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 CONSOLIDATED ANSWER TO THE AMICUS CURIAE BRIEFS

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By Appointment of The
Supreme Court Of California

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Appellant Joseph Gentile, Jr. files the following consolidated Answer to the amicus curiae briefs filed by the San Diego County District Attorney and Amicus Populi in this matter. The failure to respond to a particular argument should not be construed as a concession that amicus curiae's position is accurate. It merely reflects appellant's view that the issue was adequately addressed in appellant's prior briefing or the issue does not need to be addressed any further.

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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

In its amicus curiae brief, the San Diego County District Attorney (hereinafter "SDCDA" or "District Attorney") argues both appellant and the Attorney General were wrong to conclude Senate Bill No. 1437 (Stats. 2018, ch. 1015) ("SB 1437") eliminates second degree murder liability in California under the natural and probable consequences doctrine. (SDCDA Amicus Brief pp. 1-16.)

Initially, appellant notes it is unclear the District Attorney has standing to even make such an argument in direct contradiction of the Attorney General.

Article 5, section 13, of the California Constitution provides in pertinent part: "Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices …." (Cal. Const. Art. 5, § 13.)

Thus, pursuant to the California Constitution, the Attorney General is the "chief law officer" of the state who has "direct supervision over every district attorney." (Cal. Const. Art. 5, § 13.)

In the prosecution of criminal cases, "the district attorney represents the state, not the county." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340,

345, 359; see also *Nguyen v. Superior Court* (1996) 49 Cal.App.4th 1781, 1787 ["District attorneys act on behalf of the state when prosecuting crimes"]; *Sloane v. Hammond* (1927) 81 Cal.App. 590, 599 [in the prosecution of criminal matters, a district attorney "'acts as an agent of the state.'"].)

As also summarized by this Court, as the chief law officer of the state, the Attorney General "possesses not only extensive statutory powers but also broad powers derived from the common law relative to the protection of the public interest. (See *Pierce v. Superior Court* (1934) 1 Cal.2d 759, 761-762, and cases there cited, especially *People v. Stratton* (1864) 25 Cal. 242, 246-247.) '(H)e represents the interest of the people in a matter of public concern.' (*Savings Bank v. Superior Court* (1894) 103 Cal. 27, 32.) Thus, 'in the absence of any legislative restriction, (he) has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interest.' (*Pierce v. Superior Court, supra,* 1 Cal.2d at pp. 761-762.) Conversely, he has the duty to defend all cases in which the state or one of its officers is a party. (Gov. Code, § 12512.) In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as a representative of the public interest and as statutory counsel for the state or one of its agencies or officers." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15 ("*D'Amico*"), disapproved on another point in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 944.)

As similarly recognized by the United States Supreme Court, "[t]he attorney general is the highest nonjudicial legal officer of California, and is particularly charged with the duty of supervising administration of the

criminal laws." (*Phyle v. Duffy* (1948) 334 U.S. 431, 441 [68 S.Ct. 1131, 92 L.Ed. 1494].)

As also previously determined by this Court in *D'Amico*, the Attorney General has the authority to make binding concessions and such acts are "clearly within the scope of the Attorney General's dual role as representative of a state agency and guardian of the public interest." (*D'Amico v. Board of Medical Examiners, supra,* 11 Cal.3d at pp. 15-16.)

Moreover, while it is clear the Attorney General has the authority to delegate portions of its law enforcement responsibility to the district attorney (see, e.g., *Pitts v. County of Kern, supra,* 17 Cal.4th at p. 345), that is not what is occurring in this situation. Here, the SDCDA is taking a position directly contrary to the position of the Attorney General who is representing the People in this case. In light of this direct conflict between the District Attorney and the Attorney General, the position of the Attorney General, as the chief law officer of the State, should prevail.

A contrary conclusion would potentially produce chaotic results and undermine both the efficiency of the judicial system as well as the public's confidence in it. The case at bar did not originate in or involve San Diego County, and if the District Attorneys in each of California's 58 counties are permitted to argue in judicial proceedings in which the Attorney General is representing the People that the Attorney General is wrong in its interpretation of California law, chaos, confusion, and a lack of public confidence in the criminal justice system could certainly result.

Thus, appellant urges that the SDCDA's argument that SB 1437 does not eliminate second degree murder liability in California under the natural and probable consequences doctrine should be rejected at the outset as inconsistent with the position of the chief law officer of the State, the Attorney General.

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In any event, assuming the SDCDA can properly argue the Attorney General's interpretation of the pertinent statute is wrong, the SDCDA's argument fails on the merits. Indeed, the SDCDA's arguments to the contrary are primarily based upon a fundamental misunderstanding of the law applicable to the crime of murder, aiding and abetting, and the natural and probable consequences doctrine.

In order to properly demonstrate the infirmity of the SDCDA's arguments, a brief summary of the applicable law appears in order.

First degree murder is the unlawful killing of a human being with premeditation, deliberation, and express malice aforethought, i.e., intent to kill. (*People v. Beltran* (2013) 56 Cal.4th 935, 941-942; *People v. Knoller* (2007) 41 Cal.4th 139, 151.) Second degree murder is an unlawful killing committed with an intent to kill but without premeditation and deliberation, or an unlawful killing proximately caused by an intentional act, the natural consequences of which are dangerous to life, performed with knowledge of the danger and with conscious disregard for human life, i.e., with implied malice. (*People v. Beltran, supra,* 56 Cal.4th at p. 942; *People v. Knoller, supra,* 41 Cal.4th at pp. 151-152.)

"There are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted."' [Citation.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 158.)

"An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.'

[Citation.]" (*People v. Chiu, supra,* 59 Cal.4th at p. 161, emphasis in original.)

Under the natural and probable consequences doctrine, "'"[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."' [Citations.]" (*People v. Chiu, supra,* 59 Cal.4th at p. 161.) "A nontarget offense is a '"natural and probable consequence"' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually foresaw the nontarget offense. [Citation.] Rather, liability '"is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."' [Citation.]" (*Id.* at pp. 161-162.)

Turning to the arguments presented herein, the SDCDA argues that if SB 1437 were interpreted to eliminate liability for second degree murder under the natural and probable consequences doctrine, this "would allow defendants who, with malice aforethought, aid and abet crimes that result in death to literally get away with murder." (SDCDA Amicus Brief pp. 1-2.)

This argument is misplaced because a defendant who directly aids and abets a homicide with either express or implied malice aforethought can still be convicted of first or second degree murder as a direct aider and abettor. (See *People v. Chiu, supra,* 59 Cal.4th at pp. 166-167 [observing that although the Court in that case decided to prohibit first degree murder convictions under the natural and probable consequences doctrine for policy reasons and as a matter of fundamental fairness, "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles;" … "An aider and abettor who knowingly and

intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder."].)

The SDCDA argues that if SB 1437 eliminated liability for second degree murder under the natural and probable consequences doctrine, a defendant could get away with murder by, for example, "claim[ing] that he or she did not kill, intend to kill, or know that their fellow participant intended to kill the victim," and could also get away with murder where the evidence shows two or more persons acted with malice aforethought but the prosecution is unable "to pinpoint which person committed the act which caused the death." (SDCDA Amicus Brief p. 1.) The SDCDA concludes the Legislature could not have intended this "absurd result." (SDCDA Amicus Brief p. 1.) These arguments are also based on a misunderstanding of the law.

Contrary to the SDCDA's suggestion, it is not required to establish a person killed, intended to kill, or knew their fellow participant intended to kill in order to convict a person of second degree murder as a direct aider and abettor. Rather, as noted above, a person can be convicted of second degree murder as a direct aider and abettor if he or she aided and abetted an act, the natural consequences of which are dangerous to life, and that person knowingly acted with a conscious disregard for human life. (See *People v. Chiu, supra,* 59 Cal.4th at pp. 166-167; *People v. Beltran, supra,* 56 Cal.4th at pp. 941-942; *People v. Knoller, supra,* 41 Cal.4th at pp. 151-152; see also *People v. Johnson* (2016) 62 Cal.4th 600, 638-641 [an aider and abettor may be convicted of either first or second degree murder based on his or her own mental state]; *People v. Garcia* (2002) 28 Cal.4th 1166, 1170, 1174 [defendant convicted of second degree murder as an aider and abettor by aiding and abetting the shooter in a gang related homicide].)

Similarly, it is well-established that it is not required to pinpoint which person committed the act which caused the death in order to convict a person of murder as either a direct perpetrator or a direct aider and abettor. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) As previously stated by this Court in *McCoy*, which was a direct aiding and abetting case (see *id.* at p. 1117), "the dividing line between the actual perpetrator and the aider and abettor is often blurred." (*Id.* at p. 1120) "The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who was the direct perpetrator or to what extent each played which role." (*Ibid.*) As more recently stated by this Court in *Gomez* on this same point, as long as the jury is convinced the defendant committed murder as that offense is defined by statute, "'the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator.'" (*People v. Gomez* (2018) 6 Cal.5th 243, 279.)

As also aptly and recently stated by the Court of Appeal in *Offley*, SB 1437 eliminated second degree murder liability in all cases under the natural and probable consequences doctrine. (*People v. Offley* (2020) 48 Cal.App.5th 588, 595.) However, this "change did not … alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.' [Citations.] One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law." (*Id.* at pp. 595-596.)

The SDCDA additionally, similarly, and incorrectly argues that "under a direct aiding and abetting theory, the aider and abettor would necessarily always be guilty of aiding and abetting 'express malice murder' since express malice means the intent to kill and direct aiding and abetting requires the aider and abettor to intend and act to help bring about the

killing." (SDCDA Amicus Brief p. 3.) The SDCDA additionally incorrectly argues the natural and probable consequences doctrine should be preserved as a theory of liability for murder because "[w]ithout such, a jury would be limited to only considering direct aiding and abetting express malice murder," and the "People would be precluded from presenting other available evidence that could show that each defendant acted with a conscious disregard for human life (implied malice)." (SDCDA Amicus Brief p. 12.) On the contrary, and as set forth above, a defendant can be convicted of directly aiding and abetting a second degree murder based on an implied malice theory. (*People v. Chiu, supra,* 59 Cal.4th at pp. 166-167; *People v. Beltran, supra,* 56 Cal.4th at pp. 941-942; *People v. Knoller, supra,* 41 Cal.4th at pp. 151-152; *People v. Johnson, supra,* 62 Cal.4th at pp. 638-641; *People v. Garcia, supra,* 28 Cal.4th at pp. 1170, 1174.)

The SDCDA additionally argues the legislative history underlying SB 1437 demonstrates the Legislature did not intend to eliminate the natural and probable consequences doctrine as a theory of liability for second degree murder. (SDCDA Amicus Brief pp. 4-7.) This argument also has no merit.

The uncodified section of SB 1437 stating the purpose of the legislation makes clear the Legislature's intent: "There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides." (Stats. 2018, ch. 1015, SB 1437 § 1(b).) "It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability." (Stats. 2018, ch. 1015, SB 1437 § 1(d).) "Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the

individual." (Stats. 2018, ch. 1015, SB 1437 § 1(e).) "It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, S.B. 1437 § 1(f).) "Except as stated in subdivision (e) of Section 189 of the Penal Code (the revised first degree felony murder rule), a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea." (Stats. 2018, ch. 1015, S.B. 1437 § 1(g).)

Consistent with the above stated legislative intent, the Legislature amended Penal Code section 188, subdivision (a)(3), in order to abolish liability for murder under the natural and probable consequences doctrine, and to require a defendant personally act with malice aforethought in order to be convicted of murder except under the revised felony murder rule contained in amended Penal Code section 189.

In urging a contrary conclusion, the SDCDA relies almost exclusively on the lone fact that in subdivision (f) of section 1 of the legislative materials the Legislature used the word "amend" in stating "it is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, S.B. 1437 § 1(f).) From this, the SDCDA concludes the Legislature did not intend to amend the natural and probable consequences doctrine by eliminating it as a theory of liability for second degree murder, but rather intended to amend and preserve the natural and probable

consequences doctrine in some other manner for purposes of second degree murder liability.[1] (SDCDA Amicus Brief pp. 4-7.)

However, the SDCDA takes this language out of context. The Legislature did amend the natural and probable consequences doctrine as it relates to murder by eliminating it as a theory of second degree murder liability, just as this Court previously eliminated it as a theory of first degree murder liability in *Chiu*. The Legislature did not eliminate the natural and probable consequences doctrine as a whole or with respect to any other crimes. The Legislature further accomplished its stated purpose by amending Penal Code section 188, subdivision (a)(3), for purposes of natural and probable consequences liability, and amending Penal Code section 189 for purposes of felony murder liability. Properly viewed in context, the fact that the Legislature stated it was necessary to amend the law does not support the SDCDA's strained interpretation of how the law was amended. Perhaps most importantly, the SDCDA's interpretation of the legislative intent is contrary to the plain language of the statutes amended by SB 1437.

The SDCDA instead posits the correct interpretation of SB 1437 is that it preserved natural and probable consequences liability for second degree murder and "simply added proof of one additional element, malice, to the natural and probable consequences doctrine in order to be liable for murder under a statutorily modified doctrine." (SDCDA Amicus Brief p. 6, see also pp. 2, 6-9, 15-16.) In this same vein, the SDCDA urges "[i]n effect, the legislative amendment to Penal Code section 188 created a hybrid doctrine in what can best be described as 'aiding and abetting with implied malice.'" (SDCDA Amicus Brief p. 7.)

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[1] In the course of making this argument, the SDCDA also twice incorrectly argues that "felony murder requires an intent to kill." (See SDCDA Amicus Brief p. 7.)

However, this interpretation of SB 1437 is not supported by either the text of this new law or logic. Indeed, as previously explained by this Court in *Chiu*, "[a]ider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature." (*People v. Chiu, supra,* 59 Cal.4th at p. 164.) "'By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. … 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.'" (*Ibid.*; see also *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."].)

The SDCDA is effectively arguing that without having actually said so, in enacting SB 1437, the Legislature created a brand new doctrine of natural and probable consequences liability, which contrary to all prior recitations and understanding of this doctrine, renders the defendant's own mental state as to the nontarget offense not only not irrelevant, but instead controlling and necessary. Because the Legislature did not purport to create such a brand new doctrine of liability, and because the SDCDA's interpretation of the revised law is contrary to how the natural and probable consequences doctrine has always fundamentally operated, the SDCDA's argument should be rejected. (See also *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 303 [in enacting statutes, the Legislature is presumed to be aware of existing judicial decisions, and unless the Legislature modified or overturned the judicial decision, it can be presumed the Legislature acquiesced in the application of those decisions to the newly enacted statute].)

The SDCDA also argues the Legislature's amendment of Penal Code section 189 demonstrates the Legislature's intent not to eliminate second degree murder liability under the natural and probable consequences doctrine. (SDCDA Amicus Brief pp. 13-14.) This argument is misplaced because these are two different statutes and two different theories of liability.

Penal Code section 189 addresses first degree felony murder liability and is limited to participation in one of the felonies enumerated in subdivision (a) of that statute, which include what are generally deemed the most serious of all felonies. (See Pen. Code, § 189, subd. (a).) Within revised subdivision (e)(1), the Legislature allowed for a first degree felony murder conviction for a death occurring in the commission of or attempted commission of one of these enumerated felonies without a finding of malice aforethought, but only if the defendant was the "actual killer." (Pen. Code, § 189, subd. (e)(1).) Otherwise, for those who were not the actual killer, the revised first degree felony murder rule requires a finding the defendant acted with an intent to kill or was a major participant in the underlying felony who acted with a reckless indifference to human life. (Pen. Code, § 189, subds. (e)(2), (e)(3); see also *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285 [a "reckless disregard for human life" is viewed as a somewhat higher, more culpable mental state than the "conscious disregard" required for implied malice].)

The fact that the Legislature amended the felony murder rule in this fashion does not have any bearing on its intent with respect to the natural and probable consequences doctrine. Moreover, the Legislature made clear its intent to eliminate second degree murder liability based on imputed malice under the natural and probable consequences doctrine within Penal Code section 188 when it amended Penal Code section 188, subdivision (a)(3), to provide: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice

aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (Pen. Code, § 188, subd. (a)(3).)

The SDCDA also cites the provocative act murder doctrine in support of its interpretation of SB 1437. (SDCDA Amicus Brief p. 14.) The SDCDA posits that because a provocative act murder requires malice, this demonstrates the Legislature did not intend to eliminate natural and probable consequences liability for second degree murder, and instead shows "the amendment to Penal Code section 188 simply brings the natural and probable consequences doctrine in line with other theories of accomplice liability for murder that require proof of implied malice." (SDCDA Amicus Brief p. 14.)

However, the provocative act murder doctrine was not even a part of SB 1437, it is also a fundamentally different doctrine of murder liability that already requires a finding of malice aforethought, and it has no direct bearing on the Legislature's intent in revising the natural and probable consequences doctrine. (See, e.g., *People v. Lee* (2020) 49 Cal.App.5th 254, 264-265 (rvw. granted 7/15/20, S262459) [observing the provocative act doctrine is different than the felony murder rule and the natural and probable consequences doctrine, and a defendant previously convicted under the provocative act murder doctrine is not eligible for relief under SB 1437 because such a conviction already required the defendant to have personally acted with malice aforethought]; see also *People v. Gonzalez* (2012) 54 Cal.4th 643, 655 [a murder conviction under the provocative act murder doctrine requires the defendant personally act with malice aforethought]; *People v. Mejia* (2012) 211 Cal.App.4th 586, 603 [provocative act murder is not based upon vicarious liability].)

The SDCDA's argument also misses the mark in any event because by eliminating natural and probable consequences liability for second degree murder, the Legislature has now required a direct aider and abettor to act with implied malice to be convicted of second degree murder, and to act with

express malice to be convicted of first degree murder. The provocative act murder doctrine does not support any different result.

Finally, appellant notes that the SDCDA has ignored and not addressed any of the myriad recent authorities on this issue, all of which have unanimously concluded that SB 1437 eliminated liability for murder under the natural and probable consequences doctrine. (See *People v. Lombardo* (2020) ___ Cal.App.5th ___, ___ (C090041, filed 9/11/20) [SB 1437 "eliminate[d] second degree murder based on the natural and probable consequences doctrine"]; *People v. Galvan* (2020) 52 Cal.App.5th 1134, ___ (B300323, filed 8/4/20) [SB 1437 "abolished the natural and probable consequences doctrine in cases of murder"]; *People v. Johns* (2020) 50 Cal.App.5th 46, 58 [SB 1437 amended "Penal Code sections 188 and 189 to restrict the scope of first degree felony murder and eliminate second degree murder based on the natural and probable consequences doctrine"]; *People v. Lee, supra,* 49 Cal.App.5th at p. 262 (rvw. granted 7/15/20, S262459) [SB 1437 "eliminated liability for murder under the natural and probable consequences doctrine"]; *People v. Offley, supra,* 48 Cal.App.5th at pp. 594-595 [the effect of SB 1437 "was to eliminate liability for murder under the natural and probable consequences doctrine"]; *People v. Verdugo* (2020) 44 Cal.App.5th 320, 323 (rvw. granted 3/18/20, S260493) [SB 1437 "amended the felony murder rule and eliminated the natural and probable consequences doctrine as it relates to murder"]; *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134 (rvw. granted 3/18/20, S260598) [SB 1437 "amended section 188 to eliminate liability for murder under the natural and probable consequences doctrine"]; *People v. Larios* (2019) 42 Cal.App.5th 956, 964 (rvw. granted 2/26/20, S259983) [in light of newly enacted Penal Code section 188, subdivision (a)(3), "we conclude the natural and probable consequences doctrine no longer may support a murder conviction"]; *People v. Medrano* (2019) 42 Cal.App.5th 1001,

1007-1008 (rvw. granted 3/11/20, S259948) [SB 1437 abrogated liability for murder under the natural and probable consequences doctrine]; *People v. Lopez, supra,* 38 Cal.App.5th at pp. 1102-1103 & fn. 9 (rvw. granted 11/13/19, S258175) [SB 1437 eliminates liability for second degree murder under the natural and probable consequences doctrine].)

For all the above reasons, and consistent with all the above authorities, this Court should hold SB 1437 eliminated liability for second degree murder under the natural and probable consequences doctrine.

II

BECAUSE AMICUS POPULI'S ARGUMENTS ARE NOT PERTINENT TO THIS CASE AND DO NOT FALL WITHIN THE SCOPE OF THE ISSUES UPON WHICH THIS COURT HAS GRANTED REVIEW, APPELLANT OFFERS NO OPINION AS TO THE MERITS OF ANY OF THESE ARGUMENTS

Amicus curiae party Amicus Populi argues: 1) the "actual killer" described in Penal Code section 189, subdivision (e)(1), of the revised felony murder rule is the proximate cause, not the actual or direct cause of death; 2) a defendant may be liable as the actual killer where the intermediary is an innocent party; and 3) the Legislature has not abolished co-conspirator liability. (Amicus Populi Amicus Brief pp. 12-29.)

On the other hand, the case at bar involves aiding and abetting liability and the natural and probable consequences doctrine. Because Amicus Populi's arguments are not pertinent to this case and because they also do not appear to fall within the scope of the issues upon which this Court has granted review, appellant does not offer any opinion or argument on the merits of any of these contentions.[2]

[2] Appellant does note that it appears Amicus Populi agrees that SB 1437 eliminated second degree murder liability under the natural and probable consequences doctrine. (See Amicus Populi Amicus Brief p. 28.)

CONCLUSION

For the foregoing reasons, the additional reasons set forth in Appellant's Opening and Reply Briefs 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: 9/14/20

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 Consolidated Answer to the Amicus Curiae Briefs contains a total of 5,974 words.

Executed this 14th day of September, 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 14th day of September, 2020, I caused to be served the following:

APPELLANT'S CONSOLIDATED ANSWER TO AMICUS CURIAE

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
CMC East Facility A2144
P.O. Box 8101
San Luis Obispo, CA 93409

Arnold Lieman (trial atty)
78446 Platinum Dr
Palm Desert, CA 92211

I further declare that on this same date I electronically served a copy of the above-referenced document to the following parties:

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Fourth District Court of Appeal, Div. 2
Served via True Filing

Amicus Curiae parties
Serve 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 September 14, 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**

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Date

/s/Eric Larson

Signature

Larson, Eric (185750)

Last Name, First Name (PNum)

Law Firm