IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State of California,	)	S256698
Plaintiff and Respondent,	)	
v.	)	
Joseph Gentile Jr.,	)	
Defendant and Appellant.	)	

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

Application to File Amicus Curiae Brief and Amicus Curiae Brief of Amicus Populi In Support of Neither Party

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Amicus Populi's Application to File Amicus Curiae Brief in Support of Neither Party

To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court:

Amicus curiae Amicus Populi requests permission to file the attached amicus curiae brief in support of neither party, pursuant to Rule 8.520(f) of the California Rules of Court.

Amicus Populi represents individuals who worked as prosecutors during the past three decades, when California became much safer. #From 1993 to 1998 alone, the state's homicide rate was cut in half. From 1993 to 2014, the homicide rate dropped from 12.9 to 4.4 (per 100,000), its lowest in 50 years. The violent crime rate dropped from 1059 to 393 in 2014, so there were about 3,275 fewer homicides and 256,400 fewer violent crimes in that year than there would have been had crime remained at its 1993 level. The reversal of the crime rate saved tens of thousands of lives and

prevented millions of violent crimes over two decades.

Amicus Populi works to preserve this improvement, balancing the imperative of punishing offenders according to their culpability with the imperative of protecting public safety, the first duty of government. (See *People ex rel. Gallo v. Acuna* (1996) 14 Cal.4th 1090, 1126; *People v. Blake* (1884) 65 Cal. 275, 277.)

Amicus curiae certifies that no party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

If this Court grants this application, amicus curiae requests the Court permit the filing of this brief which is bound with the application.

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Question Presented

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?

Introduction

This case provides this Court with its first (and certainly not last) chance to construe SB 1437 and determine its effect on, inter alia, felony-murder, provocative-act murder, and conspiracy doctrine. Although this Court may decline to resolve all these issues immediately, this brief will attempt to connect these disparate concepts through a coherent rationale as this Court begins to assess their future application.

This Court decided two cases at the end of August 2001, which reached contrary outcomes. (*People v. Cervantes* (2001) 26 Cal.4th 860; *People v. Sanchez* (2001) 26 Cal.4th 834.) Two defendants engaged in a public shootout in *Sanchez*; though it was unclear who fired the single fatal bullet, both defendants could be guilty of the murder as concurrent proximate causes. (*Id.* at pp. 846-851.) The jury could find each defendant "set[] in motion a chain of events" producing a death as a "direct, natural and probable consequence of the act." (*Id.* at p. 845.) For example, *Cervantes* cited *Wright v. State* (Fla.Dist.Ct.App. 1978) 363 So.2d 617, 618, where the defendant shot at a driver who, "ducking bullets," lost control of his car and fatally ran over a pedestrian. Because the shooting set in motion the chain of events, whose natural and probable consequence was death, the shooter was properly liable for the homicide.

By contrast, the Court reversed a murder conviction where a Highland Street gangmember nonfatally shot an Alley Boy gangmember, and then, at another location, a several Alley Boy members fatally shot a different Highland Street member. (*Cervantes*, *supra*, 26 Cal.4th at p. 863.) The homicide could not be "natural and probable consequence" of the earlier shooting, because the second shooting was independently "felonious,

intentional, [and] perpetrated with malice aforethought." (*Id.* at p. 874.) It was thus an superseding intervening act, which broke the causal chain. (*Id.* at p. 871.)

The contrast implemented the analysis of Professor Sanford Kadish's work in *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine* (1985) 73 Calif. L. Rev. 323. Kadish contrasted physical events, which follow as a matter of natural necessity, with voluntary human actions, which are freely chosen expressions of will. (*Id.* at pp. 326-327.) Sixteen years earlier, Kadish explained why a case like *Cervantes* should have a different outcome from that of *Wright*.

> [W]e use different concepts to determine when a person may be blamed for things that happen [*Wright*] and when he may be blamed for what other people do [*Cervantes*]. . . . We regard a person's acts as the products of his choice, not as an inevitable, natural result of a chain of events. Therefore, antecedent events do not cause a person to act in the same way that they cause things to happen, and neither do the antecedent acts of others.

(*Id.* at p. 333.)

Kadish distinguished causation, which determines a person's responsibility for a "subsequent event," with complicity, which determines responsibility for the "subsequent unlawful action of another." (*Id.* at p. 356.) Causation cannot extend to another's voluntary actions like that of the avenging gangmembers in *Cervantes*. "What another freely chooses to do is his doing, not mine. It cannot be seen as a part of my action the way a natural physical consequence would be." (*Id.* at p. 406.) For such intentional criminal acts, complicity doctrine is needed: "Only if I chose to identify with his action may I incur liability that action creates." (*Ibid.)*

Summary of Argument

A single hypothetical can explain amicus curiae's three arguments. D1 and D2 plan to rape a victim; D1 will restrain her while D2 administers a tranquilizing agent to render her unconsciousness. (See *People v. Thompson* (2010) 49 Cal.4th 79, 118; see also *People v. Dominick* (1986) 182 Cal.App. 1174, 1185, 1210-1211.) The import of SB 1437 is that if D2 changes the plan and injects the victim with a substance he alone knows is lethal, D1 is liable for only the felonies, so only D2 is liable for the murder. But if both defendants act according to the plan and the victim dies from medical complications created by the tranquilizer, both defendants are guilty as the actual killer. (Argument I, *post*.) If police attempt a rescue attempt and either an officer or defendant dies in a shootout, any surviving defendants are guilty of murder. (Argument II, *post*.) And if D1 knows that D2 is impulsive, so his stabbing the victim is objectively foreseeable, though it is not contemplated by their plan, D1 is not responsible for that homicide. (Argument III, *post*.)

Statement of the Case and Facts

Amicus curiae incorporates by reference the statement of case and facts prepared by the People.

Argument

I. The "actual killer" described in section 189, subdivision (e)(1) is the proximate cause, not the actual or direct cause.

The first question concerns the "actual killer" provision of section 189, subdivision (e)(1). Though the instant case does not involve a section 189 felony, it involves the kind of joint action that could raise questions of "actual killer" liability in section 189 felonies. This Court in *People v. Sanchez* (2001) 26 Cal.3d 834, endorsed the analysis of *People v. Pock* (1993) 19 Cal.App.4th 1263, that "Proximate" causation, not "actual" or "direct" causation, is necessary and sufficient for "actual killer" status: "Any person whose conduct proximately causes the death of another is an actual killer." (*Id.* at p. 1273.) Recent Sixth District dicta questioned this conclusion (*People v. Garcia* (2020) 46 Cal.App.5th 123, 153), but it is correct as a matter of policy, history, and text.

A. Proximate causation, not "actual" or "direct" causation, is the measure of culpability.

Unlike actual/direct causation, proximate causation is rooted in policy and justice. The distinction appeared in *Wright*, where the defendant shot at a driver who, "ducking bullets," lost control of his car and fatally ran over a pedestrian. (*People v. Cervantes* (2001) 26 Cal.4th 860, 870, citing *Wright v. State* (Fla.Dist.Ct.App. 1978) 363 So.2d 617, 618.) Though the automobile collision was the "actual" or "direct" cause, the shooting was the "proximate" cause, so Wright was liable for the homicide.[1] Shooting, not

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[1] For convenience, the brief will sometime refers to the individual, not just the action, as the "cause."

losing control of one's car, was the culpable conduct that caused death and warranted punishment.

Cervantes also cited *Madison v. State* (1955) 234 Ind. 517 [130 N.E.2d 35], where Madison threw a grenade at one Couch, who instinctively it kicked it away, toward the decedent. (*Cervantes*, *supra*, 26 Cal.4th at p. 870.) Though Couch's *kicking* the grenade was the direct cause of the victim's death, it was Madison's *throwing* the grenade in the first place that was the proximate cause. Madison, not Couch, was guilty of homicide.

Proximate causation liability resembles (and may combine with) transferred intent, which reflects a policy that a party committing a culpable act with a guilty mental state should be liable, regardless of *whom* he kills. (*People v. Scott* (1996) 14 Cal.4th 544, 551.) If Wright's bullet killed a victim on contact, he would deserve liability regardless of whether it killed the (targeted) driver or instead killed the pedestrian. Proximate causation likewise supports liability regardless of *how* the defendant causes death; Wright would deserve liability if he killed the driver by firing the bullet into his body, or by causing him to lose control of the car and crashing into a wall. (See *People v. Roberts* (1992) 2 Cal.4th 271, 317, citing *Letner v. State* (1927) 156 Tenn. 68 [299 S.W. 1049] [where shooter's firing at boat causes passengers to jump, and they then drowned, "the wrongful act of the defendant . . . was the . . . proximate cause of death."]) By extension, Wright deserved liability if (1) his bullet killed the driver; (2) his bullet killed the pedestrian; (3) the driver lost control and died in a collision; or (4) the driver lost control of his car and the collision killed the pedestrian.

This Court applied the proximate causation principle and held both shooters could be liable for first degree murder when their public shootout killed a bystander. (*Sanchez*, *supra*, 26 Cal.4th 834, 838.) The victim

suffered only one bullet wound, so one of the shooters was not the direct cause of death. Regardless, "there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*Id.* at p. 846.) *Sanchez* cited a case affirming manslaughter liability for two drag racers who concurrently caused the victim's death, even though only one car struck the victim's vehicle. (*Sanchez,* at pp. 846-847, citing *People v. Kemp* (1957) 150 Cal.App.2d 654.) The Court of Appeal cited both *Sanchez* and *Kemp* in another drag racing case where it was uncertain which vehicle directly caused the victim's death, but both drivers were liable for proximately causing the deaths, with implied malice. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 842-846.)

Significantly, the *Canizalez* court was not misled by adjectives. Though prosecutors could not prove which racer was the **direct *cause***, both were guilty as **direct *perpetrators***, not aiders and abettors. (*Canizalez*, *supra*, 197 Cal.App.4th at pp. 841, 845-846.) The semantic similarity between "actual killer" and "actual cause" likewise does not render them synonymous.

B. The "actual killer" designation excludes aiders and abettors, not those who proximately and indirectly cause death.

Section 189, subdivision (e) is modeled after California special circumstance provision, which also references the "actual killer." (§ 190.2, subds. (c)(d)).) This provision distinguishes "actual killers" from their "aiders and abettors" or "accomplices." It does not require the "actual killer" be the "actual cause."

After the U.S. Supreme Court prescribed the minimum criminal involvement needed to support the death penalty in *Tison v. Arizona* (1987)

481 U.S. 137, the California Supreme court disapproved its own precedent that required an intent to kill for anyone sentenced to death, regardless of his role in the murder. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1140-1141.) "[W]e overrule *Carlos* [*v. Superior Court* (1983) 35 Cal.3d 131] and hold as follows: intent to kill is not an element of the felony-murder special circumstance; but when the defendant **is an aider and abetter rather than the actual killer**, intent must be proved." (*Anderson*, at p. 1147, emphasis added; see also at p. 1139, requiring an intent to kill "when the defendant is an aider and abetter rather than the actual killer.)[2] This Court reaffirmed this rule later that year, merely changing "aider and abettor' to "accomplice": "[T]he court need not instruct on intent to kill as an element of the felony-murder special circumstance unless there is evidence from which the jury could find that the defendant was an **accomplice rather than the actual killer**." (*People v. Miranda* (1987) 44 Cal.3d 57, 89, emphasis added, citing *Anderson, supra,* 43 Cal.3d 1104, 1147.) Again, in *People v. Warren* (1988) 45 Cal.3d 471, this Court characterized "actual killers" as contrasting with aiders and abettors. "[Bbefore the trier of fact can make a felony-murder or multiple-murder special-circumstance finding as to a defendant **who was an aider and abetter rather than the actual killer**, it must determine that he acted with intent to kill." (*Id*. at p. 487.)

The phrase "personally killed" soon seeped into Court opinions, though it was not used synonymously with "actual killer." The trial court in *People v. Belmontes* (1988) 45 Cal.3d 744, 791, disapproved on another ground in *People v. Cortez* (2016) 63 Cal.4th 101, 118, gave special

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A special circumstance may now apply also to a major participant in the felony who acts with reckless indifference to human life. (See *People v. Cleveland* (2004) 32 Cal.4th 704, 752.)

instructions, so the jury determined Belmontes "personally committed the killing" **and** was the "actual killer." But *Belmontes*' dicta also described a U.S. Supreme Court rule as holding "felony-murderers who *personally* killed may properly be subject to the death penalty" even without an intent to kill." (*Belmontes*, at p. 794, citing *Cabana v. Bullock* (1986) 474 U.S. 376, 386.) On that page, *Cabana* explained the Eighth Amendment forbids executing someone who "has not **in fact** killed, attempted to kill, or intended" to kill, but permits executing someone who "**in fact** killed, attempted to kill, or intended to kill." (*Cabana*, at p. 386, emphasis added.)

The defendant in *People v. Jennings* (1988) 46 Cal.3d 963, 971, "personally used" a knife, as proscribed by section12022, subdivision (b). Because he committed the homicide without any accomplices, he surely also was the "actual killer," as needed for the special circumstance finding. (*Id.* at p. 979.) But the *Jennings* opinion conflated the terms, and used the "personally" adverb (relevant to the section 12022 finding) in reference to the special circumstance too. (*Ibid.*) It cited *Miranda*, *supr*a, 44 Cal.3d 57, and *Anderson*, 43 Cal.3d 1104, as authority, though neither used that term.

> A felony-murder special circumstance is established even absent intent to kill, premeditation, or deliberation, if there is proof beyond a reasonable doubt that the defendant **personally killed the victim** in the commission or attempted commission of, and in furtherance of, one of the felonies enumerated in subdivision (a)(17) of section 190.2. (*People v. Miranda*, *supra,* 44 Cal.3d 57, 89; *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1139 [parallel citation].)

(*Jennings*, *supra*, at p. 979, emphasis added.)

Section 190.2 used, and continues to use, the term "actual killer," not "personally killed."

This Court explained the meaning of the modifier "personally" in *People v. Bland* (2002) 28 Cal.4th 313, 333-338. Section 12022.53, subdivision (d) enhances the penalty for anyone who "intentionally and *personally* discharges a firearm and *proximately causes* great bodily injury . . . or death." (Emphasis added.) The different modifiers indicated the Legislature intended different requirements for the firearm discharge and the injury infliction. (*Id.* at p. 336.) *Bland* recalled *Sanchez*, *supra*, 26 Cal.4th 834, as a case where the defendant personally discharged a firearm and proximately caused injury. (*Bland*, at pp. 337-338.) *Bland*'s holding that "defendant could indeed proximately cause injury or death even if his own bullets did not hit anyone" perfectly fit the facts of *Wright*, *supra*, 363 So.2d 617, where the defendant personally discharged the gun and proximately caused the fatal collision, even though his bullets hit neither the driver nor the pedestrian.

This Court has since confirmed that one may "personally" inflict an injury in combination with others. (*People v. Modiri* (2006) 39 Cal.4th 481.) The defendant there joined with others to beat a victim, and it was not possible to link the victim's injuries to a particular assailant, weapon, or blow. (*Id.* at p. 485.) So long as the defendant personally inflicted force, and that force — "either alone *or in concert with others*" — was enough to inflict grievous bodily harm, a jury could properly the defendant personally inflicted the injury. (*Id.* at p. 497, emphasis added.) *Modiri* reaffirmed the personal infliction language "covers persons who 'directly acted to cause the injury,' and excludes those who merely 'aided or abetted the actor directly inflicting the injury.' " (*Id.* at p. 485, citing *People v. Cole* (1982) 31 Cal.3d 568, 572.)

C. Proximate causation is coterminous with "actual killing" for section 190.2 purposes.

A similar group attack caused a fatal injury, but forensic examination could not determine the precise assailant, in *People v. Pock* (1993) 19 Cal.App.4th 1263. At least two of three intruders shot at the decedent, who sustained four separate bullet wounds. (*Id.* at pp. 1270-1271.) One forensic expert opined all four wounds contributed to death, though the chest wound would have been produced death quicker than the others. (*Id.* at p. 1271.) The other expert considered only the chest wound to be independently fatal, and doubted the other wounds contributed to death. (*Ibid.*) The Court of Appeal described appellant as someone who "might have actually fired the fatal shot or might have participated in all major events, not as an aider and abettor, but as an actual participant." (*Id.* at p. 1274.) The case resembles the instant one, where both physical evidence and witness statements suggest more than one person attacked the victim on the same occasion.

The defense in *Pock* contended "appellant had to be found the **actual cause** of the victim's death before no intent to kill would be required." (*Id.* at p. 1272, emphasis added.) The trial court instead instructed the jury that "Any person whose conduct **proximately causes** the death of another is an **actual killer**." (*Id.* at p. 1273, emphasis added.)

The Court of Appeal, and later the Supreme Court, endorsed the trial court's conclusion. Despite the uncertainty regarding whose bullet was the fatal one, "if appellant was [a] substantial factor in the death of [the victim], he would be liable as the actual killer." (*Pock*, *supra*, 19 Cal.App.4th at p. 1275.) The Supreme Court would cite *Pock* in *Sanchez*, *supra*, 26 Cal.4th 834, 845, which also involved an uncertain "actual, direct

cause." A single bullet was the cause, but it was uncertain which of the two defendants shot it. (*Ibid.*) This court recalled however, "there may be multiple proximate causes of a homicide, even where there is only one known actual or direct cause of death." (*Id.* at p. 846.)

Though *Sanchez* did not involve a special circumstance, this Court confirmed in such a case that multiple individuals involved in a homicide did not necessarily have distinct roles as "direct perpetrator" and "aider and abettor: "[A] sharp line does not always exist between the direct perpetrator and the aider and abettor." (*People v. Thompson* (2010) 49 Cal.4th 79, 117.) For example, if one person restrained the victim while the other stabbed her, "both participants would be direct perpetrators as well as aiders and abettors of the other." (*Id.* at p. 118, quoting *People v. McCoy* (2001) 25 Cal.4th 1111, 1120; see also *Modiri*, *supra*, 39 Cal.4th at p. 496, describing *People v. Dominick* (1986) 182 Cal.App. 1174, 1185, 1210-1211: "defendant grabbed rape victim's arms and pulled her head back to allow accomplice to strike her throat with pole, causing victim to fall down hillside and break shoulder.")

D. Aiding and abetting legally differs from jointly committing a homicide with a co-perpetrator.

Recent Court of Appeal dicta questioned the *Pock* rule that a person who proximately causes the death of another is an actual killer. (*Garcia*, *supra*, 46 Cal.App.5th 123.) Defendant Austin handed codefendant Garcia duct tape, which Garcia then wrapped over the victim's mouth and asphyxiated him. (*Id.* at pp. 136, 141.) The Sixth District held that one did not qualify as an actual killer by handing a lethal instrumentality to someone else, who then used it to kill the victim. (*Id.* at pp. 150-154.)

Garcia was thus an aider and abettor, and the Court of Appeal distinguished the case from concurrent causation cases like *Sanchez*, *supra*, 26 Cal.4th 834, and *Pock*, *supra*, 19 Cal.App.4th 1263. Unlike the defendants in those cases, the prosecutor alleged not that "Austin did an act concurrently with a coperpetrator but instead that Austin first did something (i.e., provide the tape) and then another person subsequently did an act that caused the death." (*Id.* at p. 154.) Accordingly, he did not qualify under section 190.2, subdivision (b) from the intent-to-kill requirement. (*Id.* at p. 150.)

But Garcia also expressed doubt that *Pock* correctly described the law in instructing that proximately causing death qualified one as an actual killer under section 190.2, subdivision (b). (*Garcia*, *supra*, 46 Cal.App.5th at p. 153.) *Garcia* recognized cases holding an "aider and abettor" was the contrast to an "actual killer," but also quoted the dicta from both *Belmontes*, *supra*, 45 Cal.3d 744, 794, and *Jennings*, *supra*, 46 Cal.3d 963, 979. (*Garcia*, at pp. 151-152.) But neither precedent supports rejecting the rule announced in *Pock, supra,* 19 Cal.App.4th 1263, 1273. As *Garcia* itself recognized, there is difference between being "actual killer" and an "aider and abettor," and it was this distinction (from *Anderson*, *supra*, 43 Cal.3d 1104, 1139, and *Miranda*, *supra*, 44 Cal.3d 57, 89) that *Jennings*, *supra*, 46 Cal.3d 963, 979, thought it was following. *Belmontes* simply misread the page from *Cabana v. Bullock*, *supra*, 474 U.S. 376, 386.

Garcia also quoted the language from *Bland*, *supra*, 28 Cal.4th 313, 336, distinguishing proximate causation from personal discharge. *Garcia*, *supra*, 46 Cal.App.5th at p. 151.) The *Bland* quote undermines *Pock* only if section 190.2, subdivision (b) requires that the defendant "personally killed" the victim, which it does not. To the contrary, *Bland* pointed out after distinguishing personal infliction from proximate causation that "The

Legislature is aware of the difference. When it wants to require personal infliction, it says so." (*Bland*, *supra*, at p. 336.) Section 189, subdivision (e)(1) does not require "personal" killing.

The section 12022.53, subdivision (d) distinction makes sense. The Legislature wished to reduce the process of firearm *use*, which render crimes more likely to kill, more likely to kill multiple, unintended victims, and easier to accomplish. (See *People v. Aguilar* (1973) 32 Cal.App.3d 478, 486.) There is an understandable preference, therefore, for felons to use less dangerous weapons, if they must be armed at all. But there is no comparable preference for the result that the victim is *killed* by an instrument other than a gun; it made no difference if the pedestrian in *Wright*, *supra*, 363 So.2d 617, was killed by the bullets fired directly by Wright or by the vehicle whose driver the gunshot disoriented.

The strongest reason for preserving *Pock* is neither history nor language but policy. When an accomplice, as in *Garcia*, *supra*, 46 Cal.App.5th 123, hands a weapon to a principal, the life and death of the victim is entirely within the principal's hands. If he desists, the victim is unharmed; if he acts, the victim dies. Everything is within his control, not the accomplice's.

> The voluntary action of the principal actor cannot appropriately be said to have been caused . . . by the action of the . . . accomplice. A voluntary action is treated as the terminal point of a causal inquiry beyond which the inquiry does not proceed. No one and nothing caused the principal's action. He freely and voluntarily chose to act.

(*Kadish*, *supra*, 73 Calif. L. Rev. 323, 327.)

As this Court has put it, a "willful and malicious murder" is an "independent intervening act" that precludes attributing proximate causation to an antecedent act. (*Cervantes*, *supra*, 26 Cal.4th 860, 874.)

There is no such break in the causal chain in *Pock*, *supra*, 19 Cal.App.4th 1263, where two (or more) confederates acted in combination. As *Garcia* acknowledged, *Pock* involved multiple shooters, and thus "multiple concurrent causes," not a weapon handed by an aider and abettor to a principal, for him to use and inflict harm exclusively. (*Garcia*, *supra*, 46 Cal.App.5th at p. 153.) The instant case, involving two people who contemporaneously engaged in violence against the victim, resembles *Pock*, so both Gentile and Roberts could have been an "actual killer."

There is no sound policy reason to disfavor indirect, proximate causes as compared to direct proximate causes. If a robber threw a grenade during the robbery, and a panicked customer kicked it toward a second, as in *Madison v. State*, *supra*, 130 N.E.2d 35, the robber would not be any less culpable if the grenade killed the second customer instead of the first. Proximate causes, whether direct or indirect, qualify as "actual killers."

II. A defendant may be liable as the actual killer where the intermediary is an innocent party.

Many homicides occur where as in *Wright*, *supra*, 363 So.2d 617, or *Madison*, *supra*, 130 N.E.2d 35, where the action of the intermediary is involuntary. (See also *Roberts*, supra, 2 Cal.4th 271, 317; *Letner v. State, supra,* 299 S.W. 1049.) In such cases, the intermediary does not act with a "volition through which he is free to choose his actions." (*Kadish*, *supra*, 73 Calif. L. Rev. 323, 330; see also *Cervantes*, *supra*, 26 Cal.4th at p. 873, recalling how they were "acting without volition.") Involuntary actions are considered as being "caused by a prior action of another because we deem them lacking that quality of unconstrained free choice that generally characterizes human actions." (*Id.* at p. 333.) But literal involuntariness is not required; conduct that is justifiable, such as a victim's self-defense, or a police officer's enforcing the law, is "not wholly unconstrained." (*Id.* at pp. 333-334; see also *Cervantes*, at p. 873, describing "reasonable response" to violent crime.) So long as the intermediary's conduct is innocent, and not "felonious, intentional, [and] perpetrated with malice aforethought," the intermediary's conduct is a dependent intervening cause, which does not break the casual chain. (*Cervantes*, *supra*, 26 Cal.4th at p. 874.)

Included in this category of proximately caused homicides are cases where the defendant caused a third party to kill in response to their violent actions. (*Cervantes*, *supra*, 26 Cal.4th at p. 872, fn. 15.)

> In all intermediary cases, the defendant's liability will depend on whether it can be demonstrated that his own conduct *proximately caused* the victim's death—i.e. whether it can be shown that the intermediary's conduct was merely a dependent intervening cause of death, and not an independent superseding cause.

(*Ibid.*)

In *Pizano v. Superior Court* (1978)21 Cal.3d 128, one of the robbers used his victim as a human shield, and an armed neighbor fired at the criminals but inadvertently hit and killed the robbery/kidnapping victim. (*Id*. at pp. 131-132.) The neighbor's response, while sadly ineffective, was innocent, and not in the category of willful, malicious conduct that supersedes the felon's actions; it was a *dependent* intervening act.

Proximate causation should support liability, regardless of whether a co-perpetrator, victim, police officer, or bystander is the direct cause. SB 1437 does not affect this doctrine.

III. The Legislature has not abolished co-conspirator liability.

Courts have long recognized that criminals acting in concert endanger the public more than individuals acting alone. (*People v. Zamora* (1976) 18 Cal.3d 538, 555; *People v. Welsh* (1928) 89 Cal.App.18, 22: "a group of evil minds planning and giving support to the commission of crime is more likely to be a menace to society than where one individual alone sets out to violate the law." For example, a home invasion robbery is less dangerous when the victim can see the only threat than when there are multiple assailants for whom the victim cannot account. Similarly, cases show that a perpetrator may commit more harm when he has assistance. (See e.g. *Modiri*, *supra*, 39 Cal.4th at p. 496, describing *Dominick*, supra, 182 Cal.App. 1174, 1185, 1210-1211, emphasis added: "defendant grabbed rape victim's arms and pulled her head back **to allow accomplice to strike her throat with pole**, causing victim to fall down hillside and break shoulder.") And doctrines like felony-murder that penalize felons for unintended consequences can have a powerful deterrent effect: "[K]nowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant's readiness to do the furnishing." (*People v. Mattison* (1971) 4 Cal.3d 177, 185.)

On the other hand, SB 1437 reflects concern that for the injustice of imposing of convicting two co-felons of the same offense, where one's act and intentions are toward murder, and the other's acts and intentions are toward only a lesser crime. For example, in *People v. Martin* (1938) 12 Cal.3d 466, the getaway driver (Spotts) waited outside to assist Martin's robbery, Martin entered the store and demanded money, and when the clerk went to comply, Martin shot him and left without any money. Martin on his own changed the plan from robbery to murder (without robbery), a

change for which Spotts was not responsible.

The disparate doctrines of "natural and probable consequences" and "co-conspirator" liability have protected the public from the special dangers of group crime. The latter has a narrower reach; conspirator liability does not extend to conduct that was the independent product of the perpetrator's mind, rather than a product of the conspiracy's design. (See *People v. Smith* (2014) 60 Cal.4th 603, 615-618.)The facts of *Tison v. Arizona*, *supra*, 481 U.S. 137, illustrated the disparate reaches of the two doctrines.

Gary Tison's children planned to help him and Randy Greenawalt escape from prison. (*Tison*, *supra*, 481 U.S 137, 139.) They entered the prison with a large ice chest filled with guns. (*Ibid.*) Brandishing weapons, they locked guards and visitors in a storage closet and fled the prison. (*Ibid.*) They switched cars, but the second car (a Lincoln) developed a flat tire, so they used the only spare. (*Ibid.*) When another tire failed, they flagged down a family driving by, who offered to help. (*Id.* at pp. 139-140.) The Tisons and Greenawalt took control of the family's car (a Mazda) and possessions. (*Id.* at p. 140.) They forced the family into the Lincoln and drove it to a more isolated desert area. (*Ibid.*) Gary shot at the Lincoln's radiator to disable it. (*Ibid.*) The father of the family asked the Tisons and Greenawalt to "[g]ive us some water . . . just leave us out here, and you all go home." (*Ibid.*) Gary told his sons to get some water. (*Ibid.*) They complied, and Gary and Greenawwalt shot the entire family to death. (*Id.* at p. 141.)

Pointing weapons at guards to effect the escape, the Tisons contemplated the use of force to effect the escape, and it was committed to further the common design, so if one of the group had shot at a guard or visitor, all could be liable as coconspirators. (*Tison*, *supra*, 481 U.S. at p.

144.) But the gratuitous slaughter of the family who came to their aid was arguably the independent product of Gary's and Greenawalt's independent mind, and not in furtherance of the common design. The sons would not be liable for it under conspiracy law, but could be under the natural probable consequences doctrine of aiding and abetting law, if it was objectively foreseeable that Gary and Greenawalt would act that way. As both Gary and Greenawalt were imprisoned for murder, their killing again was objective foreseeable, and thus would support murder liability for everyone under the natural and probable consequences doctrine.

The difference between the two forms of liability was what divided the majority opinion from the dissent in *People v. Brigham* (1989) 216 Cal.App.3d 1039. The majority found that the defendant who fatally shot the victim had a "presumably erratic and uncontrollable nature," so it was objectively foreseeable that he would commit a crime outside the original plan (killing another person when the planned victim did not appear). (*Id.* at p. 1055.)[3] The majority favored the objective inquiry of the aider and abettor natural and probable consequences doctrine.

> A **subjective inquiry** as to whether the perpetrator's committed crime was the **"independent product" of his mind**, so as to lead to exculpation of the aider and abettor on that basis, is improper because the ultimate factual determination of the jury as to the liability of an aider and abettor is based instead on an **objective analysis of causation**; i.e., whether the committed crime was the **natural and probable consequence** of the principal's criminal act the aider and abettor knowingly encouraged or facilitated.

(*Id.* at p. 1051, emphasis added.)

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[3] This Court recently rejected liability for an aider and abettor where he knew of the direct perpetrator's "propensity for violence." (*In re Scoggins* (2020) 9 Cal. 5th 667 [Slip op. 4.]

The dissent countered that an accomplice should not be derivatively liable for an "intentional act [that] was a product only of his mind that did not further the different criminal offense planned." (*Id.* at p. 1069, dis. opn. of Kline, J.) Justice Kline thus opposed imposing liability on the non-shooter for the shooter's act: "If the jury agreed that Bluitt independently and intentionally acted outside the plan appellant aided and abetted and not in furtherance of that plan, appellant could not be held liable." (*Ibid.*)

This view conforms to the opinion reflected in *Cervantes*, *supra*, 26 Cal.4th 860, 874, and by Professor Kadish. A shooting that is outside the plan, and is the independent product of the shooter's own mind, is not the "inevitable, natural result of a chain of events." (Kadish, supra, 73 Calif. L. Rev. 323, 333.) To the contrary, "What another freely chooses to do is his own doing, not mine. It cannot be seen as a part of my action the way a natural physical consequence would be." (*Id.* at p. 406.) Or, as a later Court of Appeal would describe the facts on habeas review, the shooter's decision to kill an unplanned victim was "independent, intentional, deliberate and premeditated," and reflected a "personal and subjective state of mind that was insufficiently connected to petitioner's culpability for aiding and abetting" the planned crime to justify holding the petitioner liable for the shooter's "premeditated independent act." (*In re Brigham* (2016) 3 Cal.App.5th 318, 329.)

As the opening brief, observed, the Legislature wished to abolish the natural and probable consequences doctrine. (AOB 27; see also § 1170.95, subd. (a).) It did not, however, modify section 182, which governs conspiracy. It is the former doctrine that SB 1437 abolished, not the latter.

Conclusion

Consideration of SB 1437 gives this Court the opportunity to form a doctrine that shapes felony murder, provocative act murder, and coconspirator liability. Parties are liable for the natural and probable consequences of nature, not will. (*Kadish*, *supra*, 73 Calif. L. Rev. 323, 327.) They are liable for innocent, defensive responses of victims or police officers, but not the independent, felonious, and malicious actions of their partners in crime, when those are beyond the contemplated reach of their common design.

Respectfully submitted,

Dated: July 31, 2020

_____
Mitchell Keiter
Counsel for Amicus Curiae
Amicus Populi

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(Cal. Rules of Court, rule 8.204, subdivision (c).)

I, Mitchell Keiter, counsel for amicus curiae, certify pursuant to the California Rules of Court, that the word count for this document is 5,579 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Executed this 31st day of July, 2020, at Beverly Hills, California.

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Mitchell Keiter

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