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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSEPH ROBERT GENTILE, JR.,

Defendant and Appellant.

Case No. S256698

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

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
A. NATASHA CORTINA
Supervising Deputy Attorney General
MEREDITH S. WHITE
Deputy Attorney General
*ALAN L. AMANN
Deputy Attorney General
State Bar No. 301282
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2277
Fax: (619) 645-2044
Email: Alan.Amann@doj.ca.gov
Attorneys for Plaintiff and Respondent

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INTRODUCTION

Following his conviction for first degree murder for his participation in a blunt-force killing, and the court of appeal's subsequent reduction of that conviction to second degree murder due to perceived *Chiu*[1] error, appellant contended in a second appeal that Penal Code section 188[2], as amended by Senate Bill No. 1437 (2017–2018 Reg. Sess.), required that his second degree murder conviction be vacated. The court of appeal rejected that claim, and this Court granted appellant's ensuing petition for review on two issues, the first of which is whether Senate Bill No. 1437's amendment to section 188 eliminated second degree murder liability under the natural and probable consequences doctrine.

In its Answer Brief on the Merits, respondent answered that question in the affirmative. Respondent argued that section 188 eliminated the natural and probable consequences doctrine as a basis for murder by abolishing the vicarious liability integral to it and requiring the prosecution to prove malice aforethought as an element of murder for all principals, including aiders and abettors, except as specified under the felony murder rule as stated in section 189.

Two amici have since filed briefs in this matter. In the first, the San Diego County District Attorney (SDCDA), disagreeing with respondent's position, argues that Senate Bill No. 1437 did

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

[2] Statutory references herein are to the Penal Code.

not eliminate the natural and probable consequences doctrine as a basis for murder, but retained it with the additional requirement that a defendant have acted with malice aforethought in order to be guilty of murder as an aider and abettor under the doctrine. As explained herein, however, section 188's newly-added malice aforethought requirement has effectively abolished the natural and probable consequences doctrine as a standalone theory of murder liability.

In the second amicus brief, Amicus Populi (Populi) argues that the definition of "actual killer" for felony murder purposes under section 189 hinges upon principles of proximate causation, not direct or actual causation. Because the instant matter does not involve felony murder, respondent does not address that argument.

ARGUMENT

I. SECTION 188'S NEWLY-ENACTED MALICE AFORETHOUGHT REQUIREMENT DID NOT MERELY AMEND, BUT ELIMINATED, THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE AS AN INDEPENDENT BASIS FOR MURDER LIABILITY

The SDCDA contends that the natural and probable consequences doctrine "still survives" the statutory amendment to section 188 "as a theory for second degree murder liability provided the People can prove that a defendant acted with malice aforethought when aiding and abetting a charged or uncharged target crime." (SDCDA Brief 2–3.) Respondent maintains that section 188's newly-added malice aforethought requirement eliminated the natural and probable consequences theory of

liability, such that it can no longer be used as an independent means to convict a defendant of murder. As amended, the law requires proof of malice aforethought as to each defendant, and one who (with malice aforethought) aids and abets a criminal offense that proximately causes the death of another is guilty of murder under direct aiding and abetting principles.[3]

A. Section 188's Newly-Enacted Malice Aforethought Requirement Abolished the Natural and Probable Consequences Doctrine Theory of Murder Liability

As stated in respondent's Answer Brief on the Merits, liability under the natural and probable consequences doctrine is vicarious in nature; one who aids and abets a target crime is vicariously liable for any additional crime that occurs as a reasonably foreseeable consequence of the crime directly aided and abetted. (Answer Brief on the Merits (ABM) 25–27; see *Chiu*, *supra*, 59 Cal.4th at pp. 161, 164–165; *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 17.) Because that "nontarget" offense is unintended, the aider and abettor's mental state with respect to it is irrelevant, and his or her culpability for it hinges

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[3] The instant matter concerns only the natural and probable consequences doctrine as a species of liability for murder. It does not concern the use of "natural and probable consequences" as a definition or theory of causation. (See CALCRIM No. 240 [general jury instruction on causation]; *People v. Cervantes* (2001) 26 Cal.4th 860, 866 [cause of death in homicide cases refers to "an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur"].)

instead on whether it was objectively reasonably foreseeable. (*Chiu*, *supra*, 59 Cal.4th at p. 164.)

Section 188 now requires that, with the exception of felony murder, one must act with malice aforethought to be guilty of murder. (§ 188, subd. (a)(3).) Consequently (and again excluding felony murder), the prosecution must prove malice as an element of murder for *all* principals, including aiders and abettors. (*Ibid*.) Thus, far from being irrelevant, as it was under the natural and probable consequences theory of liability, an aider and abettor's mental state is now indispensable to a murder conviction: one cannot be guilty of that crime unless he or she personally acted with malice aforethought. In this essential respect, murder liability must be determined "according to [the aider and abettor's] own level of individual culpability." (Stats. 2018, ch. 1015, § 1, subd. (d).)

The SDCDA acknowledges in her brief that, due to section 188's newly-added malice aforethought requirement, "the concept of vicarious liability no longer exists for second-degree natural and probable consequences murder." (SDCDA Brief 2.) She argues, however, that this amounts only to a modification and not a repudiation of the natural and probable consequences doctrine. (SDCDA Brief 2.) But the very purpose of the natural and probable consequences theory of liability in the context of murder was to eliminate the need to prove malice aforethought with respect to each principal, and allow the prosecution to prove, in its stead, that a murder was committed as an objectively foreseeable consequence of a target crime directly aided and

abetted. (ABM 25–27; *Chiu*, *supra*, 59 Cal.4th at pp. 161, 164–165.) Under section 188 as amended, the prosecution no longer can rely on the commission of an objectively foreseeable murder to establish liability, but must prove malice aforethought as an element of murder for each principal.

Consequently, the natural and probable consequences doctrine may no longer serve as an independent theory of murder liability in California.[4]

B. Continued Application of the Natural and Probable Consequences Theory of Murder Liability Is Unnecessary Because One Who Aids and Abets an Implied Malice Murder with Malice Aforethought Is Guilty of Murder Under Direct Aiding and Abetting Principles

The SDCDA argues that eliminating the natural and probable consequences doctrine will allow a class of murderers—those who, acting with malice aforethought but not an express intent to kill, aid and abet a crime in which a co-participant causes another person's death—to "get away with murder" because there will be no statutory mechanism to hold them criminally liable for the murder. (SDCDA Brief 1–2, 7.) To avoid this "absurd" result, the SDCDA contends, the amendment to section 188 should be understood as creating a "hybrid" theory of murder liability in which a principal to a target crime that results in an objectively foreseeable death is guilty of murder

[4] In its amicus brief, Populi agrees that Senate Bill No. 1437 has abolished the natural and probable consequences doctrine as a basis for murder liability in California. (Populi Brief 28.)

under the natural and probable consequences doctrine if he or she acted with malice aforethought. (SCDCA Brief 1, 7–9.)

The parties do not appear to dispute the necessary elements that now form the basis of murder liability under section 188, as amended. However, the SDCDA's "hybrid," natural-and-probable-consequences-plus-malice-aforethought formulation is confusing and unnecessary. Again, section 188's newly-added malice aforethought requirement negates the purpose of the natural and probable consequences doctrine as applied to murder, which was to make irrelevant the aider and abettor's subjective mental state and replace it with objective foreseeability. (ABM 25–27; *Chiu*, *supra*, 59 Cal.4th at pp. 161, 164–166.)[5]

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[5] The SDCDA's characterization of the natural and probable consequences doctrine as one resting on imputed malice (SDCDA Brief 3, 7) is mistaken. Liability under the doctrine is not based on malice, actual or imputed, but "'the policy [that] . . . . aiders and abettors should be responsible for the criminal harms they have naturally, probably, and foreseeably put in motion.'" (*Chiu*, *supra*, 59 Cal.4th at p. 164 (italics omitted).) This entails an "'objective analysis of causation'; i.e., whether a reasonable person under like circumstances would recognize that the crime was a reasonably foreseeable consequence of the act aided and abetted." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587, citation omitted.) As a species of accomplice liability, moreover, such liability is derivative, "'result[ing] from *an act by the perpetrator* to which the accomplice contributed.'" (*People v. Perez* (35 Cal.4th 1219, 1225, citation omitted; *Chiu*, at p. 161.)

California's felony murder rule, in contrast, is grounded in imputed malice. "The felony-murder doctrine . . . operates to posit the existence of that crucial mental state [malice aforethought]—and thereby to render irrelevant evidence of

(continued…)

In addition, eliminating the natural and probable consequences doctrine as a theory of murder liability will not have the absurd result of allowing murderers to "get away with murder." In contending otherwise, the SDCDA misapprehends respondent's position, as well as the law regarding direct aider and abettor liability in connection with murder. Respondent did not argue that aiding and abetting a murder requires an intent to kill. (See SDCDA Brief 5 [asserting that respondent argued that "the Legislature required intent to kill for both aiding and abetting of second-degree murder and aiding and abetting of felony murder"].) Respondent argued only that section 188, as amended, requires malice aforethought. (ABM 29–33.) That includes implied malice, which does not require an intent to kill.

Furthermore, murder liability under direct aiding and abetting principles is not limited to express malice murder in which there is an intent to kill. (See SDCDA Brief 3, 7 [arguing that direct aiding and abetting liability extends to express malice

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(…continued)
actual malice or the lack thereof—when the killer is engaged in a felony whose inherent danger to human life renders logical an imputation of malice on the part of all who commit it." (*People v. Bryant* (2016) 56 Cal.4th 959, 965; see *People v. Chun* (2009) 45 Cal.4th 1172, 1184 ["The felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life"].) The malice to be imputed from the commission of the inherently dangerous felony, moreover, is not necessarily derivative from one person to another; instead it extends to direct perpetrators as well (i.e., killers and nonkillers alike). (*Bryant*, at p. 965; *Chun*, at p. 1184.)

murder only].) Instead it may include implied malice murder. In addition, and as shown below, such liability is functionally indistinguishable than that which would obtain under the SDCDA's proposed natural-and-probable-consequences-plus-malice-aforethought formulation. This renders superfluous (and unnecessary) continued reliance on the natural and probable consequences doctrine, either as an independent theory of liability or as part of the SDCDA's proposed "hybrid" theory.

Malice aforethought is either express or implied. (§ 188, subd. (a).) Generally, express malice equates to a deliberate intent to kill. (§ 188, subd. (a)(1); *People v. Soto* (2018) 4 Cal.5th 968, 970.)[6] Implied malice, on the other hand, requires no such intent. (§ 188; *Soto*, at p. 970; *Smith*, *supra*, 37 Cal.4th 733, 739.) It exists where "the killing is proximately caused by 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v. Smith* (2018) 4 Cal.5th 1134, 1165, quoting *People v. Knoller* (2007) 41 Cal.4th 139, 152, internal quotation marks omitted; see CALCRIM No. 520 [defining implied malice].)

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[6] This Court has also stated that express malice encompasses a defendant's knowledge that his or her acts would, "to a substantial certainty," result in death. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890 ["Express malice requires a showing that the assailant either desires the victim's death or knows to a substantial certainty that the victim's death will occur"], citing *People v. Smith* (2005) 37 Cal.4th 733, 743; *People v. Davenport* (1985) 41 Cal.3d 247, 262.)

To convict someone of a crime as a direct aider and abettor, the prosecution must show "a crime committed by the direct perpetrator," the aider and abettor's "knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends," and "conduct by the aider and abettor that in fact assists the achievement of the crime." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225, citing *McCoy*, *supra*, 25 Cal.4th at p. 1117; see CALCRIM No. 401 [defining direct aiding and abetting].) Where the definition of the offense "includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime [citation], the aider and abettor must share the specific intent of the perpetrator." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

In addition, this Court has recently clarified that, "in a homicide prosecution not involving felony murder or the natural and probable consequences doctrine"—i.e., a homicide prosecution involving direct aiding and abetting only—"the aider/abettor's guilt is based on the combined acts of all the principals and on the aider/abettor's own knowledge and intent. Consequently, in some circumstances an aider/abettor may be culpable for a greater or lesser crime than the actual killer." (*People v. Amezcua and Flores* (2019) 6 Cal.5th 886, 917–918, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1120; see *McCoy*, at p. 1122 ["[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea. If that

person's mens rea is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator"].)

Unlike express malice murder, murder committed with implied malice is not a specific intent crime. (§ 188; *Smith*, *supra*, 37 Cal.4th at p. 739.) Because of this, to be guilty of implied malice murder as a direct aider and abettor, the aider need not intend death, but only the commission of the act naturally dangerous to human life. (See *Beeman*, *supra*, 35 Cal.3d at p. 560 [requirement of shared intent applies where the offense, as defined, "includes the intent to *do some act* or achieve some consequence beyond the *actus reus* of the crime"], first italics added.)

Accordingly, and under the foregoing principles, a person is guilty of implied malice murder as a direct aider and abettor if he or she (1) by words or conduct intentionally aids, facilitates, or encourages the perpetrator in committing an act naturally dangerous to human life, (2) with knowledge of the perpetrator's intent to commit the act, and with knowledge of and conscious disregard for the danger to human life it poses, and (3) the act proximately causes another person's death. (See, e.g., *People v. Chun* (2009) 45 Cal.4th 1172, 1205 [finding erroneous felony murder instruction harmless where the court also instructed the jury on implied malice murder, and "[n]o juror could have found that defendant participated in this shooting, *either as a shooter or as an aider and abettor*, without also finding that defendant committed an act that is dangerous to life and did so knowing of

the danger and with conscious disregard for life—which is a valid theory of malice"], italics added; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1118 [noting that a person can be guilty of implied malice murder as a direct aider and abettor if the perpetrator acted with either express or implied malice, and the aider and abettor assisted the perpetrator with knowledge of the perpetrator's criminal purpose and the intent to encourage or facilitate it]; see also *People v. Woods* (1991) 226 Cal.App.3d 1037, 1047–1048 [affirming defendant's second degree murder conviction on either an express or implied malice theory, and as either a principal or an aider and abettor, where substantial evidence showed that defendant was part of a group who shot and killed a rival gang member; "the intentional firing of a gun at the victim at close range is an act dangerous to human life and presents a high probability of death"]; cf. *People v. Mejia* (2012) 211 Cal.App.4th 586, 604 [stating, in the context of second degree provocative-act murder, that, "[w]hen a defendant, with conscious disregard for human life, intentionally acts in a manner inherently dangerous to human life or, with the same state of mind, aids and abets in the underlying crime, he demonstrates implied malice"].)

Finally, because one who with either express or implied malice aids and abets a crime—including a "target" crime, in natural-and-probable-consequences-doctrine parlance—that is naturally dangerous to human life is guilty of murder as a direct aider and abettor if it proximately causes a killing, there is no need for the continued existence of the natural and probable

consequences theory of liability, given section 188's newly-added malice aforethought requirement. Indeed, there appears to be no scenario in which one can be guilty of murder under the SDCDA's proposed formulation without *also* being guilty of that murder as a direct aider and abettor, if not a direct perpetrator.[7] In both instances, the perpetrator must have committed a crime, or a constituent act thereof, that is naturally dangerous to human life. In both instances, the aider and abettor must have, acting with malice aforethought, intentionally aided and abetted the commission of that naturally dangerous crime. And in both instances, that naturally dangerous crime must have proximately caused someone's death. "Proximate cause," in the context of direct aider and abettor liability, is identical to causation for purposes of the natural and probable consequences doctrine: it refers to "an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [death] and without which the [death] would not occur." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 49; compare *Chiu*, *supra*, 59 Cal.4th at p. 164 [natural and probable consequences theory of liability seeks to hold aiders and abettors liable for "criminal harms they have naturally, probably and foreseeably put in motion"].) And where the death is

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[7] See *McCoy*, *supra*, 25 Cal.4th at p. 1120 [explaining that "the dividing line between the actual perpetrator and the aider and abettor is often blurred. . . . . When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator"].)

foreseeable, even a claim of superseding cause will not absolve the direct aider and abettor of liability, particularly where, as in cases involving implied malice, the aider and abettor personally acted with a conscious disregard that death may result. (*Schmies*, at p. 49 [an intervening cause that is a normal and reasonably foreseeable result of defendant's original act is not superseding and will not relieve defendant of liability].)

The SDCDA sets forth in her brief two factual scenarios in which she claims the defendant could not be convicted of murder absent continued reliance on natural and probable consequences theory of liability. (SDCDA Brief 10–12.) Her arguments, however, are premised on the mistaken notion that direct aider and abettor liability extends only to express malice murder. (See SDCDA Brief 12.) Not only is that incorrect, but both scenarios illustrate well how defendants can be guilty of implied malice murder under direct aiding and abetting principles. In the first scenario, the defendant served as a driver in two gang shootings so his fellow gang members could "do their dirty work," while knowing they often carried guns and that such confrontations often escalated toward gunfire and even death. (SDCDA Brief 10.) In the second scenario, the defendant was part of a group who beat and stabbed an African-American to death. (SDCDA Brief 11–12.) The facts in both scenarios show the defendant's guilt of implied malice murder as a direct aider and abettor, as both defendants intentionally aided other perpetrators and co-participants in committing crimes naturally dangerous to human life, while knowing of and consciously disregarding the dangers

posed by those crimes. Accordingly, the natural and probable consequences theory of liability would not have been indispensable toward conviction in both instances, but redundant.

For the foregoing reasons, section 188's newly-added malice aforethought requirement did not modify, but eliminated, the natural and probable consequences doctrine as a theory of murder liability. That new requirement negates the vicarious liability undergirding the natural and probable consequences theory of liability, and eliminating it will not lead to absurd results, as one who with malice aforethought aids and abets a crime (or any of its constituent acts) naturally dangerous to human life that proximately causes a death can be held liable for murder under direct aiding and abetting principles.

CONCLUSION

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

Dated: September 14, 2020 Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
A. NATASHA CORTINA
Supervising Deputy Attorney General

/S/ ALAN L. AMANN
ALAN L. AMANN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

ALA:ab
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I certify that the attached **RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** uses a 13 point Century Schoolbook font and contains 3,551 words.

Dated: September 14, 2020

XAVIER BECERRA
Attorney General of California

/S/ ALAN L. AMANN
ALAN L. AMANN
Deputy Attorney General
Attorneys for Plaintiff and Respondent

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA
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Eric Larson Court Added 185750	Larson1001@yahoo.com	e-Serve	9/14/2020 4:32:00 PM
Mitchell Keiter Court Added 156755	Mitchell.Keiter@gmail.com	e-Serve	9/14/2020 4:32:00 PM
Alan Amann Office of the Attorney General 301282	alan.amann@doj.ca.gov	e-Serve	9/14/2020 4:32:00 PM
Laura Arnold California Public Defenders Association	lbarnold@co.riverside.ca.us	e-Serve	9/14/2020 4:32:00 PM
Michael Runyon San Diego County District Attorney 177235	michael.runyon@sdcda.org	e-Serve	9/14/2020 4:32:00 PM

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