IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSEPH GENTILE, JR, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, APPELLATE DIVISION, Respondent.	No. S256698
THE PEOPLE, Real Party in Interest.	

Fourth Appellate District, Division Two
Riverside County Superior Court, Case No. INF1401840
Court of Appeal, Case No. E069088

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE

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TO THE HONORABLE CHIEF JUSTICE TANI G. CANTIL-SAKAUYE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The San Diego County District Attorney respectfully asks permission to file the attached amicus curiae brief, pursuant to rule 8.520, subdivision (f), of the California Rules of Court. No party nor counsel for a party in this appeal authored in whole or in part the proposed amicus curiae brief, nor made any monetary contribution to fund the preparation or submission of the proposed amicus curiae brief. Furthermore, no person or entity, other than amicus and her counsel, has contributed – monetarily or otherwise – to the preparation or submission of the attached amicus curiae brief.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The San Diego County District Attorney represents the People of the State of California residing within the County of San Diego. The San Diego County District Attorney's Office prosecutes many murder cases each year, including natural and probable consequence murders. This court's decision on the first issue concerning elimination of natural and probable consequence murders directly affects this Office's prosecution of new natural and probable consequence murders and its litigation of old natural and probable consequence murders that are reviewed through the process established by Senate Bill 1437.

Counsel for amicus has reviewed the petitioner's merits brief, the respondent's answer brief, and the reply brief in this case and asks leave of the court to file this amicus curiae brief for a limited purpose: To address whether the amendment to California Penal Code section 188 via Senate Bill 1437 eliminated the natural and probable consequences doctrine for murder or simply amended it. Amicus disagrees with both appellant and

respondent that the amendment to section 188 of the Penal Code *eliminates* second degree murder liability under the natural and probable consequences doctrine. Rather, amicus contends that the amendment to Penal Code section 188 *amended* the natural and probable consequences doctrine to require that the People prove the subjective mens rea of a defendant charged with murder under this theory of liability, that is, that the defendant acted with malice aforethought.

For the foregoing reasons, the District Attorney of San Diego County respectfully requests the court accept the accompanying brief for filing in this case.

Dated: July 15, 2020

Respectfully Submitted,

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AMICUS CURIAE BRIEF

INTRODUCTION

A holding by this court that Senate Bill 1437 (SB1437) eliminates the natural and probable consequences doctrine for second-degree murder would allow defendants who, with malice aforethought, aid and abet crimes that result in death to literally get away with murder. This unjust result would be seen in at least two often-occurring gang/group crime scenarios: 1) where evidence plainly shows two or more people acting with malice aforethought participate in a crime which reasonably and foreseeably results in the killing of a victim but where each individual participant later claims that he or she did not kill, intend to kill, or know that their fellow participant intended to kill the victim; and 2) where evidence shows two or more people acting with malice aforethought band together to participate in a crime against a victim but where the prosecution is unable by the very nature of the group conduct to pinpoint which person committed the act which caused the death, such as a group assault in which a fatal stabbing occurs. The Legislature surely did not intend this absurd result nor does the actual language of the newly enacted statute support it.

Allowing a defendant to escape murder liability in a situation when he or she, while acting with conscious disregard to human life, is a principal in an underlying crime during which one or more co-participants kills another not only violates sound public policy but defeats the Legislature's intent to "more equitably sentence offenders in accordance with their involvement in homicides" and to ensure that "a person should be punished for his or her actions according to his or her own level of individual culpability." (Stats. 2018, ch. 1015, § 1, subds. (b), (d).) Such a holding would encourage group criminal conduct because any principals in the underlying crime would know they could not be held accountable for a

death that is the foreseeable result of their participation in that crime during which they acted with conscious disregard for human life. This absurdity would result merely because the principals in the underlying crime did not commit the act which ultimately caused death even though they acted with malice aforethought.

While the concept of vicarious liability no longer exists for second-degree natural and probable consequences murder, the natural and probable consequences doctrine has not been completely eliminated. The statutory language of Penal Code sections 188 and 189 as well as the legislative history of SB1437 support this conclusion. By amending Penal Code section 188 to require that all principals to a crime act with malice aforethought in order to be convicted of murder, the Legislature did not entirely eliminate the natural and probable consequences doctrine as a theory of second-degree murder liability. Rather, the Legislature simply modified this theory of liability by requiring in a murder prosecution the People prove that each principal acted with malice aforethought – that is, his or her *subjective* mens rea – rather than allow malice to be imputed to a principal based solely upon their participation in a crime – that is, objective mens rea. A simple adjustment to the language of CALCRIM 402 and CALCRIM 403 would clearly embody this change in the law and best illustrate how the natural and probable consequences doctrine not only survives SB1437 but naturally falls in line with other theories of accomplice liability for murder that require proof of implied malice on the part of the aider and abettor.

Thus, Amicus asks the court to hold that that the natural and probable consequences doctrine still survives 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.

ARGUMENT

I.

SB1437 AMENDED BUT DID NOT ELIMINATE THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE FOR MURDER

Prior to SB1437 and its amendment to Penal Code section 188, a defendant could be guilty of aiding and abetting murder in two ways. First, as a "direct" aider and abettor where the aider and abettor is aware of the killer's criminal purpose, murder, and intends to aid and abet that crime. (CALCRIM 401; see *People v. Beeman* (1984) 35 Cal.3d 547, 560; *People v. McCoy* (2001) 25 Cal.4th 1111.) Second, under the natural and probable consequences doctrine where the aider and abettor intend to and does aid and abet some other crime and it is reasonably foreseeable that a death could result. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 260; *People v. McCoy* (2001) 25 Cal.4th 1111, 117; *People v. Medina* (2009) 46 Cal.4th 913, 920.) 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. (Pen. Code, § 188, subd. (a)(1); CALCRIM 401, 520.) Under the natural and probable consequences theory, however, no subjective mens rea was required on behalf of the defendant; no showing of express or implied malice on the part of defendant's mental state was necessary. Instead, the malice (implied) required for murder was imputed to a defendant based on his or her participation in some other crime in which it was objectively foreseeable that a death could result. It was this concept the Legislature sought to address when they enacted SB1437.

In the legislative history of SB1437 in which the Legislature declared its purpose in enacting the new law it made clear that it intended not to wholly *eliminate* the natural and probable consequences doctrine with respect to murder, but only to *amend* it to require proof of malice aforethought. In pertinent part, SB1437, section 1 states:

> The Legislature finds and declares all of the following:
>
> . . .
>
> (f) 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.
>
> (g) Except as stated in subdivision (e) of section 189 of the Penal Code, 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, sec. 1, subds. (f), (g), italics added.)

When interpreting a legislative amendment, courts adhere to well settled principals of law. The court's "role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law." (*People v. Canty* (2004) 32 Cal.4th 1266, 1276, citations and internal quotation marks omitted.) In situations where the language of a statute is unambiguous, courts do not proceed any further in attempting to divine legislative intent. Courts "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute and avoid an interpretation that would lead to absurd consequences." (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 741, citations and internal quotation marks omitted.) Courts must accept the statutory text "as it was passed into law, and must, if possible, without doing violence to the language and spirit of the law,

interpret it so as to harmonize and give effect to all its provisions." (*People v. Garcia* (1999) 21 Cal.4th 1, 14.) Ultimately, the court must adopt "the construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1369, citations and internal quotation marks omitted.)

SB1437 accomplished the stated Legislative purpose by unambiguously amending Penal Code section 188 to require proof that every principal to a "crime" act with "malice aforethought," (Pen. Code, § 188, subd. (a)(3)), which may be express or implied (Pen. Code, § 188, subd. (a)(1), (a)(2)), and to disallow malice to be "imputed to a person based *solely* on his or her participation in a crime." (Pen. Code, § 188, subd. (a)(3), italics added.)

Contrary to appellant and respondent's contention, the Legislature did not eliminate liability for murder via the natural and probable consequences doctrine. The Legislature could have explicitly done so, but it did not. "A fundamental rule of construction is that [the court] must assume the Legislature knew what it was saying and meant what it said." (*Rideout Hospital Foundation, Inc. v. County of Yuba* (1992) 8 Cal.App.4th 214, 221; *Blew v. Horner* (1986) 187 Cal.App.3d 1380, 1388; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764.)

The parties paint with too broad a brush when they argue the Legislature required intent to kill for both aiding and abetting of second-degree murder and aiding and abetting of felony murder. The analysis is more nuanced, requiring this court to focus more specifically on the language the Legislature ultimately adopted and codified into law and language that was excluded. For example, the Legislature's adoption of specific language and exclusion of other language show it followed through

on its declared intention to amend the felony murder rule as specifically articulated in subdivision (f) of the uncodified portion of SB1437 when it added the exact language of that subdivision to the now-enacted Penal Code section 189 subdivisions (e)(1), (e)(2) and (e)(3). The language codified in the current statute reflects its legislative purpose, including language requiring an actual killer, intent to kill, or reckless indifference to human life by major participants in the underlying felony for felony murder.

Similarly, the Legislature followed through on its declared intention to *amend* the natural and probable consequences doctrine when it amended Penal Code section 188 subdivision (a)(3) to require proof of either express or implied malice by all who are principals to *a crime*. While it could have included language in Penal Code section 188 requiring intent to kill—like it did for Penal Code section 189 felony murder—it did not do so. Instead, serving their stated purpose of amending the natural and probable consequences doctrine to require a person act with malice aforethought and using plain and unambiguous language, they simply added proof of one additional requirement, malice, to the natural and probable consequences doctrine in order to be liable for murder under a statutorily modified doctrine. (Stats. 2018, ch. 1015, sec. 1, subds (f), (g); Pen. Code, §188, subd. (a)(3).) Notably, SB1437 carved out felony murder to require a different intent than all other murders, including natural and probable consequence murders. Where felony murder requires an intent to kill, all other murders require malice aforethought only, as evidenced by language that "*Except as stated in subdivision (e) of Section 189 of the Penal Code*, 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, sec. 1, subds (g),

italics added.) Adopting and codifying this legislative language for malice aforethought into the statute, Penal Code section 188, subdivision (a)(3) specifically states: "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." Thus, this court "must assume the Legislature knew what it was saying and meant what it said." (*Rideout Hospital Foundation, Inc. v. County of Yuba, supra,* 8 Cal.App.4th at p. 221.)

In 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." This aiding and abetting theory for murder liability did not previously exist as a stand-alone legal theory except to the extent that implied malice was imputed to a principal based on participation in some other crime where death was objectively, reasonably foreseeable. In other words, as Penal Code section 188 is now written, and consistent with legislative intent, if the evidence demonstrates that *in addition* to a defendant's participation as a "principal in a crime" he or she acted with malice aforethought, that defendant could be convicted of second-degree murder.

While the parties are correct that through SB1437, the Legislature ended imputing malice based solely on a person's participation in a crime (objective mens rea only), the parties failed to conduct the next step in the analysis—whether non-imputed malice (in other words malice aforethought) can support a conviction based upon the natural and probable consequences doctrine. The law now requires the prosecution prove all principals in a crime who are charged with murder shall act with malice aforethought (subjective mens rea). This simple legislative modification to

the natural and probable consequences doctrine can easily be demonstrated with the following modification to CALCRIM 403[1]:

> [Before you may decide whether the defendant is guilty of murder, you must decide whether (he/she) is guilty of _____ *<insert target offense>*.]
>
> To prove that the defendant is guilty of murder, the People must prove that:
>
> 1. The defendant is guilty of _____ *<insert target offense>*;
> 2. During the commission of _____ *<insert target offense>* a coparticipant in that _____ *<insert target offense>* committed the crime of murder;
> 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the _____ *<insert target offense>*.
>
> AND
>
> 4. **Before or during the commission of _____ *<insert target offense>* the defendant had a state of mind called malice aforethought. Malice aforethought is defined for you elsewhere in these instructions.**
>
> A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

---

[1] Exact copy of CALCRIM No. 403, Revised February 2015, except modifications noted in bold type and applicable in murder cases only. The same modifications can be made to CALCRIM 402 where the target crimes are charged. (Penal Code, § 188, subdivision (a)(3); SB1437, § 1, subds. (f) and (g).)

A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

[Do not consider evidence of defendant's intoxication in deciding whether murder was a natural and probable consequence of <*insert target offense*>.]

To decide whether the crime of murder was committed, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].
[The People are alleging that the defendant originally intended to aid and abet _____ <*insert target offenses*>.

If you decide that the defendant aided and abetted one of these crimes and that murder was a natural and probable consequence of that crime, **the defendant may only be guilty of murder if he had a state of mind called malice aforethought.** You do not need to agree about which of these crimes the defendant aided and abetted. **However, you must all agree that the defendant had a state of mind called malice aforethought.]**

As demonstrated, the above modification to CALCRIM 403 reflects the People's burden to prove malice aforethought beyond a reasonable doubt as to any principal to a crime, thereby satisfying the subjective *mens rea* requirement in newly amended Penal Code section 188.

II.

SOUND PUBLIC POLICY AND THE INTERESTS OF JUSTICE FOR MURDER VICTIMS SUPPORTS A MODIFIED NATURAL AND PROBABLE CONSEQUENCES DOCTRINE FOR MURDER

Sound public policy, the interests of justice for murder victims, and the desire to "promot[e] rather than defeat[] the general purpose of the statue, and [to] avoid an interpretation that would lead to absurd

consequences," (*People v. Hagedorn*, *supra*, 127 Cal.App.4th at p. 741) supports holding accountable all those who are culpable for murder by their own actions and subjective mens rea. The statutorily modified natural and probable consequences doctrine, argued above, well serves those interests. Two cases prosecuted by the San Diego County District Attorney's Office illustrate the importance of upholding an amended natural and probable consequences theory of liability for second-degree murder rather than finding such was "eliminated" as appellant and respondent contend.

First, in *People v. Abran Franco*, Mr. Franco was tried and convicted of two counts of second-degree murder as the driver in two separate gang shootings committed only four months apart. (*People v. Franco* (Dec. 10, 2012) D060354 [nonpub. opn.].)[2] The first victim was an innocent 14-year-old boy who was shot multiple times while in a neighborhood park, and the second was an unarmed rival gang member who was shot for being at a liquor store in disputed territory. When interviewed by detectives following his arrest, Mr. Franco admitted that his fellow gang members always call on him when they needed to "do their dirty work" because he owned a car. He also acknowledged that he knew his fellow gang members often carried guns, and that gang confrontations and fights escalated quickly and often resulted in people getting killed because of the prevalence of guns and weapons. Ultimately, however, Mr. Franco's position was that he neither intended to kill anyone nor knew that his fellow gang member and co-defendant intended to kill anyone, he thought they were just going to look for rivals to fight.

---

[2] Amicus cites to the unpublished decision in the matters of *People v. Franco* and *People v. Valdez, Dean and Garcia* only to show where the cases may be found, and not as legal authority.

More recently in *People v. Dean, Valdez, and Garcia*, the defendants were tried and convicted of second-degree murder for ambushing and stabbing to death an African American man who was simply walking home from McDonald's. (*People v. Dean et al.* D074371 [pending].) The defendants were members of a gang who viewed all African Americans as "rivals" irrespective of whether they belonged to any gang. If found in gang territory, African American citizens were often confronted by gang members, chased down with knives and other weapons, and assaulted if caught. The gang spray-painted parts of the neighborhood with anti-black phrases and other racial epithets including the "N-word" and threats of "187."

On the night of the murder, the three defendants were captured on surveillance video ambushing the victim as he walked down the street. The video captures all three defendants attacking the victim. At times the victim can be seen pushing a defendant away only to see that defendant return and continue participating in the attack. As the victim appeared to stagger from the scene in the direction of his home the defendants stalk him before turning to run back to their vehicle. The victim collapsed inside the doorway of his family's home, bleeding and begging not to let him die. He succumbed to his injuries 18 days later, never awaking after surgery. Sometime after the attack, other members of the gang posted a rap song on YouTube proudly proclaiming the gang's animosity toward African Americans, bragging about killing them, and glorifying the defendants who had been arrested for the murder.

At trial, the surveillance video was instrumental in both capturing the attack and identifying the defendants. However, the video was too dark and too far away to see precisely which one, two or all three of the

simply walking home from McDonald's. The Legislature could not have intended such an absurd result.

Adopting appellant and respondent's position that natural and probable consequences has been eliminated for second-degree murder despite the plain language of the statute and the Legislature's declared purpose in amending the doctrine to the contrary, sends the message to these murder victims' families and to other murder victims' families, especially in marginalized communities and communities of color where these types of group and gang attacks occur most frequently, that the murders of their family, friends and community members do not count.

III.

THE MENTAL STATE MODIFICATION OF THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE IS CONSISTENT WITH THE MALICE REQUIREMENTS FOR THE NEWLY AMENDED FELONY MURDER LAW AND EXISTING PROVOCATIVE ACT THEORY OF LIABILITY FOR ACCOMPLICES

In addition to its plainly stated intention only to amend, and not eliminate, the natural and probable consequences doctrine as it relates to murder, the Legislature's amendments to Penal Code section 189 further demonstrate the Legislature's intent *not* to eliminate murder liability of accomplices if it can be proved that a defendant either intended to aid and abet murder in the first degree (Pen. Code, § 189, subd. (e)(2)) or otherwise acted with malice when aiding and abetting a felony listed in section of Penal Code 189 (Pen. Code, § 189, subd (e)(3)).

As to the latter, SB1437 amended Penal Code section 189 by specifically incorporating the requirements of Penal Code section 190.2, subdivision (d) into it, thereby requiring a defendant to have been a major participant in the underlying felony and to have acted with reckless indifference to human life in its commission to be convicted of first-degree

CONCLUSION

In using the term "amend" instead of "eliminate" in the uncodified portion of SB1437, the Legislature, consistent with their declared intent, demonstrated their desire to limit application of the natural and probable consequences doctrine in murder cases to only those cases in which the People could prove beyond a reasonable doubt that as a principal in a crime the defendant acted with malice aforethought. This clarification of the application of the statutorily amended or modified natural and probable consequences doctrine could easily be accomplished by the suggested modifications to CALCRIM 403, set forth above.

A prosecution under this aiding and abetting with implied malice theory of liability would be consistent with the mens rea requirements of both the provocative act theory of liability for non-provocateur accomplices as articulated in *People v. Mejia, supra*, and the recently amended felony murder rule in Penal Code section 189. In all three scenarios, the People would have to prove that the defendant acted with malice in his participation in the underlying or target crime.

This interpretation of the amendment to Penal Code section 188 would also be consistent with public policy in that it would provide a means of holding accountable those who act with a conscious disregard for human life while assisting, facilitating or encouraging crimes which foreseeably lead to the deaths of others.

For the foregoing reasons, amicus asks this court to reject both appellant's and respondent's contention that SB1437 eliminated second-degree murder liability via the natural and probable consequences doctrine. Amicus asks the court to hold that that the natural and probable consequences doctrine still survives 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.

Dated: July 15, 2020

Respectfully Submitted,

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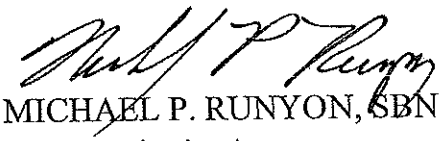

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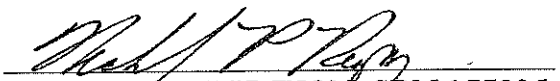
CERTIFICATE OF WORD COUNT

I certify that this **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS** including footnotes, and excluding tables and this certificate, contains 4,816 words according to the computer program used to prepare it.



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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSEPH GENTILE, JR, Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, APPELLATE DIVISION, Respondent.	Supreme Court No. S256698 Court of Appeal No. E069088 Riverside Co. Sup Ct. No. INF1401840
THE PEOPLE, Real Party in Interest.	

PROOF OF SERVICE

I, the undersigned, declare as follows:

I am employed in the County of San Diego, over eighteen years of age and not a party to the within action. My business address is 330 West Broadway, Suite 860, San Diego, CA 92101.

On July 15, 2020, a member of our office electronically served a copy of the within **APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS** to the interested parties via www.truefiling.com:

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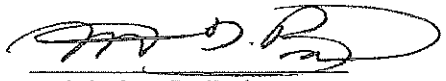
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 15, 2020 at 330 West Broadway, San Diego, CA 92101.



Marites D. Balagtas