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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. STEVEN RUDY GONZALES, Defendant and Appellant.	B291309 (Los Angeles County Super. Ct. No. KA042216)

APPEAL from a judgment of the Superior Court for Los Angeles County, Salvatore Sirna, Judge. Vacated and remanded with directions.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez, Idan Ivri and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Steven Rudy Gonzales appeals from a judgment sentencing him to 15 years to life in prison for second degree murder (Pen. Code,[1] § 187, subd. (a)) plus 25 years to life for a firearm enhancement (§ 12022.53, subds. (d), (e)(1)), after the trial court granted his petition for writ of habeas corpus and vacated his original conviction for first degree murder under *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). He contends that, under Senate Bill No. 1437 (S.B. 1437), which was enacted after he was resentenced for second degree murder, his conviction must be vacated because it was based upon the now-invalid natural and probable consequences theory of aiding and abetting. He also contends the trial court failed to exercise its discretion and/or abused its discretion by refusing to consider his post-conviction conduct when determining whether to impose or strike the firearm enhancement.

The Attorney General argues that S.B. 1437 does not permit defendant to seek to vacate his murder conviction in a direct appeal to this court. Rather, defendant must first seek that relief in the trial court by filing a petition under section 1170.95. We agree. However, as the Attorney General concedes, defendant's contention regarding the firearm enhancement has merit. Therefore, we conditionally reverse the judgment and remand the matter with directions.

Our directions are informed by the Attorney General's statement in the respondent's brief that defendant filed a section 1170.95 petition in the superior court in January 2019, and several hearings were held

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1 Further undesignated statutory references are to the Penal Code.

before the trial court stayed the proceedings pending resolution of this appeal.[2] On remand, the trial court should, after appropriate hearings, make a determination on the section 1170.95 petition. If defendant does not prevail and his conviction for second degree murder remains, the court must then consider defendant's post-conviction conduct in determining whether to exercise its discretion to strike the firearm enhancement.

BACKGROUND

A. *The Murder and Conviction*

In February 1999, defendant (who was 16 years old at the time), his cousin Michael Ronnie Gonzales, Jr. (who, according to the information, was 23 years old), and 14-year-old Manuel Rodriguez Jimenez were charged by information with first degree murder of Julian Llamas, with gang and firearm enhancements. All three were

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[2] We observe that the better practice would have been for defendant and/or the Attorney General to ask this court to stay the appeal pending the determination of the section 1170.95 petition. (See *People v. Martinez* (2019) 31 Cal.App.5th 719, 729 (*Martinez*) ["Once a notice of appeal is filed, jurisdiction vests in the appellate court until the appeal is decided on the merits and a remittitur issues. [Citations.] But a defendant retains the option of seeking to stay his or her pending appeal to pursue relief under Senate Bill 1437 in the trial court. A Court of Appeal presented with such a request and convinced of its merit can order the pending appeal stayed with a limited remand to the trial court for the sole purpose of permitting the trial court to rule on a petition under section 1170.95. [Citation.] In those cases where a stay is granted and a section 1170.95 petition is successful, the direct appeal may either be fully or partially moot. If the petition is unsuccessful, a defendant may seek to augment the appellate record, as necessary, to proceed with any issues that remain for decision"].)

convicted, and defendant was sentenced to a term of 25 years to life for the murder, plus 25 years to life for the firearm enhancement; the trial court also imposed and stayed a two-year enhancement under section 186.22, subdivision (b)(1). All three appealed to this court, and we reversed the judgment based upon errors in sentencing, but found, among other things, that sufficient evidence supported defendant's conviction under the natural and probable consequences theory of aiding and abetting. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 5 (*Gonzales I*).) The following summary of the facts regarding the murder is from our prior opinion.

Defendant, Michael Gonzales, and Jimenez were members of the Little Hill street gang. On October 11, 1998, they were riding in a car with Michael Gonzales' girlfriend, Rachel Molina, when they saw Juan Barrientos and Julian Llamas walking down the street. (*Gonzales I*, *supra*, 87 Cal.App.4th at p. 6.) There was conflicting testimony about who flashed gang signs at whom: Barrientos testified that two people in the car flashed Little Hill gang signs toward him and Llamas, but defendant testified that Barrientos and Llamas flashed Happy Homes Puente gang signs at the car. (*Id.* at pp. 6-7.) Defendant and Jimenez got out of the car and ran toward the two young men; defendant intended to fight them because he felt they had disrespected Molina by throwing gang signs. (*Id.* at p. 7.) Michael Gonzales parked the car and also ran toward the two men. (*Ibid.*)

Barrientos saw that Jimenez was carrying a gun at his side as Jimenez ran toward him. When Jimenez pointed the gun, Llamas

rushed him and tried to take the gun. (*Gonzales I*, *supra*, 87 Cal.App.4th at p. 7.) Defendant and Michael attacked Llamas as he tried to take the gun from Jimenez, and Barrientos joined in the fight to try to help Llamas. (*Id.* at p.10.) As we stated in our previous opinion, "There was conflicting evidence as to which defendant fought with which victim, and which group had the upper hand in the fight. But the evidence is undisputed that Jimenez shot and killed Llamas with a single shot to the head."[3] (*Id.* at p. 7.) Before the shot was fired, Barrientos heard Michael say, "Shoot him, shoot him." (*Id.* at p. 10.) Defendant testified that he did not know that Jimenez had a gun. (*Id.* at p. 7.)

B. *The Petition for Writ of Habeas Corpus*

In March 2017, defendant filed an in propria persona petition for writ of habeas corpus, arguing that under *Chiu*, *supra*, 59 Cal.4th 155, it was error for the trial court to have instructed the jury in his case on a natural and probable consequences theory of aiding and abetting because the Supreme Court held it is unconstitutional to convict an aider and abettor of first degree murder under that theory. Initially,

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[3] At the preliminary hearing, a witness to the shooting testified that Michael Gonzales and defendant were on either side of Llamas, holding him down, when Jimenez shot him. At trial, the witness admitted giving that testimony and providing a similar statement to a deputy sheriff immediately after the shooting and to a detective later that day, but stated that he subsequently realized that it was not true. He testified that, in fact, there was someone (who might have been defendant) fighting with Barrientos when the shot was fired, and Jimenez and Michael Gonzales were fighting with Llamas and holding him down until Jimenez got up and shot Llamas.

the trial court summarily denied the petition, finding that defendant failed to explain and justify his delay in bringing the petition, and raised issues that either could have been raised on appeal or were raised and rejected on appeal. Defendant filed a motion to reconsider, pointing out that *Chiu* set out a new standard in 2014, which was found to apply retroactively, and that defendant could not have raised the issue in his direct appeal 13 years earlier.

The trial court granted the motion for reconsideration and requested an informal response to the petition for writ of habeas corpus. The Los Angeles County District Attorney's Office filed a concession letter, stating that defendant was entitled to a reduction of his sentence to second degree murder under *Chiu*, *supra*, 59 Cal.4th 155. The district attorney explained that in defendant's trial, "the prosecutor solely argued [defendant's] culpability for first degree murder based on the natural and probable consequences theory." The letter quoted at length from the prosecutor's closing argument and rebuttal, and attached the transcript of those arguments. In those arguments, the prosecutor made the following statements:

- "Steven [i.e., defendant here] probably of the defendants has the most peripheral involvement, let's say, but nevertheless, he was there."
- "I think the evidence is clear that Steven was one of the two original attackers. Him and Manuel [Jimenez] physically attacked him, thinking, 'Hey, we're just going to duke it out' at that time. [¶] And if you believe that's in the mind of Steven, we

can still implicate him in the crime of murder because this brawl, which was one gang versus a rival gang, certainly escalated to the use of a deadly weapon for very understandable reasons. [¶] If we find that, number one, Manuel committed a particular crime just by becoming involved in that brawl, and if you find that murder, the crime of murder was a natural and probable consequence of that original crime that Steven got himself involved into, then you can find Steven guilty of the crime of murder as well, even though he did not pull the trigger, even though he did not actively participate as a principal, actively participate in the crime of murder."

- "He did, in fact, aid and abet the commission of a crime. And I'm telling you it's not the crime of murder that Steven Gonzales was trying to assist in committing. It was the crime of assault. That was the target crime that Steven Gonzales was trying to accomplish when he ran across that street to begin the fight in the first place. [¶] Because he now is assisting in effect Manuel Jimenez in committing the crime of assault upon Julian Llamas, just simply beat him up, or trying to beat him up. That is an assault under the law, and the court gave you the instruction. [¶] And we talked about it the other day, that is what the target crime that Steven Gonzales had in his mind at the beginning of this brawl. That's all he wanted to accomplish. But he becomes criminally liable for the subsequent murder if you find that by engaging in this brawl, committing the crime of assault, that it

was a natural and probable consequence of committing the crime of assault that the murder would occur."

- "In this case, the crime of assault was committed by Steven Gonzales. Steven Gonzales aided and abetted that crime of assault. [¶] In other words, he's trying to help Manuel Jimenez beat up Julian Llamas and/or Juan Barrientos. They're committing an assault, both of them. And then all of a sudden as a result of this brawl, something goes awry, or something goes wrong, which makes Manuel Jimenez commit a more serious crime, that being the crime of murder. [¶] And if you find that the crime of murder was a natural and probable consequence of assault, then guess what, Steven Gonzales, the guy that only committed the assault, now becomes criminally liable as a principal for the ultimate crime that was committed, that being murder."
- "So when [defendant's counsel] spoke to you and said there's no way that I could infer from the evidence that Steven wanted to kill anybody during the brawl, that's not what I was saying at all. I was saying Steven Gonzales was participating in the crime of assault and that the murder was a natural and probable consequence of that assault because we're talking about gangsters going at one another, and you have to win at all cost. That type of argument. That's why Steven is guilty of this particular crime of murder."

Based upon the district attorney's letter, the trial court granted defendant's writ petition, set the matter for further hearing and resentencing, and appointed defendant's original trial counsel as counsel for the resentencing. Before the resentencing hearing, defendant filed a motion to strike the firearm enhancement and a motion for a new trial.

In the motion to strike the firearm enhancement, defendant noted that after he was originally sentenced for first degree murder, Senate Bill No. 620 was enacted, which ended the statutory prohibition on the trial court's ability to strike a firearm enhancement and now allows the court to exercise its discretion under section 1385 to strike or dismiss the enhancement at the time of sentencing or resentencing. (Citing § 12022.53, subd. (h).) He argued that the court should exercise its discretion in this case because he was only 16 years old at the time of the crime, he had no prior record, he did not know that Jimenez had a gun, and he engaged in the fist fight because he thought Llamas and Barrientos had disrespected Molina. In the new trial motion, defendant argued that he was entitled to a new trial because the trial court misdirected the jury by giving the instruction on natural and probable consequences.

In a written opposition to those motions, the prosecutor conceded that, based on the record, defendant was entitled to a reduction of his sentence to second degree murder under *Chiu*. But he argued that the remedy that was set forth by the Supreme Court allowed *the People* to decide between two options: either "accept a reduction of the conviction to second degree murder or . . . retry the greater offense." (*Chiu*, *supra*,

59 Cal4th at p. 168.) Since the People chose to accept the reduction in sentence, he argued defendant's motion for a new trial should be denied. The prosecutor also argued that the court should not strike the firearm enhancement. He observed that striking the enhancement would not be in furtherance of justice because the evidence showed that defendant committed the assault for the purpose of promoting and furthering his street gang, and he did nothing to try to stop the shooting.

At the hearing on the motions, defendant's counsel argued that defendant should be given a new trial because the law on aider and abettor law was changing. Counsel observed that with the Supreme Court's most recent opinion on the issue, *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*), the Court demonstrated it was "becoming more and more concerned about what is a major participant in the crime under aider and abettor theory and what conduct did that person participate in that would lead to recklessness to raise it up to the theory under aider and abettor." When the trial court asked the prosecutor to address *Banks*, the prosecutor explained that *Banks* did not apply because it was a felony murder case, while the instant case "is a simple aiding and abetting case based upon the natural and probable consequence [theory]" and therefore *Chiu*, rather than *Banks*, applied. The court concluded that since "the People concede that *Chiu* applies to the facts and circumstances of this case," and the People "are not electing to retry the case[,] . . . the proper remedy would be to sentence [defendant] to second-degree murder . . . based on the holding in *Chiu*."

Turning to the motion to strike the firearm enhancement, defense counsel argued that, in addition to considering defendant's young age at

the time of the crime and lesser involvement in the shooting, the court should consider that defendant has "acquitted himself well" during the 19 years he has been in prison, he participated in "all kinds of programs" and has almost earned an AA degree, and he has been examined by a doctor (for a *Franklin*[4] hearing) who indicated that he was a very low risk for recidivism, dangerousness, or violence. The trial court acknowledged that defendant has "been a model prisoner" and has tried to better himself, but the court concluded that it was not permitted to consider what defendant had done since the initial sentencing. Based upon defendant's conduct as raised at the time of trial and in *Gonzales I*, the trial court declined to exercise its discretion to strike the firearm enhancement.

The court imposed a sentence of 15 years to life on the second degree murder, plus 25 years to life on the firearm enhancement. Defendant timely filed a notice of appeal from the judgment.

DISCUSSION

A. *Request to Vacate Second Degree Murder Conviction*

S.B. 1437 was enacted, effective January 1, 2019, 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, § 1, subd.

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[4] *People v. Franklin* (2016) 63 Cal.4th 261.

(f).) It accomplished this purpose by amending section 188, defining malice, and section 189, defining the degrees of murder.

In amending section 188, S.B. 1437 added the following provision: "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." (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2.) S.B. 1437 also added the following provision to section 189: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a)[5] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

S.B. 1437 also added section 1170.95, which allows a person convicted of felony murder or murder under a natural and probable consequences theory to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be

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5 Assault, the underlying crime defendant was alleged to have committed in the present case, is not one of the felonies listed in section 189, subdivision (a).

resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial. . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a); Stats. 2018, ch. 1015, § 4.)

On appeal, defendant contends that the section 1170.95 petition process enacted as part of S.B. 1437 was not intended as an exclusive remedy. He argues that we should apply S.B. 1437 retroactively and vacate his second degree murder conviction as invalid in light of the prosecutor's concession that he could be found guilty of murder only under a natural and probable consequences theory of aiding and abetting. We have neither the authority, nor the inclination, to do so.

First, as thoroughly and convincingly explained by our colleagues in Division Five of this Appellate District, S.B. 1437 is not generally retroactive. Rather, the Legislature's enactment of the petitioning procedure evinces an intent to limit retroactive application of Senate Bill 1437. Defendant may seek Senate Bill 1437 relief, but he must do so via the procedural avenue provided by the legislation. (*Martinez*, *supra*, 31 Cal.App.5th at p. 727; accord, *People v. Munoz* (2019) 39 Cal.App.5th 738, 751-752; *In re R.G.* (2019) 35 Cal.App.5th 141, 145-146.)

Second, even if S.B. 1437 gave us the authority to vacate the second-degree murder conviction in this appeal, we would decline to do so because by enacting section 1170.95 as part of S.B. 1437, the Legislature made clear that the prosecution must be given an opportunity to present new or additional evidence that may bear on the defendant's liability for murder and would preclude vacating the defendant's conviction. Under section 1170.95, if the defendant makes a prima facie showing that he or she falls within the provisions of that section, the court must hold a hearing to determine whether to vacate the murder conviction, unless the parties stipulate that the defendant is eligible to have the murder conviction vacated. (§ 1170.95, subds. (c), (d)(1), (d)(2).) If a hearing is held, the burden of proof is on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) The prosecution may rely on the record of conviction or offer new or additional evidence to meet its burden. (*Ibid.*) If the prosecution fails to sustain its burden, the prior murder conviction, and any allegations or enhancement attached to that conviction, must be vacated. (*Ibid.*)

Defendant argues that the petitioning process is not required in this case because "the prosecutor conceded that [defendant] could not be found guilty of malice murder, or as a direct aider and abettor" and therefore the prosecutor cannot retry him for murder or attempt to rebut his prima facie case under section 1170.95. This argument both overstates the prosecutor's concessions and ignores the ability of the prosecutor to present new or additional evidence to support the murder conviction.

In fact, the prosecutor did *not* concede that defendant could not be convicted of malice murder or as a direct aider and abettor. Rather, at trial the prosecutor simply focused his argument as to defendant on the natural and probable consequences theory of aiding and abetting due to a conflict in the evidence that might show he was a direct aider and abettor. Similarly, in response to the habeas corpus petition, the district attorney merely conceded that the prosecutor at trial argued only the natural and probable consequences theory of aiding and abetting with regard to defendant. And in opposition to defendant's motion for a new trial, the prosecutor conceded only that defendant was entitled to a reduction of his sentence to second degree murder under *Chiu*, which held that where the trial court instructs on the natural and probable consequences theory of aiding and abetting first degree murder as well as the valid theory that the defendant directly aided and abetted the murder, and the reviewing court cannot conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory, the appropriate remedy is to allow the People to accept a reduction of the conviction to second degree murder or to retry the greater offense under a valid theory. (*Chiu*, *supra*, 59 Cal.4th at pp. 167-168.)

Moreover, the prosecutor's concessions must be understood in the context of the law in existence at the time they were made. When defendant was tried in 1999, the natural and probable consequences theory of aiding and abetting was a permissible theory for both first and second degree murder. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1117, citing *People v. Prettyman* (1996) 14 Cal.4th 248, 259-260.)

Because there was some conflicting evidence regarding whether defendant directly aided and abetted Jimenez in the shooting of Llamas (unlike Michael Gonzales, who was holding Llamas down and shouted to Jimenez to shoot him), it is understandable that the prosecutor would focus on the natural and probable consequences theory when arguing to the jury that it should convict defendant of first degree murder as an aider and abettor.[6] But that focus on the now-invalid theory does not preclude the prosecution from attempting to rebut defendant's prima facie case under section 1170.95 by presenting new or additional evidence to prove, beyond a reasonable doubt, that defendant is ineligible for resentencing because he could be convicted of murder under a direct aider and abettor theory.[7]

Contrary to defendant's assertion, such a change in theories would not "amount to reversible prosecutorial misconduct." As observed by the Supreme Court in the case defendant cites for his assertion, although "an inconsistent prosecutorial argument 'made in bad faith' could be misconduct, . . . such argument was not improper if 'based on

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[6] The prosecutor argued: "[E]ven though Mr. Cayetano Lopez said [defendant] was originally one of the holders [of Llamas], he may have retracted that statement and said, 'Hey, I made a mistake and it was merely Michael Gonzales.' So there was some doubt as to whether [defendant]—let's give him the reasonable doubt. . . . It's in the instructions. [¶] The tie goes to the defendant. Tie goes to the defendant. But that doesn't mean [defendant] can walk on this case, that he must be found not guilty. Because there is another theory of liability supporting the fact that he should be held criminally liable for this particular crime, and that being the murder."

[7] We express no opinion whether the prosecution will be able to meet this burden. We simply hold that it must be given the opportunity to try if it so chooses.

the record and made in good faith.'" (*In re Sakarias* (2005) 35 Cal.4th 140, 159.) There is no reason to believe that if the prosecution's argument in opposition to defendant's section 1170.95 petition is inconsistent with its argument at trial, the new argument will not be based upon the record (including any new or additional evidence it presents) or that it will be made in bad faith. We certainly cannot make that determination in advance of the hearing on the section 1170.95 petition.

In sum, we hold that S.B. 1437 does not provide grounds for this court to vacate defendant's conviction for second degree murder. Therefore, we remand the matter to the trial court to conduct proceedings and rule on defendant's section 1170.95 petition.

B. *Firearm Enhancement*

Defendant contends that when the trial court declined to dismiss the section 12022.53 firearm enhancement at the post-habeas resentencing hearing, it abused its discretion by refusing to consider defendant's conduct since his original conviction. The Attorney General concedes that the trial court erroneously excluded consideration of that post-conviction conduct. (Citing *People v. Warren* (1986) 179 Cal.App.3d 676.) We agree. (*Id.* at p. 689 ["post-conviction behavior is relevant evidence which must be considered by a trial court in determining whether or not to exercise section 1385 discretion in favor of striking enhancements"]; see also *id.* at p. 690 ["no rational basis exists for refusing to consider post-sentencing conduct as that may have a bearing on an accurate assessment of a defendant's character at the time the

court is called upon to consider an exercise of section 1385 discretion"].) Accordingly, we vacate the judgment and remand to the trial court to reconsider—if the court does not grant defendant's section 1170.95 petition and vacate his murder conviction—defendant's motion to strike the section 12022.53 firearm enhancement, taking into consideration defendant's post-conviction conduct.

DISPOSITION

The judgment is vacated and the matter is remanded. On remand, the trial court shall conduct proceedings on defendant's section 1170.95 petition to determine whether defendant's second degree murder conviction must be vacated. If the trial court determines the murder conviction must be vacated, the court shall resentence defendant on the target crime of assault. If the court determines that the prosecution has met its burden of proof to show, beyond a reasonable doubt, that defendant is not entitled to have his murder conviction vacated, the court shall reconsider defendant's motion to strike the section 12022.53 firearm enhancement, taking into consideration defendant's conduct since his original conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J. CURREY, J.