, 410-411), respondent qualifies, prefaces, and attempts to undermine this evidence with phrases such as "admitted," "claimed," "according to," and "did not mention." (See Answer Brief pp. 16-18.)

Respondent also states within its Statement of Facts that the victim was "beaten to death by fists or instruments." (Answer Brief p. 14, citing *Gentile III, supra,* E069088 p. 5; 3 R.T. pp. 583, 586.) However, this misleadingly suggests that it was possible the victim was fatally beaten with fists alone, a scenario that if true would tend to rule out Saundra Roberts as the perpetrator. In fact, the pathologist's testimony was clear that some of the more serious injuries were almost certainly inflicted with an instrument such as a golf club, bottle, or chair, leaving it entirely plausible Roberts rather than appellant perpetrated the killing. (See *Gentile III, supra,* E069088 p. 5 [the evidence showed the victim's injuries "were probably inflicted with fists, a golf club, a beer bottle, and a chair"]; 3 R.T. pp. 567-570, 575-581, 583.) The deputy coroner who arrived at the scene of the homicide also testified it appeared the victim had been beaten with some type of instrument. (2 R.T. pp. 456-457.)

The evidence from the scene, including the broken golf club head with the victim's blood on it, the broken chair with blood on it, the wooden stick with blood on it, and the broken beer bottle containing blood, all further indicated, contrary to respondent's suggestion, the victim was beaten with the above items, not potentially just fists. (See *Gentile III, supra,* E069088 p. 4; 1 R.T. pp. 110, 129-131, 136-138, 141; 3 R.T. pp. 471, 503-504, 519-522.)

Respondent's summary of the procedural history of the case is also improperly skewed or inaccurate at times. For example, respondent twice

casts fault upon defense counsel for not objecting to the erroneous natural and probable consequences instruction given appellant's jury despite the fact that *Chiu* was decided more than one year prior to appellant's trial. (See Answer Brief pp. 11, 21.) However, respondent neglects to mention the trial court had a sua sponte duty to correctly instruct the jury pursuant to *Chiu*, and it also would have been highly unethical for the prosecutor to knowingly seek a first degree murder conviction in violation of *Chiu*. Fairly viewed, the record indicates the trial court, the prosecutor, and defense counsel all failed to ensure appellant's jury was instructed in accordance with this Court's decision in *Chiu*, not just defense counsel

Significantly, respondent also misstates the target crime underlying the natural and probable consequences theory at issue. Respondent states appellant's jury was instructed on "assault with a deadly weapon other than a firearm as the intended target crime." (Answer Brief p. 18.) This is not accurate. The target crime upon which appellant's jury was instructed was assault with force likely to produce great bodily injury or with a deadly weapon other than a firearm. (2 C.T. pp. 301-302.)

Specifically, appellant's jury was instructed pursuant to CALCRIM No. 403 that the alleged target crime being relied on by the prosecution was a violation of "PC 245(a)(1)," i.e., [former] Penal Code section 245, subdivision (a)(1).[1] (2 C.T. pp. 291-292.)

Appellant's jury was further instructed on this target crime pursuant to CALCRIM No. 875 in pertinent part as follows:

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[1] As noted in Appellant's Opening Brief on the Merits, Penal Code section 245, subdivision (a)(1), has since been amended. (Brief on the Merits p. 24, fn. 7.) In addition, appellant's jury was also instructed on natural and probable consequences liability using CALCRIM No. 402, which additional instruction was erroneously provided his jury because appellant was not separately charged with the target crime of felony assault. (Brief on the Merits p. 24, fn. 8.)

"The defendant is alleged to have participated in a PC 245(a)(1) assault with (force likely to produce great bodily injury and/or a deadly weapon other than a firearm in violation of Penal Code section 245.

"To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person;

"1A. The defendant did an act that by its nature would directly and probably result in the application of force to a person, and

"1B. The force used was likely to produce great bodily injury;

"2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"AND

"4. When the defendant acted, he had the present ability to apply force (likely to produce great bodily and/or with a deadly weapon other than a firearm."

…

"A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily." (2 C.T. pp. 301-302.)

Thus, as the above instructions make clear, the target crime provided appellant's jury was assault with force likely to produce great bodily injury

or assault with a deadly weapon other than a firearm, not only assault with a deadly weapon other than a firearm as suggested by respondent.

Finally, respondent also states that at the hearing on appellant's motion for a new trial following the jury's verdict, defense counsel "acknowledged that appellant had been 'convicted of first degree murder under the theory of premeditation and deliberation.'" (Answer Brief pp. 19, 41.) For numerous reasons, this statement by respondent is both misleading and irrelevant. First, defense counsel was not in the jury deliberation room and was not in a position to acknowledge anything about what the jury did or did not do. Second, respondent takes defense counsel's statement completely out of context. This was not a felony murder case or a case involving a destructive device, the only theory of first degree murder presented to the jury was based on premeditation and deliberation, and defense counsel's statement merely acknowledged that fact. (See 4 R.T. pp. 832-833; Pen Code, § 189.) Defense counsel's statement was in fact made in the context of arguing for a new trial or a reduction in the offense pursuant to Penal Code section 1181(6) on the specific basis that he was not the actual killer and was instead necessarily convicted as an aider and abettor. (See 4 R.T. pp. 832-833.)

Third, a motion for a new trial under Penal Code section 1181(6) requires the trial court to determine whether the evidence was sufficient under a 13th juror standard (see *Porter v. Superior Court* (2009) 47 Cal.4th 125, 133), which is simply not at issue herein. Fourth, and most importantly, it is for this Court, not trial counsel, to decide what theories upon which the jury may have convicted appellant and whether the instructional error not known or noticed by anyone in the trial court was prejudicial.

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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

Respondent concedes 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. (Answer Brief pp. 24-33.) Thus, appellant presents no further argument on this issue.

Appellant adds only that the most recent Court of Appeal decisions addressing this issue have again reached this same conclusion. (*People v. Lee* (2020) ___ Cal.App.5th ___, ___ (B297928, filed 5/1/20, certified for publication 5/22/20) [SB 1437 "eliminated liability for murder under the natural and probable consequences doctrine"]; *People v. Offley* (2020) 48 Cal.App.5th 588, ___ [the effect of SB 1437 "was to eliminate liability for murder under the natural and probable consequences doctrine"].)

II

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

A. Instructing Appellant's Jury With The Standard Versions Of CALCRIM Nos. 520 And 521 Regarding Malice Aforethought Murder Committed As A Direct Perpetrator Did Not Render The *Chiu* Error Harmless Beyond A Reasonable Doubt

1. Respondent's Argument Should Be Deemed Barred By Principles Of Forfeiture, Issue Preclusion, And Law Of The Case

In appellant's previous appeal in Case No. E064822, appellant argued, and the Attorney General conceded, the *Chiu* error was prejudicial

because the record did not establish beyond a reasonable doubt that the jury did not rely on the erroneous natural and probable consequences instruction in returning their verdict. (E064822, AOB pp. 17-32; E064822, Resp. Brief, pp. 16-19.) The Court of Appeal agreed, holding the error in instructing appellant's jury on the natural and probable consequences theory of liability was not harmless beyond a reasonable doubt based on the record. (*Gentile I, supra,* E064822, pp. 12-14, as modified Mar. 22, 2017.) That decision became final on July 5, 2017 upon the Court of Appeal's issuance of a remittitur. (See E064822 Docket.)

Thereafter, the People declined to conduct a retrial, appellant's conviction was reduced to second degree murder, and the current appeal arose involving the issues left unresolved in *Gentile I* as well as the additional natural and probable consequences issue regarding appellant's second degree murder conviction that arose following the Legislature's enactment of SB 1437. (See *People v. Gentile* (Nov. 15, 2018, E069088) [nonpub. opn.] ("*Gentile II*"), pp. 2-3; *Gentile III, supra,* E069088, pp. 12-18; E069088 C.T. pp. 8-20; E069088 R.T. pp. 1-3.)

The Attorney General now takes the opposite tact, and asserts for the very first time there was no *Chiu* error at all, or if there was any *Chiu* error it was harmless beyond a reasonable doubt, in light of the standard instructions on malice aforethought murder given his jury pursuant to CALCRIM Nos. 520 and 521. (Answer Brief pp. 12, 33-42.) Respondent does not assert this argument was unavailable previously or could not have been raised for any reason in appellant's prior appeal. Rather, respondent asserts the Attorney General's prior concession and the failure to raise this argument previously was "an apparent oversight," "mistaken," and "regretfully an error." (Answer Brief pp. 21, 42, fn. 5.)

Appellant urges this Court should reject this new argument at the outset based on principles of forfeiture, issue preclusion, and law of the case.

In light of the Attorney General's prior concession on this exact issue in appellant's prior appeal, as well as the Attorney General's additional failure to raise this argument at any time within the Court of Appeal in the current appeal, a finding of forfeiture appears appropriate. (See *People v. Hines* (1997) 15 Cal.4th 997, 1034, fn. 4 [the Attorney General cannot offer a new theory for affirmance not previously raised below]; *People v. Burnett* (1999) 71 Cal.App.4th 151, 172-173 [the People may not alter their position and theory of the case on appeal]; *People v. Mendez* (1991) 234 Cal.App.3d 1773, 1783 ["The People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the district attorney"]; *Amadeo v. Zant* (1988) 486 U.S. 214, 228, fn. 6 [108 S.Ct. 1771, 100 L.Ed.2d 249] ["Having conceded this point in both courts below, respondent will not be heard to dispute it here."]; *Washington v. Yakima Indian Nation* (1979) 439 U.S. 463, 476, fn. 20 [99 S.Ct. 740, 58 L.Ed.2d 740] [alternative ground for affirmance must have been properly raised below].)

Even if not deemed forfeited, principles of issue preclusion[2] and law of the case should be deemed to preclude respondent's argument.

"Collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.'" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896.) The following requirements must be satisfied for issue preclusion to apply: "First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be

[2] Commonly referred to in the past as "collateral estoppel," this Court has explained it is now preferable to use the term "issue preclusion." (*Samara v. Matar* (2018) 5 Cal.5th 322, 326.)

final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341; *Samara v. Matar, supra,* 5 Cal.5th at p. 327.)

If these threshold requirements are all satisfied, the final question becomes whether the public policies underlying the doctrine support its application in a particular setting. (*Lucido v. Superior Court, supra,* 51 Cal.3d at pp. 342-343.) These public policy considerations, which include "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation -- strongly influence whether its application in a particular circumstance would be fair to the parties and constitute sound judicial policy." (*Id.* at p. 343.)

For example, in *Lucido*, this Court addressed whether issue preclusion barred a subsequent criminal trial for indecent exposure where a probation revocation allegation based on the same underlying conduct had previously been rejected by a different court. (*Lucido v. Superior Court, supra,* 51 Cal.3d at p. 339.) This Court found all five threshold requirements for application of issue preclusion were fulfilled (*id.* at pp. 341-342), but ultimately declined to apply the doctrine in that case for public policy reasons due to the numerous and substantial differences between probation revocation proceedings and criminal trials. (*Id.* at pp. 347-352.)

On the other hand, in *Quarterman*, the Court of Appeal subsequently held that issue preclusion did bar a second probation revocation hearing on an identical violation previously rejected due to a failure of proof, even though the prosecution presented new and additional witnesses at the second proceeding. (*People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1284-1285.) In so holding, the Court of Appeal observed that "the identical

issue was decided at both revocation proceedings, that is, 'whether the defendant's conduct demonstrates that the leniency extended by the grant of probation remains justified.' [Citation.]" (*Id.* at p. 1289.) In finding the issue was previously litigated despite the fact the People presented different and additional evidence at the second proceeding, the Court of Appeal observed: "'[T]he important question, at least for threshold purposes, is whether the People had the *opportunity* to present their entire case at the revocation hearing, not whether they availed themselves of the opportunity.' (*Lucido, supra*, 51 Cal.3d at p. 340, fn. 2.)" (*Id.* at p. 1289, emphasis in original.) The Court of Appeal went on to hold that "the issue the prosecutor sought to relitigate -- whether defendant's probation should be provoked -- was necessarily decided," the prior court's decision was final, the Solano County District Attorney represented the People in both proceedings, and public policy considerations supported application of issue preclusion. (*Id.* at pp. 1289-1291, 1296.)

As in both *Lucido* and *Quarterman,* all of the above threshold requirements for application of issue preclusion are met. The issue respondent seeks to relitigate, whether the jury may have relied on the erroneous natural and probable consequences instruction in returning their verdict, is identical to the issue previously decided by the Court of Appeal in Case No. E064822. This is not a new issue specific to appellant's current second degree murder conviction, or a new issue related to SB 1437. Rather, respondent is now arguing the Court of Appeal's prior decision reversing appellant's first degree murder conviction due to *Chiu* error was incorrect. In other words, this is the identical issue resolved in the prior appeal. (See *Ayala v. Dawson* (2017) 13 Cal.App.5th 1319, 1326-1327 [the identical issue requirement addresses whether identical issues are at stake in the two proceedings, not whether the same legal theories are asserted by the parties in both proceedings]; *Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 746 [issue preclusion bars

relitigation of the same issues; it does not require the same legal theories to have been raised]; *Clark v. Lesher* (1956) 46 Cal.2d 874, 880-881 [issue preclusion bars relitigation of the same issue, "even though some legal theory, argument or 'matter' relating to the issue was not expressly mentioned or asserted."].)

It also makes no difference that the People did not avail themselves of the opportunity to argue the giving of CALCRIM Nos. 520 and 521 rendered any *Chiu* error harmless in the prior appeal. (See *Lucido v. Superior Court, supra*, 51 Cal.3d at p. 340, fn. 2, emphasis in original [the important question is whether the People had the *opportunity* to present their case, not whether they availed themselves of the opportunity]; *People v. Quarterman, supra,* 202 Cal.App.4th at p. 1289; see also *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 826 ["The bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case"].) The issue of whether there was prejudicial *Chiu* error was previously litigated and decided by the Court of Appeal in appellant's favor, and against the Attorney General pursuant to the Attorney General's own concession. Moreover, the Court of Appeal's decision on this issue in Case No. E064822 is final and on the merits, and the party against whom preclusion is sought, the Attorney General, is the same party as in the former proceeding.

The relevant public policy considerations all further support application of the doctrine of issue preclusion in this case. First, public confidence in the integrity of the judicial system is threatened when two tribunals render inconsistent judgments on the same facts involving the same parties. (*People v. Taylor* (1974) 12 Cal.3d 686, 695-696.) Indeed, apparently recognizing the finality of the Court of Appeal's prior decision, respondent does not suggest appellant's first degree murder conviction should be reinstated, but rather argues appellant's second degree murder conviction should be affirmed because the Court of Appeal's prior decision

reversing his first degree murder conviction was erroneous. This Court should opt not to entertain such an illogical and untoward proposed resolution of this case.

Applying issue preclusion in this case is further supported because both the prior appeal and this one involve the same type of judicial proceedings that serve the same public interests, namely, the resolution of criminal cases on appeal. (See *People v. Quarterman, supra,* 202 Cal.App.4th at p. 1289 ["We, unlike the *Lucido* court, are not faced with different proceedings which 'serve different public different interests'"]; c.f., *Lucido v. Superior Court, supra,* 51 Cal.3d at p. 347 [finding public policy considerations would not be served by applying issue preclusion in that case because probation revocation hearings and criminal trials serve different public interests and involve different concerns].)

Second, interests of judicial economy would certainly be served by not relitigating an issue that was previously decided by the Court of Appeal several years ago in accordance with the Attorney General's own concession, and was not even raised by the Attorney General in the Court of Appeal in this appeal.

Third, while appellant is the party who filed both of the appeals in this case, "[i]t is not harassment, or vexatious, for a defendant to pursue vindication of his or her rights by way of appeal. …. In our view, the right of appellate review by appeal or writ is a neutral factor with respect to the consideration of judicial economy." (*People v. Quarterman, supra,* 202 Cal.App.4th at p. 1293.) Encouraging parties to pursue their appellate remedies in fact "serves the purpose of preserving the integrity of the judicial system, and promotes respect for the judicial process." (*Ibid.*) On the other hand, while not necessarily harassment per se, for the Attorney General to concede an issue one day and then take the opposite position the

next, is certainly frustrating for a litigant, it unduly increases the time and expense inherent in the litigation, and it is ultimately inappropriate.

For all the above reasons, this Court should apply the doctrine of issue preclusion to respondent's claim, contrary to both respondent's prior concession and the Court of Appeal's prior decision, that any *Chiu* error was harmless beyond a reasonable doubt because his jury was instructed with CALCRIM Nos. 520 and 521.

Respondent's argument should also be deemed precluded by the doctrine of law of the case.

"Under the doctrine of the law of the case, a principle or rule that a reviewing court states in an opinion and that is necessary to the reviewing court's decision must be applied throughout all later proceedings in the same case, both in the trial court and on a later appeal." (*People v. Jurado* (2006) 38 Cal.4th 72, 94; see also *People v. Sons* (2008) 164 Cal.App.4th 90, 99 ["'the law-of-the-case doctrine "prevents the parties from seeking appellate reconsideration of an already decided issue in the same case absent some significant change in circumstances."'"]; *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 213 ["The 'law of the case' doctrine dictates that an appellate court's holding, on a rule of law necessary to an opinion, must be adhered to throughout the case's subsequent progress in the trial court and on subsequent appeal"].)

As also previously stated by this Court in *Gray*, the doctrine of law of the case "'applies to this court even though the previous appeal was before a Court of Appeal.'" (*People v. Gray* (2005) 37 Cal.4th 168, 196, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 668.)

Here, the Court of Appeal's prior finding the *Chiu* error was prejudicial was necessary to its prior decision reversing appellant's first degree murder conviction, and respondent's contention herein that the *Chiu* error was not prejudicial in light of the fact appellant's jury was also

instructed with CALCRIM Nos. 520 and 521 is barred by the doctrine of law of the case.

Appellant notes there is one exception to this doctrine, namely, where its "'application will result in an unjust decision, e.g., where there has been a "manifest misapplication of existing principles resulting in substantial injustice" [citation], or the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations. [Citation.]'" (*People v. Gray, supra,* 37 Cal.4th at p. 197.) However, this exception "'does not apply when there is a mere disagreement with the prior appellate determination.' (*Stanley*, *supra*, 10 Cal.4th at p. 787.)" (*Ibid.*) Here, respondent's argument amounts to a mere disagreement with the Court of Appeal's prior decision, and should be rejected based on the doctrine of law of the case.

2. The Fact That Appellant's Jury Was Instructed With CALCRIM Nos. 520 And 521 Regarding Murder Committed As A Direct Perpetrator Did Not Render The Erroneous Natural And Probable Consequences Instruction Harmless Beyond A Reasonable Doubt

Appellant's jury was instructed on the crime of malice aforethought murder pursuant to the standard version of CALCRIM No. 520, which provided in pertinent part as follows:

> "The defendant is charged in Count 1 with murder in violation of Penal Code section 187.
>
> "To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant committed an act that caused the death of another person;
>
> "AND
>
> "2. When the defendant acted, he had a state of mind called malice aforethought;

"AND

"3. He killed without lawful excuse or justification.

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"The defendant acted with express malice if he unlawfully intended to kill.

"The defendant acted with implied malice if:

"1. He intentionally committed an act;

"2. The natural and probable consequences of the act were dangerous to human life;

"3. At the time he acted, he knew his act was dangerous to human life;

"AND

"4. He deliberately acted with conscious disregard for life.

….

"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 C.T. pp. 295-296; CALCRIM No. 520.)

Appellant's jury was instructed on first degree murder pursuant to the standard version of CALCRIM No. 521, which provided 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 length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.
>
> "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 C.T. pp 297-298; CALCRIM No. 521.)

Respondent contends that because appellant's jury was given the above standard instructions, the *Chiu* error was harmless beyond a reasonable doubt. (Answer Brief pp. 33-42.) Specifically, respondent argues that in light of CALCRIM Nos. 520 and 521, the jury was required to find appellant personally committed the murder with malice aforethought, premeditation, and deliberation in order to convict him of first degree murder, and thus the jury could not have relied on the natural and probable consequences theory of liability in returning their verdict.

(Answer Brief pp. 12, 34, 40, 42, fn. 5.) This argument lacks merit and should be rejected.

In addition to CALCRIM Nos. 520 and 521, appellant's jury was also instructed on aiding and abetting and natural and probable consequences liability.

Appellant's jury was instructed on general aiding and abetting liability pursuant to CALCRIM No. 400 as follows:

> "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.
>
> "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.
>
> "Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." (2 C.T. p. 286; CALCRIM No. 400.)

Appellant's jury was instructed on direct aiding and abetting pursuant to CALCRIM No. 401 in pertinent part as follows:

> "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:
>
> "1. The perpetrator committed the crime;
>
> "2. The defendant knew that the perpetrator intended to commit the crime;
>
> "3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;
>
> "AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime;

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." (2 C.T. p. 287; CALCRIM No. 401.)

Appellant's jury was instructed on liability under the natural and probable consequences doctrine pursuant to CALCRIM No. 403 as follows:

"Before you may decide whether the defendant is guilty of PC 187, you must decide whether he is guilty of PC 245(a)(1).

"To prove that the defendant is guilty of PC 187, the People must prove that:

"1. The defendant is guilty of PC 245(a)(1);

"2. During the commission of PC 245(a)(1) a coparticipant in that PC 245(a)(1) committed the crime of PC 187;

"AND

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of PC 187 was a natural and probable consequence of the PC 245(a)(1).

"A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include an innocence bystander.

"A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the PC 187 was committed for a reason independent of the common plan to commit the PC

245(a)(1), then the commission of PC 187 was not a natural and probable consequence of PC 245(a)(1).

"To decide whether the crime of PC 245(a)(1) was committed, please refer to the separate instructions that I will give you on that crimes [sic].

"The People are alleging that the defendant originally intended to aid and abet PC 245(a)(1).

"If you decide that the defendant aided and abetted one of these crimes and that PC 187 was a natural and probable consequence of that crime, the defendant is guilty of PC 187. You do not need to agree about which of these crimes the defendant aided and abetted." (2 C.T. pp. 291-292; CALCRIM No. 403.)

As also noted previously, for purposes of the natural and probable consequences theory of liability, appellant's jury was instructed on the target crime of "PC245(a)(1)," assault with force likely to produce great bodily injury or assault with a deadly weapon other than a firearm. (2 C.T. pp. 301-302; CALCRIM No. 875.)

On appeal, the question of whether the instructions given the jury correctly stated the law is subject to an independent standard of review. (*People v. Alvarez* (1996) 14 Cal.4th 155, 220.) "Moreover, instructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) "'It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions.' [Citation.]" (*People v. Covarrubuis* (2016) 1 Cal.5th 838, 926.) "Out of necessity, an appellate court presumes the jurors faithfully followed the court's instructions, including erroneous ones." (*People* v. *Lawson* (1987) 189 Cal.App.3d 741, 748.)

Respondent's contention that the standard versions of CALCRIM Nos. 520 and 521 given appellant's jury demonstrate beyond a reasonable doubt the jury found appellant guilty of first degree murder as a direct perpetrator, and thus rendered any *Chiu* error harmless beyond a reasonable doubt, is misplaced for numerous reasons.

First, as noted above, appellant's jury was expressly instructed on a natural and probable consequences theory of liability, and respondent's claim the jury could not have relied on it in returning their verdict is somewhat dubious at the outset.

Second, respondent is improperly focusing on CALCRIM Nos. 520 and 521 in isolation, rather than the instructions as a whole. For example, respondent contends that because CALCRIM No. 521 provided in part that "[t]he defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation," this means the jury was required to find appellant personally committed the murder with intent to kill, deliberation, and premeditation in order to convict him of first degree murder. (Answer Brief pp. 12, 34-36, 40, 42, fn. 5.) However, this argument ignores the fact that appellant's jury was also instructed on an alternative natural and probable consequences theory of liability.

Third, the above portion of the standard version of CALCRIM No. 521 relied on by respondent provided that "*if*" the People have proved the defendant acted with intent to kill, premeditation, and deliberation, he was guilty of first degree murder. (2 C.T. p. 297, emphasis added.) However, by its terms, even this portion of CALCRIM No. 521 relied upon by respondent did not *require* a finding of premeditation and deliberation on behalf of appellant as respondent suggests. Rather, it just provided a means of returning a first degree murder verdict "*if*" the jury made those findings. Significantly, and as appellant's jury was also instructed, the only thing they "*must*" find to return a first degree murder verdict was that "the killing was first degree

murder rather than a lesser crime." (2 C.T. p. 298.) In addition, the version of CALCRIM No. 403 given appellant's jury made crystal clear the jury did not have to find appellant personally acted with any requisite mental state pertaining to the charged crime of murder, and they could instead rely upon the alternative natural and probable consequences theory of liability based on his commission of the target offense of assault. (2 C.T. pp. 291-292; CALCRIM No. 403.)

Fourth, respondent focuses only on the portion of CALCRIM No. 521 that referred to "the defendant." (Answer Brief pp. 19, 36.) However, respondent's brief both omits and ignores the portion of this same instruction that refers to a "person" in defining the elements of premeditation and deliberation.[3] (See CALCRIM No. 521, emphasis added ["The length of time *the person* spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from *person to person* and according to circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time."]; Answer Brief pp. 19, 36 [omitting the above paragraph of the standard instruction within its briefing].)

Fifth, respondent's argument regarding CALCRIM No. 520 is also inconsistent with the jury instructions actually given. For example, respondent suggests that because CALCRIM No. 520 provided in part that "[i]f you decide that the defendant committed murder, it is murder of the second

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[3] The version of CALCRIM No. 252 given appellant's jury regarding the intent or mental state required for the crimes of both assault and murder also referred to the mental state of "a person." (2 C.T. p. 273; CALCRIM No. 252.)

degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521," this means the jury could only convict appellant of first degree murder as the direct perpetrator. (Answer Brief pp. 34-36.) Again, respondent takes this instruction out of context. Indeed, this portion of the standard version of CALCRIM No. 520 was also phrased conditionally and provided that "*if* you decide that the defendant committed murder." However, as appellant's jury was also instructed pursuant to CALCRIM Nos. 400, 401, and 403, they were not required to find appellant committed murder at all. Rather, they were permitted to convict appellant of murder if he merely aided and abetted the target crime of aggravated assault.

Sixth, respondent's argument is ultimately illogical. For example, at one point, respondent suggests the natural and probable consequences instructions given appellant's jury "permitted jury reliance on the doctrine for second degree murder only." (Answer Brief p. 34, fn. 4.) However, both of the standard versions of CALCRIM Nos. 520 and 521 regarding first and second degree murder given appellant's jury were generally phrased in terms of "the defendant" committing the murder and "the defendant" having the requisite mental state. (2 C.T. pp. 295-298; CALCRIM Nos. 520, 521.) Yet, under respondent's proposed interpretation of these instructions, the jury in fact could not have found appellant guilty of either first or second degree murder on a natural and probable consequences theory because both CALRIM Nos. 520 and 521 referred to the defendant committing the murder and the defendant having the requisite mental state. This is not how appellant's jury was instructed, and not how the natural and probable consequences doctrine works. (See *People v. Chiu, supra,* 59 Cal.4th at p. 164 ["'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.'"]; *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1102 [the natural and probable consequences doctrine "is not an implied malice theory; the mens rea of the aider and abettor with respect to the nontarget offense, actual or imputed, is irrelevant."].)

For all of the above reasons, and properly viewed as a whole, the instructions given appellant's jury permitted a conviction under the natural and probable consequences doctrine.

Respondent's argument to the contrary is based in large part upon the Court of Appeal's decision in *People v. Stevenson* (2018) 25 Cal.App.5th 974, 983-984. (See Answer Brief pp. 37-40.) However, the Court of Appeal's analysis and conclusion in *Stevenson* was incorrect for at least two reasons, and it should be disapproved by this Court.

Stevenson was a case involving three defendants, each of whom may have committed the two charged murders at issue. (*People v. Stevenson, supra,* 25 Cal.App.5th at pp. 978-981.) The jury was instructed on three alternative theories of liability as to those two murders, namely, liability as the direct perpetrator, direct aiding and abetting liability, and natural and probable consequences liability based on their commission of a third murder as the target crime. (*Id*. at pp. 980-982.)

In rejecting a claim of *Chiu* error based on the natural and probable consequences alternative, the Court of Appeal in *Stevenson* first stated that "[t]he error recognized in *Chiu* was that the jury was instructed in accordance with CALCRIM No. 521 that 'to find defendant guilty of first degree murder, the People had to prove that the *perpetrator* acted willfully, deliberately, and with premeditation.' (*Chiu, supra,* 59 Cal.4th at p. 161, italics added.)" (*People v. Stevenson, supra,* 25 Cal.App.5th at p. 983.) However, this is incorrect, and this was not the error recognized in *Chiu*.

In *Chiu*, the evidence established, and all parties agreed, the defendant was not the direct perpetrator of the murder. (*People v. Chiu, supra,* 59

Cal.4th at p. 160.) At trial, the prosecution proceeded upon two alternative theories of liability as to the murder charge, namely, direct aiding and abetting liability, and natural and probable consequences liability based on the target offense of assault or disturbing the peace. (*Ibid.*) The defendant's jury was thus "instructed that to find defendant guilty of murder, the People had to prove that the perpetrator committed an act that caused the death of another person, that the perpetrator acted with malice aforethought, and that he killed without lawful justification. (CALCRIM No. 520.) The trial court further instructed that if the jury found defendant guilty of murder as an aider and abettor, it had to determine whether the murder was in the first or second degree. It then instructed that to find defendant guilty of first degree murder, the People had to prove that the perpetrator acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree. (CALCRIM No. 521.)" (*Id.* at pp. 160-161.)

Rather than finding fault with the above instructions as suggested in the *Stevenson* decision, in *Chiu*, this Court instead broadly held, largely for public policy reasons, 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. 161-167.)

Indeed, in *Chiu*, the jury was in fact appropriately instructed under CALCRIM Nos. 520 and 521 in accordance with the evidence therein that the defendant was indisputably not the perpetrator of the murder, and thus CALCRIM Nos. 520 and 521 appropriately referred to the perpetrator committing the murder and the perpetrator's mental state, rather than the defendant committing the murder and the defendant's mental state. (See *People v. Chiu, supra,* 59 Cal.4th at p. 164 [under the natural and probable consequences doctrine, the defendant's own mental state as to the murder is "irrelevant"]; see also CALCRIM No. 401 [setting forth the required mental state for directly aiding and abetting the perpetrator].)

The only substantive difference between the instructions in *Chiu* and the instructions in the case at bar is that the instructions in the case at bar allowed for the additional circumstance, supported by the evidence herein, that appellant may or may not have been the person who committed the murder. (CALCRIM Nos. 520, 521; see also 2 C.T. p. 287 [appellant's jury was alternatively instructed pursuant to CALCRIM No. 401 on the mental state required for directly aiding and abetting the perpetrator who committed the murder]; 2 C.T. p. 291 [appellant's jury was alternatively instructed pursuant to CALCRIM No. 403 that to find the defendant guilty under the natural and probable consequences doctrine, they had to find that a coparticipant in the assault committed the murder].) However, pertinent to the issue herein, the instructions in both *Chiu* and the case at bar permitted a conviction of either first or second degree murder under the natural and probable consequences doctrine.

Second, the Court of Appeal in *Stevenson* reasoned that because the jury in that case was instructed with CALCRIM No. 521 in terms of the defendant's mental state, rather than the perpetrator's mental state as was the case in *Chiu*, "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." (*People v. Stevenson, supra,* 25 Cal.App.5th at pp. 983-984.) This conclusion was also incorrect because it was premised upon the faulty interpretation of *Chiu* discussed above, because it overlooked the fact that the version of CALCRIM No. 521 given the jury in that case was also phrased conditionally in terms of "if" the defendant personally acted with premeditation and deliberation, and because under the natural and probable consequences alternative theory the jury was given, the defendant's own mental state for purposes of murder and the degree of murder was irrelevant.

For each of the above reasons, *Stevenson* was incorrectly decided and should be disapproved by this Court.

Respondent next contends there is no possibility the jury relied upon the natural and probable consequences alternative theory of liability in returning their verdict because the prosecutor told the jury during closing argument they had to decide whether appellant was guilty of "first degree or second degree murder," and because the prosecutor argued appellant was guilty as the actual killer/direct perpetrator of the murder. (Answer Brief pp. 40-41.) This argument has no merit and should by summarily rejected.

The jury had to determine whether appellant was guilty of first or second degree murder no matter what theory of liability they relied upon, and this portion of the prosecutor's argument is irrelevant to the issue herein. Moreover, in making the above argument, respondent fails to acknowledge, and in fact simply ignores, the other portions of the prosecutor's closing argument in which the prosecutor alternatively argued that even if they believed appellant's version of the events and concluded appellant was not the actual killer, he was still guilty of the murder under the natural and probable consequences doctrine. (See 4 R.T. pp. 738, 750, 753-755, 757-758; see also Appellant's Opening Brief on the Merits pp. 7, 39-40 [expressly noting multiple times that while the prosecutor primarily argued appellant was the actual killer, the prosecutor alternatively relied upon the natural and probable consequences theory].)

Finally, respondent argues the jury could not have relied upon the natural and probable consequences theory in returning their verdict because during a subsequent hearing on a motion for a new trial, defense counsel indicated appellant was convicted of first degree murder on a theory of premeditation and deliberation. (Answer Brief p. 41.) However, as set forth in detail in the above Statement of Case and Facts, *ante*, pp. 10-11, respondent takes defense counsel's statement during the hearing on this

motion completely out of context, and respondent's argument on this point is both misleading and irrelevant in any event.

B. Respondent's Other Claims Of Harmless Error Are Also Without Merit

Respondent next argues the *Chiu* error was harmless because, according to respondent's argument heading, "substantial evidence showed that appellant murdered Saavedra with deliberation and premeditation." (Answer Brief pp. 42-46.) Within the body of this argument, respondent similarly argues "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 instead found appellant guilty as the direct perpetrator. (Answer Brief p. 43.) Respondent additionally argues "a reasonable juror could have found" appellant guilty as a direct aider and abettor. (Answer Brief p. 44.) Respondent further argues "the jury could have reasonably credited Roberts' testimony" and found appellant guilty as the direct perpetrator. (Answer Brief p. 45.) However, all of these arguments are misplaced because the question is not whether there was substantial evidence to support a conviction under a legally valid alternative theory, or whether a reasonable juror could have found appellant guilty under a legally valid alternative theory. Respondent is advocating and applying the wrong standard of review.

Under the correct standard of review, when, as in this case, a jury is instructed on alternative theories of liability and one of those theories is legally invalid, the instructional error is deemed prejudicial unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, the reviewing court is able to determine the error was harmless beyond a reasonable doubt. (*People v. Aledamat* (2019) 8 Cal.5th 1, 3; *People v. Chiu, supra,* 59 Cal.4th at pp. 167-168; *In re Martinez* (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].)

As previously conceded by the Attorney General, and as previously held by the Court of Appeal in applying the correct standard, it cannot be concluded beyond a reasonable doubt based on the record herein that none of appellant's jurors relied on the erroneous natural and probable consequences theory in returning their verdict. (E064822, Resp. Brief, pp. 16-19; *Gentile I, supra,* E064822, pp. 12-14, as modified Mar. 22, 2017.)

On the merits, and as noted, respondent argues that based on the evidence the jury could have found appellant guilty as the direct perpetrator. (Answer Brief p. 43.) Appellant agrees the jury could have, just as they could have found him guilty under a natural and probable consequences theory, but again notes that is not the appropriate question or standard of review.

Moreover, the conclusion that the jury found appellant guilty as the direct perpetrator is directly undermined by the jury's rejection of the personal weapon use allegation, in which the jury unanimously found appellant did not personally use a deadly or dangerous weapon in the commission of the murder.[4] (1 C.T. p. 249.) Addressing this not true finding by appellant's jury, respondent attempts to downplay it and states it "may have been the product of compromise, lenity, or mistake." (Answer Brief pp. 45-46, citing *People v. Gonzalez* (2018) 5 Cal.5th 186, 207.)

Gonzalez does not aid respondent's argument. In *Gonzalez*, this Court stated "[w]here 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. Gonzalez, supra,* 5 Cal.5th at p. 207.) Here, there is nothing irreconcilable about the jury's verdicts. Rather, the jury's not true finding on the personal weapon use allegation is in fact entirely

[4] The jury was further instructed for these purposes that "[a] deadly or dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury." (2 C.T. p. 303; CALCRIM No. 3145.)

consistent with the conclusion that the jury relied on the erroneous natural and probable consequences theory of liability in finding appellant guilty.

It is also a fundamental principle of law "that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions.' [Citation.]" (*People v. Covarrubuis, supra,* 1 Cal.5th at p. 926.) "'The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.'" (*People v. Homick* (2012) 55 Cal.4th 816, 867.) Respondent has offered nothing to overcome this presumption, and respondent's suggestion the jury's not true verdict on the personal weapon use allegation should be disregarded or overlooked because it might have been a mistake should be squarely rejected.

Respondent also argues the jury "could have found" appellant guilty under a direct aiding abetting theory. (Answer Brief pp. 44-46, 50-51.) Again, appellant agrees the jury could have, just as they could have found him guilty under a natural and probable consequences theory, but again notes that is not the appropriate question or standard of review.

As also noted previously, there were effectively two different factual scenarios presented by the evidence. The first was that appellant was the direct perpetrator of the murder. The second was that appellant assaulted the victim by punching him a few times, appellant then left the area, and Roberts subsequently killed the victim using the broken golf club, broken chair, and broken beer bottle found at the scene. Thus, while appellant's jury was instructed on a direct aiding and abetting theory of liability for the murder, that theory in fact had the weakest evidentiary support of all three potential theories. Indeed, in his closing argument, the prosecutor never expressly argued appellant was guilty as a direct aider and abettor in the murder. (See 4 R.T. pp. 737-759, 790-793.) Rather, as noted, the prosecutor primarily argued appellant was guilty of the murder as the direct perpetrator, and alternatively

argued that even if appellant's version of the evidence was true, appellant was still guilty under the natural and probable consequences theory. (4 R.T. pp. 738, 750, 753-755, 757-758.) Under these circumstances, while it was possible appellant's jurors convicted him on a direct aiding and abetting theory, it was not likely, and it certainly cannot be concluded beyond a reasonable doubt the jury necessarily relied on this theory.

Respondent next purports to address all the numerous reasons set forth in Appellant's Opening Brief on the Merits as to why the instructional error was not harmless beyond a reasonable doubt. (See Brief on the Merits pp. 37-41; Answer Brief pp. 46-51.) However, respondent largely just rehashes and reiterates its prior arguments, such as there was no prejudice in light of CALCRIM No. 521, the prosecutor primarily argued appellant was guilty as the direct perpetrator of the murder, there was substantial evidence to support a conviction on a valid theory, appellant could have been convicted on a valid theory, and the jury's not true verdict on the personal weapon use allegation may have been a mistake. (Answer Brief pp. 46-51.) As already discussed above, these arguments by respondent have no merit.

With respect to the jury's question submitted during deliberations regarding whether "fists [are] considered a deadly weapon?", to which the trial court correctly responded they were not (1 C.T. p. 235), respondent additionally argues the jury could have been asking about either the natural and probable consequences theory of liability based on assault with a deadly weapon as the target crime, or the personal weapon use enhancement allegation. (Answer Brief pp. 47-48.) Appellant agrees this question could have concerned either of the above, or both. However, under the correct standard of review, the fact that the jury asked this question lends further support to the conclusion the instructional error on the natural and probable consequences theory was not harmless beyond a reasonable doubt.

Respondent also appears to offer a somewhat convoluted argument as to how the jury was not likely to have found appellant aided and abetted the target offense of assault with a deadly weapon, and thus respondent appears to argue it was not likely the jury relied on the natural and probable consequences doctrine in returning their verdict. (See Answer Brief p. 47.) This argument can be quickly disposed of for two reasons. First, appellant's jury was instructed on the target crimes of both assault with force likely to produce great bodily injury and assault with a deadly weapon other than a firearm (see 2 C.T. pp. 291-292, 301-302), not just assault with a deadly weapon other than a firearm as suggested by respondent. (Answer Brief pp. 18, 47.) Second, as appellant's jury was also instructed with respect to these target offenses, under the natural and probable consequences doctrine, the jury was only required to find that appellant was guilty of one of the target offenses as either the direct perpetrator or an aider and abettor, it did not require the jury to find appellant aided and abetted a target offense as respondent suggests. (See 2 C.T. pp. 291-292; CALCRIM No. 403.)

With respect to the jury's request during deliberations for a copy of appellant's statement to the police (1 C.T. p. 236), respondent suggests the jury might have requested to review this evidence again just to confirm that appellant's statements were "all lies" as argued by the prosecutor. (Answer Brief pp. 48-49.) While possible, it was also possible the jury may have requested to review this evidence again because they may have been considering it for its truth. Thus, under the correct standard of review, this request further supports a finding of prejudice. Moreover, the jury's not true verdict on the personal weapon use allegation in fact suggests the jury found appellant's version of the events to be credible, rather than the "all lies" possibility suggested by the People.

Respondent further notes that in closing argument, the prosecutor also argued that even if appellant did not intend to kill the victim, he acted with at

least implied malice. (Answer Brief p. 49.) The prosecutor did briefly argue this, but did so primarily in the context of appellant being guilty of the murder as the direct perpetrator. (See 4 R.T. p. 754 ["At the time he acted, he knew his act was dangerous to human life. That's subjective awareness of when you take a deadly object like a golf club and you're beating somebody down, he knows that this could cause significant damage and possibly the death of somebody."].) As also previously noted, the jury found appellant guilty of first degree murder, not second, and the jury's not true verdict on the weapon use allegation indicates the jury found appellant was in fact not the direct perpetrator. Furthermore, and as also noted above, the fact that the prosecutor argued in favor of a legally valid theory does not demonstrate beyond a reasonable doubt the jury did not rely on the erroneous natural and probable consequences theory they were provided.

Respondent additionally points out that the prosecutor never expressly mentioned the phrase "natural and probable consequences doctrine" during his closing argument. (Answer Brief p. 50.) While true, this was likely due to the fact that the prosecutor primarily argued appellant was guilty as the direct perpetrator of the murder. Furthermore, the prosecutor did not need to invoke the natural and probable consequences doctrine by name in his closing argument because appellant's jury was expressly instructed upon it, and because the prosecutor argued appellant was still guilty of the murder even if the jury believed his statements to police that he only punched the victim. The prosecutor's closing argument is also of limited

Finally, with respect to appellant's contention that the evidence in this case was conflicting and unclear, as expressly observed by the trial court below and as conceded by the prosecutor below, which in turn further suggests potential jury reliance on a natural and probable consequences theory (Brief on the Merits pp. 38-39), respondent again argues there was "substantial evidence" to support a verdict on a legally valid theory, the jury

could have convicted appellant on a legally valid theory, and the jury's not true finding on the personal weapon use allegation could have been a mistake. (Answer Brief p. 51.) As previously discussed, and under the appropriate standard of review, these arguments have no merit.

For all of the above reasons, as well as the additional reasons set forth in detail in Appellant's Opening Brief on the Merits, 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, it was prejudicial error to instruct the jury on natural and probable consequences liability as a theory of murder.

C. Respondent's Final Argument That Appellant May Not Obtain Relief Under SB 1437 On Direct Appeal Is Contrary To This Court's Prior Order Dismissing Review On That Issue And Limiting The Issues To Be Briefed

On September 11, 2019, this Court granted review in this case. Within this Court's September 11, 2019 order granting review, this Court stated: "The issues to be briefed and argued are limited to the following: 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 Does Senate Bill No. 1437 apply retroactively to cases not yet final on appeal? 3. Was it prejudicial error to

instruct the jury in this case on natural and probable consequences as a theory of murder?" (S256698, 9/11/19 Order.)

On October 30, 2019, this Court issued a subsequent order stating: "Review was granted in this matter on September 11, 2019. The issues to briefed and argued are limited to the following: 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?" (S256698, 10/30/19 Order.)

Despite this Court's October 30, 2019 order, respondent has argued appellant may not obtain relief under SB 1437 on direct appeal because SB 1437 does not apply retroactively to cases not yet final on direct appeal, and appellant must instead seek relief via the superior court petition procedure set forth in Penal Code section 1170.95. (Answer Brief pp. 52-57.)

It appears respondent has ignored this Court's October 30, 2019 order, and appellant therefore refrains from presenting any briefing on this issue in reply to respondent's argument.

To the extent appellant is incorrect and this Court does wish to entertain briefing on this issue despite this Court's October 30, 2019 order, appellant respectfully requests leave and permission to file a supplemental letter brief addressing this issue on the merits.

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CONCLUSION

For the foregoing reasons, the additional reasons set forth in Appellant's Opening Brief on the Merits, and in the interests of justice, this Court should hold the amendment to Penal Code section 188 by recently enacted 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.

Dated: 6/15/20

Respectfully submitted,

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

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, Appellant's Reply Brief on the Merits contains a total of 10,881 words.

Executed this 15th day of June, 2020, in San Diego, California.

/s/ Eric R. Larson
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Supreme Court No.: S256698
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 15th day of June, 2020, I caused to be served the following:

APPELLANT'S REPLY 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:

Joseph Gentile, #AY3628
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San Luis Obispo, CA 93409

Arnold Lieman (trial atty)
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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 June 15, 2020, at San Diego, California.

/s/ Eric R. Larson
Eric R. Larson

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. GENTILE**
Case Number: **S256698**
Lower Court Case Number: **E069088**

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

2. My email address used to e-serve: **Larson1001@yahoo.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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APPLICATION TO FILE OVER-LENGTH BRIEF	S256698_Application.To.File.Oversized.Reply.Brief.on.the.Merits_Gentile

Service Recipients:

Person Served	Email Address	Type	Date / Time
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Rebecca Jones Attorney at Law 163313	jones163313@gmail.com	e-Serve	6/15/2020 2:59:04 PM
Office Office Of The Attorney General Court Added	sdag.docketing@doj.ca.gov	e-Serve	6/15/2020 2:59:04 PM
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

6/15/2020
Date

/s/Eric Larson

Signature

Larson, Eric (185750)

Last Name, First Name (PNum)

Law Firm