Filed 9/5/17 In re Thompson CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re THOMPSON, On Habeas Corpus.	B270387 (Los Angeles County Super. Ct. No. A648471)

ORIGINAL PROCEEDING for Petition for Writ of Habeas Corpus, A648471, Janice Claire Croft and Stephanie M. Dunbar, Judges. Petition granted in part and denied in part.

Robert H. Derham, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Steven D. Matthews and Ryan M. Smith, Deputy Attorneys General, for Respondent.

In 1990, petitioner Sekou Kwane Thompson was convicted of first degree murder (Pen. Code,[1] §§ 187, 189), exploding or igniting a destructive device causing death (former § 12310, subd. (a)), and exploding or igniting a destructive device causing bodily injury (former § 12309).[2] He was sentenced to state prison for a term of life without the possibility of parole. In 2014, the California Supreme Court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine," and that "his or her liability for that crime must be based on direct aiding principles." (*People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu*).)

Following the decision in *Chiu*, Thompson filed this petition for writ of habeas corpus, arguing that, as a matter of law, he could not be convicted of the crime of first degree murder or the crime of exploding or igniting a destructive device under the natural and probable consequences doctrine. Thompson asserts that each of his convictions must be vacated because the jury erroneously was instructed that he could be found guilty of these crimes under the natural and probable consequences doctrine, and the record does not establish beyond a reasonable doubt that his convictions were based on a legally valid theory. We grant the petition as to the conviction for first degree murder, but deny the petition as to the convictions for exploding or igniting a destructive device causing death and bodily injury.

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1 All further statutory references are to the Penal Code.

2 Effective January 1, 2012, former sections 12309 and 12310 were repealed and reenacted as new sections 18750 and 18755, respectively, without any substantive change. (Stats. 2010, ch. 711, §§ 4, 6.)

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Trial Proceedings[3]

"It was about 11:30 p.m., July 3, 1988, when Lisa Lee and her two-year-old son Dionsa returned home after an evening at [her] grandmother's house. Lisa gave Dionsa a bath and brought him to his [bedroom]—the front bedroom, closest to the street. The lights were on and only thin curtains covered the two windows. By now it was almost midnight. Dionsa, naked from his bath, was on his bed jumping up and down. Lisa was reaching for her son's pajamas, her side to the windows, when she heard the window break. She looked at the window and saw a second 'cocktail'—a 'fireball'—fly into the room and roll under the bed. The bed went up in flames and she heard her 'little boy screaming 'cause he couldn't get off the bed.' Dionsa was burning from the neck down. He jumped off the end of the bed and ran into the hall. Lisa ran after him, tripped him, and by patting him and lying on top of him, put out the flames. With her boyfriend's help, she carried Dionsa outside. He was 'still sizzling'—you could hear it. [¶] Paramedics transported Dionsa to Martin Luther King Hospital. After a few hours he was transferred to the UCLA Burn Center and then, after a few days, to the burn institute in Boston. He died there on July 14. [¶] About a week later, on July 19, 1988, [Thompson] confessed to aiding and

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[3] Thompson's judgment of conviction has been the subject of two prior appeals before this court—*People v. Thompson* (1992) 7 Cal.App.4th 1966 and *People v. Thompson* (1994) 24 Cal.App.4th 299. The description of the trial proceedings is taken from these prior opinions.

abetting two friends who had filled two 40-ounce beer bottles with gasoline, inserted rag wicks, ignited them, and threw them through the victim's bedroom window." (*People v. Thompson*, *supra*, 7 Cal.App.4th at p. 1969.)

"A multicount information was filed against [Thompson] and two codefendants. [Thompson's] motion to sever his trial was granted. A jury convicted him of first degree murder (count I), igniting a destructive device causing death (count III), igniting a destructive device causing bodily injury (count IV), and acquitted him of arson causing great bodily injury (count II). He was sentenced to concurrent state prison terms of 25 years to life (count I), life without possibility of parole (count III), and 7 years (count IV)." (*People v. Thompson*, *supra*, 7 Cal.App.4th at p. 1970.)

II. Direct Appeals

Thompson filed an appeal from his judgment of conviction. In a 1992 opinion, this court affirmed the conviction on each count, but reversed the sentences on the counts for first degree murder (count I) and exploding or igniting a destructive device causing death (count III). We remanded the matter to the trial court with directions to resentence Thompson on counts I and III, and to stay the sentence on one of those counts under section 654. (*People v. Thompson*, *supra*, 7 Cal.App.4th at pp. 1974-1975.)

On remand, the trial court sentenced Thompson to a term of life without the possibility of parole on count III and stayed the sentence of 25 years to life on count I pursuant to section 654. Thompson thereafter filed a second appeal from his judgment of conviction in which he challenged his sentence of life without the possibility of parole on count III. In a 1994 opinion, this court

held the trial court did not err in resentencing Thompson and affirmed his judgment of conviction. (*People v. Thompson*, *supra*, 24 Cal.App.4th at pp. 302-303.)

III. Habeas Proceedings

On March 13, 2015, Thompson filed a petition for writ of habeas corpus in Los Angeles County Superior Court. The superior court denied the petition. On February 23, 2016, Thompson filed a petition for writ of habeas corpus in this court. After considering the petition and the Attorney General's informal response thereto, we appointed counsel to represent Thompson in this habeas proceeding and granted his counsel leave to file a supplemental petition. On September 19, 2016, Thompson's counsel filed a supplemental petition for writ of habeas corpus, contending that each of Thompson's convictions must be vacated based on the California Supreme Court's decision in *Chiu*. We thereafter issued an order to show cause why the relief requested by Thompson should not be granted. The Attorney General filed its return on December 16, 2016, and Thompson filed his traverse on February 6, 2017.[4]

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[4] At this court's request, the Attorney General included with its return a complete set of the jury instructions that were given at Thompson's trial. In his original habeas petition, Thompson included as exhibits a portion of these jury instructions, the jury's verdicts on counts I and III, and three pages of the reporter's transcript on the prosecution's closing argument. Although Thompson cites to other portions of the reporter's transcript in the statement of facts in his supplemental petition, those records were not included as exhibits to the original or supplemental petition. No other records from Thompson's trial have been

DISCUSSION

At trial, the jury was instructed that it could find Thompson guilty of a charged crime as an aider and abettor or as a co-conspirator if that charged crime was a natural and probable consequence of the crime that Thompson aided and abetted or conspired to commit. In his habeas petition, Thompson argues that, based on the holding in *Chiu*, his conviction for first degree murder must be vacated because he could not be convicted of that crime under the natural and probable consequences doctrine, and there is no basis in the record to determine whether he was convicted under a legally valid theory. Thompson also asserts that the reasoning in *Chiu* should be extended to vacate his convictions for exploding or igniting a destructive device causing death and bodily injury because those crimes require that the perpetrator act with a uniquely personal and subjective mental state, which does not warrant imposing liability on an aider and abettor under the natural and probable consequences doctrine.

I. Relevant Jury Instructions

A. Vicarious Criminal Liability

At Thompson's trial, the jury was instructed on three types of vicarious liability: (1) direct aiding and abetting, (2) aiding and abetting under the natural and probable consequences doctrine, and (3) membership in an uncharged conspiracy.

With respect to liability as a direct aider and abettor, the jury was instructed with CALJIC No. 3.00 that "[t]he persons

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provided to this court, and according to the Attorney General, the available records are very limited due to the age of this case.

concerned in the commission of a crime who are regarded by law as principals in the crime thus committed and equally guilty thereof include: [¶] 1. Those who directly and actively commit the act constituting the crime, or [¶] 2. Those who aid and abet the commission of the crime." CALJIC No. 3.01 instructed the jury, in relevant part, that "[a] person aids and abets the commission of a crime when he or she, [¶] (1) with knowledge of the unlawful purpose of the perpetrator and [¶] (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime, by act or advice aids, promotes, encourages or instigates the commission of the crime."

With respect to liability as an aider and abettor under the natural and probable consequences doctrine, the jury was instructed with CALJIC No. 3.02 as follows: "One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted. As to each count, you must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether the crime charged was a natural and probable consequence of such originally contemplated crime."

With respect to liability as a member of an uncharged conspiracy, the jury was instructed with the following modified version of CALJIC No. 6.10.5: "A conspiracy is an agreement between two or more persons with the specific intent to agree to commit a public offense such as ARSON OR USE OF A DESTRUCTIVE DEVICE, and with the further specific intent to commit such offense, followed by an overt act committed in this state by one or more of the parties for the purpose of

accomplishing the object of the agreement. Conspiracy is a crime, but is not charged as an offense in the information in this case. [¶] In order to find a defendant to be a member of a conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a finding as to any particular defendant that defendant personally committed the overt act, if he was one of the conspirators when such an act was committed. [¶] The term 'overt act' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a public offense and which step or act is done in furtherance of the accomplishment of the object of the conspiracy."

CALJIC No. 6.11 defined the liability of a co-conspirator as follows: "Each member of a criminal conspiracy is liable for each act and bound by each declaration of every other member of the conspiracy if said act or said declaration is in furtherance of the object of the conspiracy. [¶] The act of one conspirator pursuant to or in furtherance of the common design of the conspiracy is the act of all conspirators. [¶] A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act. [¶] You must determine whether the defendant is guilty as a member of a conspiracy to commit the crime originally contemplated, and, if so, whether the crime alleged in Counts 1,

2, 3, 4 was a natural and probable consequence of the originally contemplated criminal objective of that conspiracy."

B. Murder (Count I)

The jury was instructed that Thompson was accused in count I "of having committed the crime of murder, a violation of Penal Code Section 187." The crime of murder was defined in CALJIC No. 8.10 as follows: "Every person who unlawfully kills a human being with malice aforethought BY MEANS OF A DESTRUCTIVE DEVICE or during the commission or attempted commission of ARSON is guilty of the crime of murder in violation of Section 187 of the Penal Code. [¶] In order to prove such crime, each of the following elements must be proved: [¶] 1. A human being was killed, [¶] 2. The killing was unlawful, and [¶] 3. The killing was done with malice aforethought BY MEANS OF A DESTRUCTIVE DEVICE or occurred during the commission or attempted commission of ARSON. [¶] A killing is unlawful, if it is neither justifiable nor excusable."

The jury was then instructed on the three types of first degree murder: (1) felony murder during the commission or attempted commission of arson; (2) felony murder in pursuance of a conspiracy to commit arson; and (3) murder by means of a destructive device or explosive.

With respect to first degree felony murder during the commission or attempted commission of arson, the jury was instructed with CALJIC No. 8.21 as follows: "The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of the crime as a direct causal result of ARSON is murder of the first degree when the perpetrator had the specific intent to commit such crime.

The specific intent to commit ARSON and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." The jury also was instructed with CALJIC No. 8.27 that "[i]f a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of ARSON, all persons, who either directly and actively commit the act constituting such crime, or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

With respect to first degree felony murder in pursuance of a conspiracy, the jury was instructed with CALJIC No. 8.26 as follows: "If a number of persons conspire together to commit ARSON, and if the life of another person is taken by one or more of them in furtherance of the common design, and if such killing is done to further that common purpose or is an ordinary and probable result of the pursuit of that purpose, all of the co-conspirators are deemed in law to be equally guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental."

With respect to first degree murder by means of a destructive device or explosive, the jury was instructed with the following modified version of CALJIC No. 8.22: "Murder which is perpetrated by means of a destructive device or explosive is murder of the first degree. Before you may convict the defendant of this type of first degree murder, the People must prove beyond a reasonable doubt that the killing was committed with malice

aforethought." The jury also was instructed with CALJIC No. 3.31.5 that "[i]n the crime [of] murder by use of a destructive device, there must exist a certain mental state in the mind of the perpetrator," and that "the necessary mental state is malice aforethought." The term "malice aforethought" was defined in CALJIC No. 8.11 as follows: "'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being. [¶] Malice is implied when: [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. [¶] The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. [¶] The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

The jury also received an instruction that "[i]t is not necessary that all jurors agree unanimously on one of the prosecution's three theories of first degree murder so long as each juror is convinced beyond a reasonable doubt that defendant is guilty of first degree murder."

C. Exploding or Igniting a Destructive Device (Counts III and IV)

The jury was instructed that Thompson was accused in count III "of having committed the crime of exploding or igniting a destructive device which caused the death of Dionsa Stephone Moore, a violation of [former] Penal Code Section 12310(a)," and that "[e]very person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person, is guilty of the felony of explosion causing death." The jury was instructed that Thompson was accused in count IV "of having committed the crime of explosion of a destructive device causing bodily injury to Lisa Kaye Lee, a violation of [former] Penal Code Section 12309," and that "[e]very person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes bodily injury to any person is guilty of the felony of explosion of destructive device causing bodily injury." The word "willfully" was defined as "a purpose or willingness to commit the act or to make the omission in question," and the word "maliciously" was defined as "a wish to vex, annoy or injure another person, or an intent to do a wrongful act."

II. Relevant Law

Murder "is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Section 189, which defines the degrees of murder, provides in pertinent part: "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful,

deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289 . . . is murder of the first degree. All other kinds of murders are of the second degree." (§ 189.)

First degree murder thus includes (1) "an unlawful killing with malice aforethought that is willful, premeditated and deliberate," (2) "an unlawful killing with malice aforethought that is perpetrated by certain specified means (such as a destructive device, poison, lying in wait, torture, etc.)," and (3) "an unlawful killing during the commission or attempted commission of certain listed felonies." (*People v. Delgado* (2017) 2 Cal.5th 544, 571.) For first degree premeditated murder, "[t]he mental state required . . . is '"a deliberate and premeditated intent to kill with malice aforethought."'" (*People v. Clark* (2016) 63 Cal.4th 522, 624.) For first degree murder perpetrated by certain specified means, such as a destructive device or lying in wait, the prosecution must prove the killing was committed with malice aforethought (*People v. Stanley* (1995) 10 Cal.4th 764, 794), but independent proof of premeditation or deliberation is not required (*People v. Hardy* (1992) 2 Cal.4th 86, 162). For first degree felony murder, which is an unlawful killing that occurs during the commission of certain enumerated felonies, including arson, "'liability does not require an intent to kill, or even implied malice, but merely an intent to commit the underlying felony.'" (*People v. Bryant* (2013) 56 Cal.4th 959, 965.)

In *Chiu*, the California Supreme Court considered the liability of an aider and abettor for first degree premeditated murder. As the Court explained, "[t]here 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.]" (*Chiu*, *supra*, 59 Cal.4th at p. 158.) "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.)

The Supreme Court in *Chiu* held that an aider and abettor may be convicted of first degree premeditated murder under direct aiding and abetting principles, but not under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th pp. 158-159.) The Court reasoned that, "[i]n the context of murder, the natural and probable consequences doctrine serves the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder. [Citation.] . . . [¶] However, this same public policy concern loses its force in the context of a defendant's

liability as an aider and abettor of a first degree premeditated murder. First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty. [Citation.] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. [Citations.]" (*Id*. at pp. 165-166.) While acknowledging that "an aider and abettor's 'punishment need not be finely calibrated to the criminal's mens rea,'" the Court concluded that "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence." (*Id*. at p. 166.)

The Supreme Court accordingly held that "where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Chiu*, *supra*, 59 Cal.4th at p. 166.) The Court further held that a defendant may still be convicted of first degree premeditated murder based on direct aiding and abetting principles because "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." (*Id*. at p. 167.) In

addition, an aider and abettor may be convicted of second degree murder under the natural and probable consequences doctrine because the "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder." (*Id.* at p. 166.) The Court also made clear that "[a]n aider and abettor's liability for murder under the natural and probable consequences doctrine operates independently of the felony-murder rule," and that its holding "does not affect or limit an aider and abettor's liability for first degree felony murder under section 189." (*Ibid.*)

The Supreme Court in *Chiu* then addressed whether an error in instructing the jury on the natural and probable consequences doctrine required the reversal of the defendant's first degree murder conviction. The defendant in *Chiu* was charged with murder after he instigated a fight that resulted in a co-participant fatally shooting the victim. At trial, the jury was instructed that it could convict the defendant of first degree murder if it found that the perpetrator committed a willful, deliberate, and premeditated murder, and that the defendant either directly aided and abetted the murder or aided and abetted the target offense of assault or disturbing the peace, the natural and probable consequence of which was murder. (*Chiu*, *supra*, 59 Cal.4th at pp. 159-161.) The Supreme Court explained "[w]hen a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Id.* at p. 167.) The record indicated that the jury may have relied on the natural and probable consequences doctrine in convicting the defendant of first degree

murder. Because the Supreme Court could not conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory, it reversed the defendant's conviction. (*Id*. at pp. 167-168.)

Following *Chiu*, the Court of Appeal in *People v. Rivera* (2015) 234 Cal.App.4th 1350 (*Rivera*) considered whether a member of an uncharged conspiracy may be convicted of first degree premeditated murder under the natural and probable consequences doctrine. The defendant in *Rivera* was charged with first degree murder on the theory that he either directly aided and abetted a murder, or he was a member of an uncharged conspiracy, the natural and probable consequence of which was murder. (*Id*. at p. 1355.) On the conspiracy theory of liability, the jury was instructed that it could convict the defendant of first degree murder if it found that (1) he conspired to commit the target crime of murder, attempted murder, robbery, and/or discharge of a firearm at an occupied vehicle, (2) a co-conspirator committed the charged crime of first degree murder; and (3) the murder was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit. (*Ibid*.) The jury found the defendant guilty of first degree murder. (*Id*. at p. 1357.)

Applying *Chiu*, the *Rivera* court held that it was error to instruct the jury that it could convict the defendant of first degree premeditated murder if it found that the target crime of the uncharged conspiracy was discharging a firearm at an occupied vehicle and that first degree murder was a natural and probable consequence of that target crime.[5] (*Rivera*, 234 Cal.App.4th at

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[5] The *Rivera* court noted that its rationale only applied to the target crime of discharging a firearm at an occupied vehicle,

pp. 1355-1356.) While acknowledging that *Chiu* addressed liability as an aider and abettor rather than liability as a member of a conspiracy, the *Rivera* court reasoned that "the operation of the natural and probable doctrines is analogous" for both theories of vicarious liability. (*Id.* at p. 1356.) The court explained that, "[u]nder both these theories, the extension of liability to additional reasonably foreseeable offenses rests on the 'policy [that] conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.' [Citation.]" (*Ibid.*) The court further held that the error in instructing the jury was prejudicial because the record showed that the jury may have based its verdict on the natural and probable consequences doctrine. (*Id.* at pp. 1357-1358.) The court therefore reversed the defendant's first degree murder conviction. (*Id.* at p. 1359; see also *In re Lopez* (2016) 246 Cal.App.4th 350, 360-361 [granting habeas petition to vacate first degree murder conviction where jury erroneously was instructed that it could convict defendant of first degree murder under the natural and probable consequences doctrine either as an aider and abettor or as a co-conspirator].)

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and not to the other identified target crimes. If the jury found that the target crime was murder or attempted murder, that finding would mean the conspirators planned to commit a murder, amounting to first degree premeditated murder. Alternatively, if the jury found that the target crime was robbery, that finding would make the murder a first degree felony murder under the felony-murder rule. (*Rivera*, *supra*, 234 Cal.App.4th at p. 1356, fn. 4.)

III. The Record Does Not Demonstrate that Thompson's Conviction for First Degree Murder Was Based on a Legally Valid Theory.

Thompson argues that, based on the holdings in *Chiu* and *Rivera*, the jury erroneously was instructed that it could convict him of first degree murder either as an aider and abettor or as a co-conspirator under the natural and probable consequences doctrine. Thompson further asserts that such error requires that his conviction for first degree murder be vacated because there is no basis in the record to determine whether he was convicted under a legally valid theory. We need not resolve the instructional error issue on the limited record before us in this case, as the Attorney General does not argue that the instructions were correct, but instead contends that any error was harmless on the sole ground that the record establishes beyond a reasonable doubt that Thompson was convicted of first degree murder under the felony-murder rule. This theory, if it was the basis for the conviction, was not legally valid given that the jury acquitted Thompson of arson, the underlying felony on which the felony-murder theory was based.

In support of the harmless error argument, the Attorney General asserts that the jury was instructed that to find Thompson guilty of felony murder, "it had to find that petitioner intended to kill," and that to find him guilty of explosion of a destructive device causing death, "it had to find petitioner had malice aforethought." The Attorney General claims that these instructions thus demonstrate that Thompson was convicted of a "'legally valid theory that [he] directly aided and abetted [a] felony murder." This argument, however, is not supported by the record.

First, the jury was not instructed that it had to find that Thompson intended to kill or acted with malice aforethought to be found guilty of first degree murder. To the contrary, the instruction on first degree felony murder stated that "[t]he unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission of the crime . . . of ARSON is murder of the first degree when the perpetrator had the specific intent to commit such crime." Likewise, the instruction on aiding and abetting liability for first degree felony murder stated that "[i]f a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of ARSON, all persons, who either directly and actively commit the act constituting such crime, or who [aid and abet] its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental." While the instructions on first degree murder by means of a destructive device stated that the perpetrator of the murder had to act with malice aforethought, they did not provide that an aider and abettor or a co-conspirator also had to possess such mental state to be found guilty of that crime. Instead, the jury was instructed that, as to each count, an aider and abettor was liable "for the natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted," and a member of an uncharged conspiracy was liable "for the natural and probable consequences of any act of a co-conspirator to further the object of the conspiracy."

Second, the Attorney General is correct that felony murder was one of the theories of first degree murder on which Thompson was tried, although we cannot determine with any

certainty that the jury based its verdict on that theory. As noted, the record before this court is very limited. Apart from the jury instructions, the only records from the trial that have been provided in this habeas proceeding are the jury's verdicts on counts I and III and a few select pages of the reporter's transcript of the prosecutor's closing argument. The verdict on count I states that the jury found Thompson guilty of "murder in the first degree in violation of section 187(a)," but it does not identify the theory of liability on which the verdict was based. Nor was the jury required to unanimously agree on the theory of liability so long as each juror found Thompson guilty beyond a reasonable doubt of first degree murder. (*People v. Moore* (2011) 51 Cal.4th 386, 413.) Furthermore, the limited record that we have of the prosecutor's closing argument shows that the prosecutor did rely on the natural and probable consequences doctrine as one of the theories of liability for first degree murder. In particular, the prosecutor argued to the jury that it could convict Thompson of first degree murder if it found that he conspired either to commit arson or to use a destructive device and that murder was a natural and probable consequence of the conspiracy.[6]

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[6] In arguing that Thompson was liable for first degree murder as a co-conspirator under the natural and probable consequences doctrine, the prosecutor specifically stated: "And in conspiracy, the law goes on to say that any member is liable for the intended act, plus all the natural and probable consequences that come from that, even if they were not intended. Just like the felony murder where you intended the arson and maybe you didn't intend for anybody to die. Maybe here you intended to throw a destructive device. Maybe you intended to just burn the house. Maybe you thought no one was there. It doesn't matter. It's a reasonable and probable consequence that someone may be there. This was midnight, that someone would be there and that

The Attorney General nevertheless asserts that, because the jury was instructed that murder by means of a destructive device is first degree murder and then returned guilty verdicts on counts III and IV for exploding a destructive device causing death and bodily injury, "the jury necessarily found petitioner, who was not the actual perpetrator, guilty on the valid felony-murder theory." This argument, however, lacks merit. Murder by means of a destructive device is not felony murder under section 189. Rather, it is a kind of willful, premeditated, and deliberate killing, which requires a showing that the perpetrator acted with malice aforethought. (§ 189; see also *People v. Stanley*, *supra*, 10 Cal.4th at p. 794; *People v. Morse* (1992) 2 Cal.App.4th 620, 655.) Moreover, contrary to the Attorney General's contention, the jury's guilty verdicts on counts III and IV also do not show that the jury necessarily found Thompson guilty of first degree felony murder. Exploding or igniting a destructive device is not an enumerated felony under section 189 for purposes of the felony-murder rule. While arson is one of the enumerated felonies, the jury found Thompson not guilty of arson in count II. The record therefore does not establish that Thompson was convicted of first degree murder under the felony murder theory.

The fact that the jury returned guilty verdicts on counts III and IV also does not demonstrate that the jury found that Thompson directly aided and abetted a murder by means of a destructive device. The mental state required for the crime of exploding or igniting a destructive device is not the same as the mental state required for the crime of murder by means of a

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if someone is there, they will be injured, and you are responsible for whatever comes from that act."

destructive device, and the jury was so instructed. In addition, the record does not show beyond a reasonable doubt that the jury found Thompson guilty of exploding or igniting a destructive device under direct aiding and abetting principles. The jury was instructed on the natural and probable consequences doctrine as to each of the charged crimes, including counts III and IV. Thus, the jury could have found Thompson guilty on those counts if it found that he directly aided and abetted an undefined target crime and that the explosion or ignition of a destructive device causing death and bodily injury was a natural and probable consequence of the crime that Thompson aided and abetted.

On this record, we cannot conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory of first degree murder. The appropriate remedy for this type of instructional error is to vacate the first degree murder conviction and allow the People to either accept a reduction of the conviction to second degree murder or retry the greater offense of first degree murder under a legally valid theory. (*Chiu*, *supra*, 59 Cal.4th at p. 168.) If the People do not retry Thompson within the time prescribed by law, the trial court must modify the judgment to reflect a conviction of second degree murder on count I and resentence Thompson on that count accordingly.[7] We therefore grant Thompson's petition for writ of habeas corpus as to his conviction for first degree murder.

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[7] The trial court previously stayed Thompson's sentence of 25 years to life on count I pursuant to section 654 because count I was based on the same course of conduct as count III for which Thompson was sentenced to life without the possibility of parole. Because we are not vacating Thompson's conviction on count III for the reasons discussed below, any sentence that is imposed on count I must also be stayed pursuant to section 654.

IV. There Was No Error in Instructing the Jury that Thompson Could Be Convicted of Exploding or Igniting a Destructive Device Under the Natural and Probable Consequences Doctrine

Thompson argues that the reasoning in *Chiu* should be extended to apply to his conviction in count III for exploding or igniting a destructive device causing death and his conviction in count IV for exploding or igniting a destructive device causing bodily injury. Thompson specifically asserts that, like first degree premeditated murder, the crime of exploding or igniting a destructive device requires that the perpetrator act with a specific mental state, and that the connection between the mental state of the perpetrator and that of an aider and abettor is "'too attenuated'" to impose liability under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

We conclude, however, that the reasoning in *Chiu* does not apply to Thompson's convictions for exploding or igniting a destructive device causing death and bodily injury, and thus, there was no error in instructing the jury that it could find Thompson guilty of those crimes under the natural and probable consequences doctrine. Under former section 12310, "[e]very person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole." (Former § 12310, subd. (a).) Similarly, under former section 12309, "[e]very person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for a period of

five, seven, or nine years." (Former § 12309.) The term "willfully" means "a purpose or willingness to commit the act" (§ 7, subd. (1)), and the term "maliciously" means "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act" (§ 7, subd. (4)). There is no requirement that the perpetrator act with a mental state that is equivalent to premeditation or deliberation, which was the "uniquely subjective and personal" mental state for first degree premeditated murder that guided the decision in *Chiu*. (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

As previously discussed, the Supreme Court in *Chiu* drew a distinction between the mental state required for first degree premeditated murder and that required for second degree murder. The Court explained that, while both first and second degree murder require that the perpetrator act with malice aforethought, first degree murder "has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty." (*Chiu*, *supra*, 59 Cal.4th at p. 166.) Based on "the legitimate public policy considerations of deterrence and culpability," the Court concluded that an aider and abettor cannot be liable for first degree premeditated murder under the natural and probable consequences doctrine, but can be liable for second degree murder. (*Ibid*.)

In contrast to murder, the crime of willfully and maliciously exploding or igniting a destructive device is not divided into degrees based on the mental state of the perpetrator. Rather, the penalty for the crime depends on the resulting harm. If the explosion or ignition causes bodily injury, the punishment is imprisonment for five, seven, or nine years. (Former § 12309.) If, however, the explosion or ignition causes death, the punishment is life in prison without the possibility of parole.

(Former § 12310, subd. (a).) Although the penalty is considerably more severe where the resulting harm is death, the crime does not require a uniquely subjective or personal intent on the part of the perpetrator; instead, the perpetrator simply must intend to commit a wrongful act. (See *People v. Flores* (2016) 2 Cal.App.5th 855, 870 [declining to apply *Chiu* to the crime of torture because, unlike murder, "torture is not divided into degrees in which a uniquely subjective or personal intent element elevates the punishment above that imposed for a lesser form" of the crime].) Under these circumstances, the public policy concerns expressed in *Chiu* are not sufficiently analogous to extend its application to an aider and abettor's liability for exploding or igniting a destructive device under the natural and probable consequences doctrine. Because the jury was not erroneously instructed on Thompson's liability for exploding or igniting a destructive device causing death and bodily injury, we deny Thompson's petition for writ of habeas corpus as to his convictions in counts III and IV.

DISPOSITION

The petition for writ of habeas corpus is granted as to the conviction for first degree murder (count I), and denied as to the convictions for exploding or igniting a destructive device causing death (count III) and exploding or igniting a destructive device causing bodily injury (count IV). The conviction for first degree murder in count I is vacated. The People may either accept a reduction of the conviction on count I to second degree murder or retry Thompson on first degree murder under a legally valid theory. If the People do not bring Thompson to trial within the time prescribed by law, the trial court shall modify the judgment to reflect a conviction of second degree murder on count I and

shall resentence Thompson on count I consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.