Filed 12/9/25 P. v. Evans CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EDWIN EVANS,

Defendant and Appellant.

F088948

(Super. Ct. No. CF92469952)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Houry A. Sanderson, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Kimberley A. Donohue, Assistant Attorney General, Christopher J. Rench and R. Todd Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

This is the third time this case is before us on petitioner James Edwin Evans's appeal from the denial of a petition for resentencing pursuant to former section 1170.95 (now § 1172.6) of the Penal Code.[1] He also appeals for the second time from a judgment following resentencing pursuant to section 1172.75. (See *People v. Evans* (Jan. 25, 2024, F085206) [nonpub. opn.]; *People v. Evans* (Feb. 3, 2022, F080113) [nonpub. opn.] (*Evans*).)

Petitioner argues the order denying his petition for resentencing pursuant to section 1172.6 must be reversed because the court applied incorrect legal standards and, in any event, substantial evidence does not support a finding he aided and abetted an attempted murder with intent to kill. He further contends another remand for resentencing is required because the court did not understand the full scope of its sentencing discretion on our most recent remand, and counsel was ineffective in failing to advocate for a lesser sentence. Finally, he contends the court erred in its award of presentence conduct credits.

We agree the court misunderstood the elements of the offense of attempted murder and we therefore must reverse the order denying the petition for resentencing pursuant to section 1172.6 and remand for the trial court to consider the petition under a correct application of the law. We also agree the court failed to exercise its sentencing discretion as required on the most recent remand, and we therefore vacate the sentence and remand for a full resentencing. We direct the court to correct its award of presentence conduct credits during resentencing proceedings on remand. In light of the disposition, we need not, and therefore do not, address petitioner's remaining contentions.

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[1] Undesignated statutory references are to the Penal Code. Former section 1170.95 has been renumbered section 1172.6, with no change in text. (Stats. 2022, ch. 58, § 10.) Except where otherwise noted, we refer to the current section 1172.6 in this opinion.

FACTUAL BACKGROUND

We previously summarized the facts underlying petitioner's offenses as follows.[2]

"In 1992, William [M.] and his father, Burl [M.], resided [on] North Chateau Fresno Avenue in Fresno County. At one time, Burl [M.] had been married to the mother of defendant Eric McGowan. William [M.] met McGowan around Christmas 1991. They got to know one another when McGowan would go to the [M.] house and visit. William [M.] and defendant McGowan treated each other like brothers.

"On the evening of July 7, 1992, William [M.] was at home alone. He went to bed at 9:30 p.m. but was awakened by some banging on his bedroom window at about 12:45 a.m. [William] went to the window and saw defendant McGowan. McGowan jumped up and down and asked for entry. [William] told McGowan to go around to the back. [William] then left his bedroom, took a .22-caliber semi-automatic rifle from the hall closet, and met defendant [McGowan] outside a sliding door.

"McGowan had a bandage on his arm and said he needed help because either his ex-girlfriend or girlfriend had cut him. [William] asked whether he needed to use the telephone and then walked into the house with McGowan behind him. [William] put the rifle back in the hallway closet and proceeded to his room to get the telephone. When he took the telephone from his bedroom, he saw defendant McGowan with a .22-caliber rifle. McGowan stated, 'I'm gonna shoot ya.' [William] said something and McGowan responded, 'No, no, I was jokin'.'

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[2] We recognize that a factual summary contained in an appellate opinion is not evidence that may be considered at a section 1172.6 evidentiary hearing. (See § 1172.6, subd. (d)(3).) However, because we resolve this appeal on legal, rather than factual, grounds, review of the underlying evidence is unnecessary. We provide these facts for background purposes and to provide context for the trial court's ruling, but do not rely on these facts in resolving issues relating to petitioner's petition for resentencing pursuant to section 1172.6. (See § 1172.6, subd. (d)(3).)

Pursuant to California Rules of Court, rule 8.90, we refer to some persons by their first names. No disrespect is intended.

"McGowan then ran toward [William]. [William] ran into his room and held the bedroom door closed with his body. McGowan tried to force open the door several times unsuccessfully. After a while, [William] opened the bedroom door to take a look. He saw McGowan and three masked . . . men in the hallway. The . . . men were wearing bandannas over their faces and McGowan was still holding the rifle. [William] ran back into his bedroom but the men in the hallway followed and jumped him as he tried to get outside through a bathroom door.

"At this point, McGowan came up and put the rifle to [William]'s head, and said, 'Freeze. Stop.' [William] complied. The other . . . men pushed and tried to knock him down. They sprayed a substance in his eyes that smelled like Raid, Black Flag, or some other sort of insecticide. The men also told him to shut up. [William] continued to struggle and tried to keep moving toward the gate. However, the assailants were finally able to get him down to the ground. At this point, defendant McGowan was approximately five yards away. McGowan pointed the rifle at [William], called [him] . . . '[n]o good . . . ,' and told the three males to kill him. [William] was on the ground at this time and felt something sharp go into his side. Someone also tried to cover his face with a handkerchief. [William] was scared and repeatedly tried to get away because he wanted to live. The men kicked and hit him numerous times and [William] felt another stab in his shoulder.

"[William] pleaded with the men to stop their attack. He heard one of the assailants say, 'I lost my glasses. I can't find my glasses.' [William] then said, 'I'll get you guys the money,' and they stopped hitting him. [William] managed to stand up and they all started to push him. Defendant McGowan, who was in front of [William], pointed the rifle at him and tried to push him back into the house. The other assailants were behind [William] holding his hands. They all started walking toward the house. [William] then felt a stab to his kidney. He fell to his knees and said, 'Let go of me.' Defendant McGowan ran to the house. Once the assailants let go of [William], he

somehow ran to his neighbors' house. As [William] was running, he could hear the assailants pursuing him. He said their pursuit sounded like a herd of deer running behind him.

"Although [William] was losing oxygen, he ran through the north gate of his home and down the gravel driveway. He was barefooted and injured his feet as he ran. He eventually made his way to the home of neighbors and they called medical emergency. An ambulance came and rushed [William] to the hospital. He had been stabbed in four places, his lung had been punctured, his kidney had been cut, and he lost a substantial amount of skin from his feet. [William] was hospitalized until the afternoon of July 10 and was off from work for two months. He had to relearn how to walk because he lost all the skin on his feet. [William] still had physical problems at the time of trial. He could not lay on his bed straight anymore and still experienced pain. [William] said he could not lift as much as he used to before the incident and suffered a permanent limp from the injury to his feet.

"When [William] returned to his father's home, he determined a number of items were missing, including a Marlin .22-caliber semi-automatic rifle, a VCR and dust cover, an answering machine, a watch, an ice chest, a pair of handcuffs, and a quantity of food. A .22-caliber live round was found on the floor of the dining room and a gold chain with charms was found near the swimming pool.

"[William] could not identify any of his assailants other than McGowan. He described the other assailants as bigger, wider, and stockier than McGowan.[3] Fresno County [S]heriff's detectives talked to [William] in the hospital and learned of McGowan's involvement. They also learned McGowan was staying at [a m]otel in Fresno. Officers arrived at the motel and set up surveillance at noon on July 8th. At

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[3] "The prosecutor had the three defendants stand and noted for the record that [petitioner] and [codefendant Andress A.] Yancey were taller and stockier than defendant McGowan."

about 1 p.m., officers saw [codefendant Andress A.] Yancey drive into the motel parking lot and go into room 35. Officers went to the room and ordered the occupants to come out one at a time. Three . . . men (defendants McGowan, Yancey, and [petitioner]) and two . . . women (Angela [M.] and Sherry [Y.]) emerged from the room.

"Officers searched the motel room and found Burl [M.]'s watch, handcuffs, and rifle, a .22-caliber semi-automatic handgun, a knife and two pairs of shoes. Officers located the rifle and handgun under the bed. They searched Yancey's car and found a dust cover for [William]'s VCR. The police were also able to lift the fingerprints of [petitioner], Yancey, and one Jeffrey Todd [B.] from the car.

"Defendants McGowan and [petitioner] were barefoot when they left room 35 and codefendant Yancey was wearing shoes. [J.] Tarver, a criminologist with the Fresno County Sheriff's Department, compared the soles of Yancey's shoes and the other shoes found in the room to photographs of shoe prints found in the dirt around [William]'s house. Tarver concluded some of the prints were consistent with Yancey's shoes. The shoes in the room also had some characteristics in common with the photographed prints.

"Yancey waived his constitutional rights at the Fresno County Sheriff's Department and Detective [J.] Flores interviewed him. At first, Yancey claimed he spent the night with his girlfriend, Penny [G.]. Later, he admitted he was the fourth person in a car that drove into the country. He claimed he remained in the car while the others got out. The others then came back with a VCR, a camera, an ice chest, beer, and a rifle. Yancey said the quartet drove to the . . . [m]otel. Yancey sat in a motel room talking to [Angela M. and Sherry Y.] while the other men took the car to get more beer. After the sun came up, Yancey took the car and went to his girlfriend's house. He brought the car back to the . . . [m]otel and intended to eat with the others when Fresno County [S]heriff's deputies arrived at the scene. Yancey denied any involvement with the crimes. He said he was from Los Angeles, he knew no one, and the others were 'putting it on' him.

"Angela [M.] testified she got the room at the . . . [m]otel on July 7 and asked McGowan and Sherry [Y.] to come along because she did not want to be alone. The trio watched television until 11 p.m. or so when the others drove up and gathered in the parking lot. [Petitioner] and a man named Lewis arrived in a white car with two men she did not know, Yancey and Todd.[4] Todd was driving the white car. He was . . . the only man in the group wearing glasses. [Angela M.] said three women—Precious, Jackie, and another woman—were in a second car.

"[Angela M.], [Sherry Y.], and McGowan joined the group in the parking lot. They passed around a 40-ounce bottle of beer and McGowan drank from it. During this time, [Angela M.] heard [petitioner] and McGowan talking. [Petitioner] said they had to go get some money but McGowan said ' "Na. Na." ' A few minutes later, all five men left in Todd's car. Precious, Jackie, and the other woman left in the other car.

"[Angela M.] said she and [Sherry Y.] then went up to their motel room. They were awakened about 2 a.m. by knocking. McGowan, Yancey, and [petitioner] were at the door. McGowan was shaking and 'acting weird.' Yancey ran to the bathroom. A couple of minutes later, Yancey came out and sat in a chair. [Angela M.] noticed he had a .22-caliber handgun and a knife. Yancey placed the knife on the nightstand by her bed and began kissing and grabbing at her. He also waved the handgun at her. [Angela M.] picked up the knife and waved it back at him.

"McGowan had a rifle and was sticking something in the barrel. McGowan said he had taken the rifle from a house but the rifle was jammed. Yancey also said he had gone to a house and stuck a boy with a knife. Yancey added the knife would not go in so he just started sticking. [Petitioner] had nothing in his hands.

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[4] "[Sherry Y.] referred to Yancey's companion as 'Todd.' [Angela M.] referred to him as 'Tide.' She also referred to Yancey as 'Blue' and to [petitioner] as 'Poncho.' "

"[Petitioner] and [Sherry Y.] left the room at about 3 or 4 a.m. and returned sometime later. At about 7 a.m., [Angela M.], McGowan, and [Sherry Y.] took the car to get a refund of a deposit she had made on a different motel room. When the trio returned, Yancey took the car and left the motel. He returned just before the sheriff's deputies arrived. Todd had called and talked to [petitioner] at some point in the morning.

"[Angela M.] testified Todd is tall and skinny, Lewis is tall and chubby, and she is five foot, four inches tall and weighed [199] pounds in July 1992. [Angela M.] admitted lying when officers first interviewed her on July 8. She initially told officers she had not seen a rifle and did not know who had the pistol. She did not remember saying [petitioner] had the knife.

"Sherry [Y.] testified she had been with Angela [M.] when she was awakened by some knocking. She saw McGowan with a rifle and Yancey with a knife, a handgun, and blood on his hands. Yancey said he tried to stab someone and McGowan said the rifle did not work. At 5 a.m., she and [petitioner] went to a store to buy some alcohol. At some point during the evening, they were alone together for two or three hours and engaged in sexual intercourse. [Sherry Y.] testified she was not certain whether [Angela M.] was with her or whether [petitioner] was with her when she heard the knocking at the door. [Sherry Y.] then recalled [Angela M.] had been with her. She also recalled [petitioner], McGowan, and Yancey were the individuals who entered the room after the knocking.

"[Sherry Y.] also testified about a conversation she had with [Angela M.]. [Angela M.] said she had gone to the house, had struck the boy, and had helped remove property from the house. [Sherry Y.] then testified [Angela M.] had only been bragging and the latter had not actually been involved.

"[Sherry Y.] admitted she lied during an interview with Fresno County [S]heriff's deputies. She also admitted she was serving time for felony child endangerment at the time of defendants' trial. [Sherry Y.] claimed she had not been drinking on the night of the incident and did not recall telling a detective she had been drinking all night long.

[Sherry Y.] testified she was [petitioner]'s girlfriend before July 7. She later learned he had called her a 'bitch' in a letter and that he had also been dating one Rashonda [S.].

"Rashonda [S.] testified she had been [petitioner]'s girlfriend for two and a half months at the time of the crimes. During that time, she gave [petitioner] a gold chain necklace with a cross. Officers found that necklace at the crime scene, near [William]'s swimming pool. In August 1992, [petitioner] wrote [Rashonda S.] a letter which stated: 'Before I go any further into this letter, I must let you know, Rashonda [S.], when you come to see me and my visits was taken, it was my home boy and his wife, they came to help find the bitch Sherry [Y.] and her friend Angela [M.], baby, so I can get out in '93, Rashonda [S.]. If not, I will get 23 years . . . .'

"John G. Moser, M.D., an emergency room intern at Valley Medical Center, testified he treated 20-year-old William [M.] at approximately 2:25 a.m. on July 8, 1992. Moser found four lacerations on [William]'s back—one in the upper right shoulder, one below [William]'s left armpit, and two lacerations on the right side of the middle back. All the wounds were consistent with infliction by a knife. In addition, [William]'s right kidney was lacerated which was a potentially life-threatening injury. Moser also said the skin on both of [William]'s feet was torn off.

"Sheriff's deputies made tape recordings of McGowan, Yancey, and [petitioner] talking to one another while they were incarcerated in adjoining jail cells. The trio discussed their troubles during these recorded conversations, some of which were played to the jury during trial.

"<u>Defense (defendant McGowan):</u>

"Defendant Eric McGowan testified on his own behalf. He stated he went to room 35 at the . . . [m]otel at 6 p.m. on July 7, 1992. [Sherry Y.] and [Angela M.] accompanied him. McGowan consumed beer and smoked $20 worth of rock cocaine before arriving at the motel. At approximately 7:30 p.m., he smoked another $20 worth of rock cocaine in the motel room. McGowan did not smoke or use any other type of drug after that.

"[Petitioner] and Andress Yancey and some girls named Precious, Jackie, and Tammy eventually came to the motel. McGowan joined them in the parking lot and drank some Old English beer. He was under the influence of cocaine and was 'in a different world.' He wanted more cocaine but did not have any money. He told the driver of the white car to take him to his stepbrother's house. He thought his stepbrother, William [M.], would loan him some money. McGowan discussed this matter with [petitioner]. McGowan testified he did not know the driver of the white car or the passengers in that car. However, he knew there were three persons in the car besides himself. These included the driver, the front seat passenger, and the backseat passenger sitting next to him. McGowan stated the white car belonged to Todd and he guessed that Todd was the driver.

"McGowan gave Todd directions to [William]'s home. McGowan testified there were no females in the car. He ultimately testified [petitioner], codefendant Andress Yancey, and Todd were 'probably' the occupants of the car that went to [William]'s home.

"McGowan, [petitioner], Yancey and Todd arrived at [William]'s house. McGowan knew [William]'s father, Burl, was away because Burl was a trucker and his rig was not there. He also knew [William] was in the house by himself. McGowan alighted from Todd's car and knocked on the [M.]'s window. [William] came to the window and told him to go around to the back. He met McGowan with a gun in his hand. McGowan asked whether [William] was going to shoot him and [William] lowered the gun and mumbled something. Then he cocked the gun and McGowan thought he was going to shoot him. [William] said, 'Man, I ain't going to shoot you, man.' [William] then told McGowan to come inside the house. The pair went inside the residence and [William] asked him what he was doing. He also asked what had happened to McGowan's arm. McGowan replied he had cut his arm. [William] then asked how McGowan had gotten to the house. McGowan replied he had gotten a ride from friends. [William] asked whether McGowan needed a ride back into town. McGowan responded

in the negative. [William] put the gun in the closet and went to his bedroom to get the telephone.

"When [William] went into his room, McGowan went to the closet and got the gun. [William] returned and McGowan pointed the gun at [William]. [William] then ran into his room and peeked out the door. McGowan said, 'I am just playing with you.' When McGowan walked toward [William], the latter closed the bedroom door. McGowan tried to open the door to 'mess with him.' After a couple of minutes of pushing on the door to open it, McGowan went to the living room. [Petitioner], Yancey, and Todd entered the residence while McGowan was standing in the living room holding the gun. They asked what was taking so long and McGowan responded, 'The . . . boy pulled a gun on me.' [William] then came out of his bedroom and McGowan's friends chased him down the hallway. McGowan did not say anything. He stayed in the front room for a couple of minutes and did not see anyone. When he heard someone yell, he ran down the hallway to the back door. McGowan then saw [William] surrounded by the others in the backyard. The trio was beating [William] up. McGowan did not say anything because [William] had pulled a gun on him earlier. McGowan also claimed the drugs were still affecting him at that point.

"McGowan testified he did not know anyone had a knife or that they were trying to stab [William]. The three men stopped beating [William] when the latter said, 'I gave him some money.' McGowan's friends picked the victim up. McGowan said he asked what they were doing and they told him to shut up. McGowan denied telling the three men to kill [William]. The three men surrounded [William] and walked toward the house. McGowan entered the house and waited. When his friends appeared in the house, McGowan asked where [William] was. They told him he had gotten away outside.

"McGowan's friends started taking things from the house. McGowan himself took a gun and planned to sell it. He and the others then walked to the car after taking various valuables. Everyone got into the car, drove to a [convenience] store, and bought some beer. During the course of the evening, McGowan testified he drank about a 40-ounce bottle of Old English beer and smoked two $20 quantities of rock cocaine. After leaving the [convenience] store, the group went riding around the west side of Fresno. They returned to the . . . [m]otel after making a few stops. McGowan testified the people in the car went back to the motel but he did not know who they were. He took the gun into the motel room and laid down on a bed. [Sherry Y.] and [Angela M.] were in the room but he denied talking to them. McGowan said the other people in the room were talking but he could not recall what they were talking about. McGowan watched television until he fell asleep. The next morning he was arrested. McGowan testified [Angela M.] and [Sherry Y.] did not go to [William]'s house with him.

"**Defense ([petitioner]):**

"Precious [P.] testified [petitioner] is her uncle. Eric McGowan married [Precious P.] on August 20, 1992, after this incident. On July 7, 1992, [Precious P.] and her friends, Tammy, Jackie, and Amy, followed [petitioner], Yancey, Todd, and Lewis to a liquor store and then to the . . . [m]otel. The men were in Todd's car and the women in Tammy's car. Five small children were with the women.

"The adults socialized in the . . . [m]otel parking lot. Because [Precious P.] and [Angela M.] were 'getting ready to get in a fight,' [Precious P.] decided to take her kids home. Before doing so, she took Todd's car keys so the men would 'stay there' until she returned. However, [Precious P.] left the ignition unlocked and Todd was able to start the vehicle. Todd, Yancey, Lewis, and [petitioner] appeared at [Precious P.'s] house a short

time later.[5] [Precious P.] gave Todd his car keys and went to the store. When she returned, [petitioner], Yancey, and Todd were no longer there. [Precious P.] made two trips back to the motel but she did not find the men.

"The next day, [Precious P.] heard the men had been arrested. That evening, [Angela M.] and [Sherry Y.] came to her house. [Angela M.] told [Precious P.], [Sherry Y.], Jackie, and [petitioner's] other niece . . . [that] she had been at [William]'s house the previous evening. [Angela M.] allegedly said she had seen Yancey stabbing [William] and had helped loot the house and walk [William] to a safe.[6] [Angela M.] also said [petitioner] had not been there. Rather, he had been with [Sherry Y.] at the motel during the robbery.[7] [Precious P.] testified [Angela M.] and [Sherry Y.] threatened to harm her if she testified on [petitioner's] behalf. [Petitioner's niece] also testified she heard [Angela M.] claiming involvement in the robbery.

"[Petitioner] took the stand on his own behalf. [Petitioner] testified he met Todd on July 7, 1992, when the latter's car ran into Rashonda [S.]'s car. After the accident, Todd accompanied [petitioner] to Rashonda[S.]'s house. Todd and [petitioner] then went to Precious [P.]'s house. They left to purchase some beer and, when they returned, they met Yancey. Sometime later, Todd drove [petitioner], Yancey, and Lewis to the . . . [m]otel. On the way to the motel, they stopped to buy some beer. When they arrived at the motel, they drank beer in the parking lot. [Petitioner], McGowan, Yancey, Todd, and

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5 "According to [petitioner's] investigator, [Precious P.] said McGowan was among the men who appeared at her house."

6 "Fresno County Sheriff's Detective [D.] Gomez testified there was a locked safe box in Burl [M.]'s home office."

7 "[Angela M.] testified at trial and denied all involvement in the robbery. She claimed she never said she planned to go to the hospital to pull the plug on [William] and she was 'not going to do any time on this case' or, if she did, she was 'going to take someone with' her."

Lewis then left the motel and went to [Precious P.]'s house. Sometime later they drove to the west side of Fresno.

"[Petitioner] drank beer with [Sherry Y.] and spoke to McGowan in the parking lot of the . . . [m]otel. McGowan owed [petitioner] $20 for crack cocaine which [petitioner] had sold him on credit. The men discussed money but [petitioner] did not 'put heat' on McGowan.

"Sometime later, [petitioner] left the motel with Todd, McGowan, Yancey, and Lewis. They drove to [Precious P.]'s house in Todd's white car and got Todd's car keys. Lewis stayed behind while [petitioner], Yancey, McGowan, and Todd got back into Todd's car.

"Todd drove into the country west of Fresno and went to his brother-in-law's house. [Petitioner] had a problem with Todd's brother-in-law and planned to fight him. [Petitioner] removed his gold chain and left it in the vehicle so it would not be ripped off during the fight. [Petitioner] identified People's exhibit No. 12a (a necklace) as a gift from Rashonda [S.]. [Petitioner] said he had been wearing the necklace on the evening of July 7.

"Once the group arrived at Todd's brother-in-law's house, words were exchanged but there was no fight. Todd stayed there and the others went for more beer and then on to the motel with McGowan at the wheel. Yancey was drunk when they arrived. [Petitioner] and McGowan left him in the backseat and joined [Angela M.] and [Sherry Y.] in room 35. The four talked for a while and Yancey joined them after he sobered up. [Petitioner] and [Sherry Y.] later took the car, went to the store, and drove around for an hour or so. After they returned, McGowan, Yancey, and [Angela M.] took the car. While [petitioner] and [Sherry Y.] were in the room alone, they made love and talked. [Petitioner] eventually fell asleep.

"[Petitioner] woke to the sound of knocking. [Sherry Y.] opened the door and Yancey, McGowan, and [Angela M.] came in. [Petitioner] saw nothing in their hands and heard no one talk about William [M.]. Yancey later left the motel. The group was arrested after he returned.

"[Petitioner] denied going with McGowan and Yancey to [William]'s house and denied committing a robbery. He further denied having been in the car when the men made the stops on the west side. [Petitioner] testified he did not see [William]'s rifle or the handgun on the evening of July 7 and he denied knowing anything about stolen property until after he was arrested.

"[Petitioner] admitted he had been convicted of armed robbery in 1984, escape from custody in 1985, and assault by means of force like[ly] to cause great bodily injury in 1989.

"<u>Defense (codefendant Yancey):</u>

"Fresno County Sheriff's Detective [J.] Flores testified as to Angela [M.]'s initial statement on July 8, 1992. [Angela M.] said the men returned to the . . . [m]otel room in the middle of the night. Yancey carried nothing, [petitioner] was carrying a beer, and she did not know if McGowan was carrying anything. She also said she saw [petitioner] with a knife and no one with the rifle and pistol. Detective Flores also interviewed Sherry [Y.] on July 8, 1992. [Sherry Y.] gave two separate stories. In the first, she said she had spent the night at the motel with [Angela M.], [petitioner], and McGowan. She did not see Yancey's hands when he came into the room and she did not see any blood in the bathroom.

"Detective Flores was familiar with Jeffrey Todd [B.], a . . . male who was bigger than defendant McGowan. The car found at the motel parking lot on July 8 was registered to [Jeffrey Todd B.]. He reported the car stolen over an hour after the incident at William [M.]'s house. [Jeffrey Todd B.] said the car was stolen by three . . . men who beat him and sprayed him.

"Detective Flores interviewed McGowan following his waiver of Miranda[8] rights. At first, McGowan said he had been at the motel all night. Then he admitted going to [William]'s house to talk to his father, not to rob him. McGowan said [William] had a rifle and, when he turned his back, McGowan grabbed him and took the gun. [William] ran down the hall and the gun would not shoot. Defendant McGowan left the house and said, 'Go get him before he gets another gun.'

"On July 24, 1992, district attorney's investigator [D.] Kennedy interviewed Sherry [Y.]. [Sherry Y.] said Yancey had done the stabbing and had taken the property from [William]'s house. She also said Yancey had a nonworking .25-caliber pistol in his pants pocket, he had the knife, and he was the only one with blood on his hands. Kennedy also interviewed Angela [M.] on the same day. At first, she affirmed that defendant McGowan had returned to the motel with a rifle and [petitioner] returned with a knife and a .25-caliber pistol. Upon further questioning, [Angela M.] said Yancey had the knife and the .25-caliber pistol and [petitioner] carried only a beer." (*People v. McGowan* (Mar. 14, 1995, F019199) [nonpub. opn.] (*McGowan*).)

PROCEDURAL HISTORY

I. Underlying Convictions and Direct Appeal

We previously summarized the procedural history relating to petitioner's convictions as follows:

"On September 18, 1992, the Fresno County District Attorney filed an information charging petitioner with premeditated attempted murder (§§ 187, 664; count one), assault with a deadly weapon (to wit, a knife) and by means of force likely to produce great bodily injury (§ 245, former subd. (a)(1); count two), first degree robbery (§§ 211, 212.5; count three), and residential burglary (§§ 459, 460; count four). As to each count, the People alleged enhancements for personal infliction of great bodily injury (§ 12022.7)

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[8] "Miranda v. Arizona (1966) 384 U.S. 436."

and that a principal was armed with a firearm (§ 12022, subd. (a)(1)). Additionally, the People alleged petitioner had a prior serious felony conviction (§§ 667, subd. (a), 1192.7, subd. (c)), and had three prior felony convictions for which he had served a term of imprisonment (§ 667.5, former subd. (b)).[9]

"Petitioner, McGowan, and Yancey were tried together. On December 18, 1992, the jury found petitioner guilty as charged on all counts, and found true the allegations that he personally inflicted great bodily injury and a principal was armed with a firearm.[10] In bifurcated proceedings, the court found petitioner suffered a prior serious felony conviction and had served three prior prison terms." (*Evans*, *supra*, F080113.)

The court sentenced petitioner on count three to the upper term of six years, plus a one-year term for the arming enhancement, a three-year term for the great bodily injury enhancement, a five-year term for the serious felony enhancement, and three one-year terms for each of the prison term enhancements, for a total determinate term of 18 years. On count one, the court sentenced petitioner to a consecutive term of life with the possibility of parole. Upper-term sentences on counts two and four, and sentence on the enhancements to count one, were imposed and stayed (§ 654). (*McGowan*, *supra*, F019199.)

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9 "The information alleged the same offenses with respect to McGowan and Yancey, and further alleged that Yancey unlawfully possessed a firearm (§ 12021; count five), and that McGowan and Yancey personally inflicted great bodily injury (§ 12022.7), Yancey personally used a knife (§ 12022, subd. (b)), McGowan personally used a firearm (§ 12022.5, subd. (a)), and, as to Yancey, a principal was armed with a firearm (§ 12022, subd. (a)(1)). The information further alleged Yancey had a prior serious felony conviction (§§ 667, subd. (a), 1192.7, subd. (c))."

10 "During jury deliberations, Yancey entered a plea of no contest to unpremeditated attempted murder, and he admitted a prior serious felony conviction as well as enhancements for personal infliction of great bodily injury, personal use of a knife, and a principal being armed with a firearm. The jury found McGowan guilty as charged on all counts and found he personally inflicted great bodily injury and personally used a firearm as to each offense."

On appeal, this court reversed the great bodily injury enhancements as unsupported by the evidence and remanded for the trial court to prepare amended abstracts of judgment. In all other respects, we affirmed. (*McGowan*, *supra*, F019199.)

On remand, the trial court prepared an amended determinate abstract of judgment. It appears the court did not simultaneously prepare an amended indeterminate abstract of judgment. (See *Evans*, *supra*, F080113.) The amended determinate abstract of judgment reflected that petitioner was sentenced on count three to an upper term of six years, plus one year for the arming enhancement, three years for the prior prison term enhancements, and five years for the prior serious felony enhancement, for a total determinate term of 15 years. Upper-term sentences on counts two and four were once again imposed and stayed. The great bodily injury enhancements, which this court had ordered stricken, were included on the abstract with an "S," which designation meant the enhancements were either stricken or stayed. (*People v. Evans*, *supra*, F085206.)

"Subsequently, in 2014, the trial court received a letter from the Department of Corrections and Rehabilitation, noting that it did not have an amended indeterminate abstract of judgment bearing petitioner's name." (*Evans*, *supra*, F080113.) Thereafter, the trial court prepared an amended indeterminate abstract of judgment. It appears the court did not simultaneously prepare an amended determinate abstract of judgment. The indeterminate abstract of judgment reflected that petitioner was sentenced on count one to an indeterminate term of life with the possibility of parole. The great bodily injury enhancement, which this court had ordered stricken, was noted to have been stayed. In addition, the court erroneously added to the indeterminate abstract of judgment a four-year term for an arming enhancement pursuant to section 12022.5, subdivision (a), of which petitioner was neither charged nor convicted. (*People v. Evans*, *supra*, F085206.)

II. Petition for Resentencing

On August 16, 2019, petitioner, in propria persona, filed a petition for resentencing pursuant to former section 1170.95. On September 4, 2019, the trial court denied the petition with prejudice on the ground that resentencing "is not available to persons convicted of attempted murder." (*Evans*, *supra*, F080113.) On appeal, we reversed. We noted that former section 1170.95 had been amended during the pendency of the appeal to permit resentencing of certain persons convicted of attempted murder under a natural and probable consequences theory. We additionally noted that the superior court had erred in failing to appoint counsel or permit further briefing on the petition, as required under former section 1170.95. We declined the People's request that we conclude petitioner was ineligible for resentencing as a matter of law and uphold the denial of the petition. We noted that the jury instructions were "not a model of clarity regarding the acts and mens rea required to find an aider and abettor guilty of premeditated attempted murder" and "[i]n light of the ambiguity in the instructions, the procedural posture of the case, and the People's bare argument," we remanded for the superior court to conduct "such proceedings as necessary to determine whether petitioner is entitled to an order to show cause." We expressed no opinion on the ultimate merits of the petition. (*Evans*, *supra*, F080113.)

In addition to the foregoing, we noted that it appeared petitioner's prior prison term enhancements had recently been rendered invalid, and we directed the trial court to "address whether petitioner's prior prison term enhancements . . . must be stricken and [petitioner] resentenced pursuant to [former] section 1171.1."[11] We also ordered the court to correct the abstract of judgment to remove great bodily injury enhancements that previously were stricken, and to remove reference to the four-year sentence imposed

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[11] Former section 1171.1 was renumbered section 1172.75, with no change in text. (Stats. 2022, ch. 58, § 12.) Except where otherwise noted, we refer to the current section 1172.75 in this opinion.

pursuant to section 12022.5, subdivision (a), of which petitioner was not convicted, and to replace it with the one-year term originally imposed and stayed for a section 12022, subdivision (a)(1) enhancement, of which petitioner was convicted. (*Evans*, *supra*, F080113.)

III. Proceedings on Remand

A. Section 1172.6

On remand, petitioner, in propria persona, filed a second petition for resentencing pursuant to section 1172.6. Counsel was appointed to represent him. The court denied the petition with prejudice on the ground petitioner had failed to make a prima facie showing of eligibility. The court noted petitioner's jury was not instructed on a natural and probable consequences or felony-murder theory and that he was convicted of willful, deliberate and premeditated attempted murder as an aider and abettor. (*People v. Evans*, *supra*, F085206.)

B. Section 1172.75

The court then turned to the validity of petitioner's prior prison term enhancements. The prosecutor stated that he and defense counsel were in agreement that the prior prison term enhancements must be stricken and were also in agreement regarding the ultimate sentence. The court pointed out that petitioner was entitled to a full resentencing pursuant to section 1172.75, which "might make a difference in the consecutive aggravated terms," but would not change the sentence of life with the possibility of parole on the attempted murder count. Defense counsel confirmed that petitioner was agreeable to foregoing complete resentencing for that reason. The court conducted a colloquy with petitioner, who agreed with the proposed course.[12] (*People v. Evans*, *supra*, F085206.)

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[12] We note that, by the time of this resentencing hearing, petitioner would have served the entirety of his determinate term and would have been well into his parole

The court proceeded to recall the sentence and resentence petitioner as follows: on count one to a term of life with the possibility of parole; on count two to a concurrent middle term of three years; on count three, to a consecutive aggravated term of six years, with an additional one-year term for the arming enhancement[13]; and on count four to a concurrent middle term of four years.[14] The court also imposed a five-year term for a prior serious felony enhancement pursuant to section 667, subdivision (a). The court noted the custody credits listed on petitioner's prior abstract of judgment and stated, "[H]e has many thousands of more days that the Department of Corrections will compute and add to make sure that all his credits are properly recorded." (*People v. Evans*, *supra*, F085206.) However, the court ordered that the original determination of custody credits be included on the abstract, leaving it to the Department of Corrections and Rehabilitation to add the additional credits. (*Ibid*.)

IV. Subsequent Appeal

On appeal, petitioner argued (1) the court erred in denying his section 1172.6 petition at the prima facie stage because the record did not conclusively establish he was convicted under a valid theory of attempted murder; (2) the concurrent and consecutive terms imposed by the court are unauthorized and all but one of the terms must be stayed; (3) remand is required for the court to determine which of the terms to stay; (4) on

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eligibility period on the indeterminate term. Thus, a change in the determinate term alone would have no practical effect on petitioner's aggregate time in custody.

[13] On appeal, we noted the abstract of judgment erroneously listed this as an enhancement to count one. We instructed the court to associate this enhancement to the correct count, to the extent it was reimposed on remand. (*People v. Evans*, *supra*, F085206.)

[14] Previously, petitioner was sentenced on counts two and four to upper-term sentences, which were stayed pursuant to section 654. On appeal, we noted it appeared the court chose, when resentencing petitioner, to impose concurrent middle-term sentences on these counts at the prosecutor's suggestion. (*People v. Evans*, *supra*, F085206.)

remand, the court should be directed to conduct a full resentencing, to include application of amendments to sections 1170 and 1385; and (5) on remand, the court should calculate and grant credit for all days petitioner has served in custody through the date of resentencing. (*People v. Evans*, *supra*, F085206.)

With regard to the section 1172.6 petition, we held the record did not establish petitioner's ineligibility for resentencing as a matter of law. We acknowledged petitioner's jury was not instructed on the natural and probable consequences doctrine and that the jury seemingly was required to find that petitioner knew of the perpetrator's intent to kill and intended to aid in the commission of murder when he aided and abetted the perpetrator. However, we also noted that this court relied on the natural and probable consequences doctrine to hold the evidence was sufficient to support McGowan's conviction for attempted murder in the same trial, even though he may not have intended the actual perpetrator's crime. We explained: "[W]e are also mindful that we do not have before us a complete record of petitioner's trial. That record, which would have been before this court in petitioner's direct appeal, led this court to conclude that the natural and probable consequences doctrine was a viable theory of liability in petitioner and McGowan's joint trial. (*McGowan*, *supra*, F019199.) In light of these factors, we cannot say that the record conclusively establishes that the jury found every element of the offense of attempted murder under a valid theory." (*People v. Evans*, *supra*, F085206.) Accordingly, we reversed the denial of the petition and remanded with directions to issue an order to show cause. (*Ibid*.)

With regard to the section 1172.75 proceedings, we accepted the People's concession that the court erred in imposing consecutive terms on counts two and four and we concluded this error required us to remand for the court to determine which term or terms to stay pursuant to section 654. We also accepted the People's concession that the court erred in failing to recalculate petitioner's custody credits and we directed the court to make this calculation on remand. We did not address petitioner's remaining

arguments, which were not raised in the trial court, and instead permitted petitioner to raise these contentions on remand if he chose. Additionally, to the extent the court reimposed a section 12022, subdivision (a)(1) enhancement on remand, we directed the court to associate this enhancement with the appropriate count. (*People v. Evans*, *supra*, F085206.)

V. Proceedings on Subsequent Remand

A. Section 1172.6 Proceedings

On remand, the court issued an order to show cause and set the matter for an evidentiary hearing. The parties submitted briefs in advance of the hearing. In petitioner's brief, he argued he was entitled to resentencing because he was not a major participant in an underlying felony and did not act with reckless indifference to human life. He argued the evidence did not support a reckless indifference finding under our Supreme Court's holdings in *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522, 614–623. The People's briefing argued petitioner was ineligible for resentencing pursuant to section 1172.6 because he was guilty of murder under current law as an aider and abettor to the attempted murder.

The matter was heard on October 29, 2024. The court received into evidence the People's exhibits 1 and 1A, which were comprised of transcripts from petitioner's trial. Petitioner argued there was no evidence he knew guns would be used and the record lacked support that he participated in planning a robbery or killing. He argued McGowan went to the residence to recover a loan and the incident escalated after a gun was pointed at McGowan. On that basis, he argued he was entitled to resentencing. The People argued the evidence put petitioner at the scene and the participants' acts of beating and stabbing William after McGowan's statement to the effect of "kill him" was enough to show "this case was based on a theory of direct aiding and abetting, and not a theory where malice is imputed."

The court stated it had reviewed the trial testimony, jury instructions, and verdict forms. The court noted the jury instructions included instructions on aiding and abetting, which appeared to be the theory of the case. The jury instructions also required the jury to find a specific intent in the mind of the perpetrator. The instructions on attempted murder required the person committing the act to harbor an intent to kill.

The court then reviewed the evidence supporting "the aiding and abetting theory." This included evidence that two or three others were present when McGowan said, "kill him," after which the perpetrators continued to push, hit, and restrain William, and sprayed him with a chemical. Additionally, the evidence showed petitioner participated in an earlier discussion at the hotel regarding recovering loan money from William. The court also noted that petitioner's necklace was found at the scene.

The court explained:

> "So, once again, the testimony heard by the jurors, even with some of the inconsistencies from the females that testified at the trial, were still accepted by the jurors to be sufficient to create -- to come over I should say, to get over any reasonable doubt and beyond a reasonable doubt to find [petitioner] guilty as an aider and abetter [*sic*] in the various allegations against him.
>
> "So having reviewed the entirety of this record, having reviewed the transcripts of the witnesses' testimony, having reviewed the instructions given by the Court, having reviewed the findings by the jurors -- and let me go back to the weapons you referenced, [defense counsel]. You said he had no knowledge of guns. The knowledge of gun was right there in front of him when [William] was held at gunpoint, the gun pointed to his head while the companions of [petitioner] were beating, kicking, stabbing Mr. McGowan [*sic*]. So the gun was right there. Yes, it was a gun that was removed from the household of [William], but it was right there in his presence. It does not have to be multiple minutes or hours before that [petitioner] is aware that there is a gun. It's right there.
>
> "The young man is being stabbed and falling to the ground holding his side asking for help, asking them to let him go. And when they loosened the grip they had on his hands, that is when he had the presence of

mind to flee, and he fled to a neighbor's home asking for assistance, and that is when he was able to get away.

"And so to say that [petitioner] did not have any knowledge of guns, flies in the face of the evidence that was presented during the trial, to say that he did not realize that a robbery was being committed. Well, they went there, they entered, the scuffle continued. The entry was after this discussion that [petitioner] and Mr. McGowan had had that they had to go get money. Those are in quotes. [Petitioner] telling [McGowan], 'They had to go get money.' That does not suggest at 1:00 in the morning a casual discussion is going to be conducted to get the money that he believed Mr. McGowan [*sic*] owed him. Once again, the jurors found the defendants guilty beyond a reasonable doubt.

"In the review of this transcript, in the review of the rules that allow the Court to make the same findings, I also find that [petitioner] can be and would be found, beyond a reasonable doubt, guilty of the charges based on the evidence produced at the trial in this case.

"The request to resentence him pursuant to 1170.6 [*sic*] is denied.

"Also, there was no reliance on any felony murder rule. There was no reliance on natural probable consequences, there were no instructions given to that effect. So the Court does not believe that the jurors misunderstood their job or misapplied the rules. There is no evidence of such. And the Court does believe that beyond a reasonable doubt, Mr. Evans would be guilty of the charges under current rules, under current law as an aider and abetter [*sic*] and a principle [*sic*] and a major participant in the events that led up to [William] being assaulted and injured."

B. Section 1172.75 Proceedings

The court did not address section 1172.75 resentencing immediately following the section 1172.6 hearing but rather set a later hearing to allow the probation department an opportunity to address petitioner's custody credits.[15] The court stated it would set a future date "for the abstract of judgment to be corrected, consistent with the most recent direction from the Court of Appeal related to a couple of the counts, that they should be stayed, and the updated credits for terms for [petitioner]."

[15] The record does not reflect that an updated probation report was prepared in advance of the hearing.

In written briefing, petitioner addressed the section 1172.75 resentencing and sought clarification as to whether the prior prison term enhancements were previously stricken. He argued he was entitled to a full resentencing and the benefit of any ameliorative changes in law. He asked the court to strike his prior serious felony enhancement and to consider postconviction factors in resentencing him. He asked the court to exercise its discretion as to which counts to stay pursuant to section 654, asserting that section 654 prohibited sentence from being executed on both count two and count four.[16] Finally, petitioner asked the court to recalculate his custody credits as instructed by this court.

At the start of the November 7, 2024 hearing, the court stated, "The reason we put this matter over to today is so the Probation Department would give the correct number of credits [petitioner] is entitled to." The court stated probation had advised that petitioner was entitled to 11,811 days of actual credit and 1,771 days of good time and work time credits, for a total of 13,582 days. The court stated these numbers would be reflected on the amended abstract of judgment and asked defense counsel whether there was anything else. Defense counsel confirmed with the court that the prior prison term enhancements had been stricken.

The court then stated:

> "I re-reviewed for the many-th time the remittitur and the conclusion paragraph where it indicated that the sentence on [c]ounts [t]wo and [f]our is to be vacated, which we addressed last week . . . and for further sentencing pursuant to [section] 1172.75. So that will – certainly, I will

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[16] Contrary to petitioner's assertion in the trial court, the court was not required to choose between count two and count four in determining which sentence to stay and which sentence to execute. As explained in our prior opinion, section 654 required the court to stay the sentence on either count one or count two. Section 654 also required the court to stay the sentence on either count three or four. Additionally, although petitioner argued in his prior appeal that section 654 required the court to stay all but one of the four counts, we did not address this argument and instead permitted petitioner to raise the issue on remand. (*People v. Evans*, *supra*, F085206.)

review the abstract of judgment before it is sent to the Department of Corrections."

The court also stated it would associate the section 12022, subdivision (a)(1) enhancement with the correct count. The court did not discuss the sentence to be imposed, how it intended to exercise its discretion under section 654, or petitioner's request to strike the prior serious felony enhancement.

Ultimately, the court's fourth amended abstract of judgment reflects that petitioner was sentenced on count one to an indeterminate term of life with the possibility of parole and on count three to a term of six years. Middle term sentences on counts two and four were imposed and stayed pursuant to section 654. The section 12022, subdivision (a)(1) enhancement was noted to be associated with count "PC." An additional five-year term was imposed for the prior serious felony enhancement. The abstract reflects petitioner was awarded 11,811 days of actual custody credit and 1,771 days of local conduct credit.

The record reflects that the court subsequently received a letter from the Department of Corrections and Rehabilitation, dated April 28, 2025, suggesting the fourth amended abstract of judgment and minute order may be in error, inasmuch as (1) the abstract of judgment contained an incorrect hearing date; (2) the section 12022, subdivision (a)(1) enhancement was imposed as to count "PC"; and (3) the court may have improperly calculated conduct credit for the period beginning after the date of the original sentencing (*People v. Buckhalter* (2001) 26 Cal.4th 20, 31.) The record does not reflect that the court took any action in response to this letter.

DISCUSSION

I. Resentencing Pursuant to Section 1172.6

Petitioner contends the order denying his petition must be reversed because it is not clear the court engaged in the requisite independent factfinding and, in any event, the court applied inapplicable felony-murder principles rather than finding petitioner directly

aided and abetted an attempted murder with intent to kill. We agree the record reflects the court misunderstood the applicable law and procedure, and we therefore reverse.

A. Section 1172.6 Procedure

Effective January 1, 2019, Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437) "altered the substantive law of murder in two areas." (*People v. Curiel* (2023) 15 Cal.5th 433, 448 (*Curiel*).) First, the bill narrowed the scope of the felony-murder rule "so that a 'participant in the perpetration or attempted perpetration of a [specified felony] in which a death occurs' can be liable for murder only if '[t]he person was the actual killer'; '[t]he 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'; or '[t]he person was a major participant in the underlying felony and acted with reckless indifference to human life.' " (*People v. Arellano* (2024) 16 Cal.5th 457, 467–468, quoting § 189, subd. (e)(1)–(3).) Second, the bill "eliminate[d] liability for murder as an aider and abettor under the natural and probable consequences doctrine" by requiring that, "except in cases of felony murder, 'a principal in a crime shall act with malice aforethought' to be convicted of murder." (*Curiel*, at p. 449, quoting § 188, subd. (a)(3).) Now, " '[m]alice shall not be imputed to a person based solely on his or her participation in a crime.' " (*Curiel*, at p. 449.)

Additionally, Senate Bill No. 1437 added former section 1170.95, now section 1172.6, to provide a procedure for those convicted of a qualifying offense " 'to seek relief' where the two substantive changes described above affect a defendant's conviction." (*Curiel*, *supra*, 15 Cal.5th at p. 449.) Under section 1172.6, an offender seeking resentencing must first file a petition in the sentencing court, and the sentencing court must determine whether the petitioner has made a prima facie showing that he or she is entitled to relief. (§ 1172.6, subds. (a)–(c); accord, *People v. Strong* (2022) 13 Cal.5th 698, 708.) If the sentencing court determines the petitioner has made a prima

facie showing, the court must issue an order to show cause and hold a hearing to determine whether to vacate the qualifying conviction. (§ 1172.6, subds. (c), (d)(1).)

At this evidentiary hearing, "the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of . . . attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019." (§ 1172.6, subd. (d)(3).) "A finding that there is substantial evidence to support a conviction for . . . attempted murder . . . is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges." (*Ibid.*)

"Ordinarily, a trial court's denial of a section 1172.6 petition [following an evidentiary hearing] is reviewed for substantial evidence. [Citation.] Under this standard, we review the record ' " 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' [Citation.] But where there is an issue as to whether the trial court misunderstood the elements of the applicable offense, the case presents a question of law which we review independently." (*People v. Reyes* (2023) 14 Cal.5th 981, 988 (*Reyes*).)

B. Applicable Law of Attempted Murder

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) For the offense of murder, malice may be express or implied. (§ 188, subd. (a).) However, " '[t]he mental state required for attempted murder has long differed from that required for murder itself.' " (*People v. Smith* (2005) 37 Cal.4th 733, 739.) "To prove the crime of attempted murder, the prosecution must establish 'the specific intent to kill and the commission of a direct but ineffectual act toward

accomplishing the intended killing.' " (*People v. Canizales* (2019) 7 Cal.5th 591, 602 (*Canizales*).)

"Intent to unlawfully kill and express malice are, in essence, 'one and the same.' " (*People v. Smith*, *supra*, 37 Cal.4th at p. 739.) "Express malice requires a showing that the assailant ' " 'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' " ' " (*Ibid*.) Because there is rarely direct evidence of a defendant's intent, intent to kill may "be inferred from the defendant's acts and the circumstances of the crime." (*Id.* at p. 741.)

A person may be convicted of attempted murder as a direct aider and abettor. " '[D]irect aiding and abetting is based on the combined actus reus of the participants and the aider and abettor's own mens rea.' " (*Reyes*, *supra*, 14 Cal.5th at pp. 990–991.) " '[T]o be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054 (*Nguyen*).)

C. Analysis

As stated, petitioner advances two arguments regarding the court's misapplication of the law: (1) the court did not engage in independent factfinding to find him guilty of attempted murder beyond a reasonable doubt, and (2) the court misunderstood the elements of attempted murder and therefore failed to find he acted with intent to kill, as required to support his conviction. As we explain, we conclude the court's ruling raises doubt as to whether the court independently found petitioner guilty of attempted murder but, in any event, the court misapplied the law applicable to that offense and failed to find the elements necessary to support his conviction.

We begin with petitioner's contention that the court did not independently find him guilty of attempted murder, as was required at the evidentiary hearing, but rather focused on the jury instructions and verdict to find him ineligible for resentencing. Ordinarily, "[a]bsent evidence to the contrary, we presume that the trial court knew and applied the governing law." (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1390.) Thus, we ordinarily will presume that the court is aware of the independent factfinding duty imposed by section 1172.6, subdivision (d)(3), which requires the court to determine, as a factual matter and in the first instance, whether the People proved the petitioner is guilty of the relevant offense (here, attempted murder) under current law and beyond a reasonable doubt. Here, however, the record reflects the court may have misunderstood its role in the section 1172.6, subdivision (d)(3) proceedings.

The court's analysis focused heavily on the jury instructions and verdict. Jury findings may preclude section 1172.6 relief in an appropriate case. (*People v. Strong*, *supra*, 13 Cal.5th at p. 716.) However, where a prior finding "does not establish that the petitioner is in a class of defendants who would still be viewed as liable for [attempted] murder" under current law, it does not preclude relief. (*Id*. at p. 718; see *id*. at pp. 717–718.) In this case, we previously determined the jury instructions and verdict *did not* establish petitioner was convicted of attempted murder under a currently valid theory and therefore *did not* preclude relief. (*People v. Evans*, *supra*, F085206.) The trial court seemingly reached a contrary conclusion, inasmuch as the court concluded the jurors did not "misunderst[and] their job or misappl[y] the rules," and section 1172.6 "allow[s] the Court to make the same findings" as the jury. The court noted the jury was not instructed on the natural and probable consequences doctrine or the felony-murder rule and twice emphasized that the jury found the evidence sufficient to find petitioner guilty beyond a reasonable doubt. It is apparent the trial court was focused, at least in part, on whether the jury validly found petitioner guilty of attempted murder, rather than on its own independent determination on this point. In light of our prior decision holding the record

did not establish the jury found petitioner guilty under a currently valid theory, the court's analysis of the jury instructions and verdict is misplaced and erroneous.

We nonetheless acknowledge the court engaged in some independent factfinding. The court found that petitioner participated in the discussion at the hotel regarding recovering loan money from William. The court also found that a robbery was committed, and petitioner was aware of his companion's use of a firearm during the course of that robbery. The court also found that petitioner's necklace was at the scene of the offense, suggesting petitioner was present when the offense occurred. However, the court found this evidence was "accepted by the jurors to be sufficient to . . . get over any reasonable doubt and beyond a reasonable doubt to find [petitioner] guilty as an aider and abettor." It therefore is not clear the court relied on these facts to make its own determination regarding petitioner's guilt.

The court went on to state that, under "the rules that allow the Court to make the same findings [as the jury]," petitioner "*can be and would be* found, beyond a reasonable doubt, guilty of the charges." (Italics added.) The court later reiterated that petitioner "*would be* guilty of the charges under current rules, under current law." (Italics added.) While section 1172.6, subdivision (d)(3) does not require a court to use any specific phrasing in denying a section 1172.6 petition, it nonetheless requires the court to determine whether the prosecution has proved, beyond a reasonable doubt, that a petitioner *is guilty* of the relevant offense, i.e., attempted murder. In this case, when considered alongside the court's findings regarding the jury's prior determinations, the court's use of hypothetical and conditional phrasing regarding petitioner's guilt makes it unclear whether the court made the findings necessary to support denial of the petition. Put simply, it is very difficult to discern from this record that the court independently found, beyond a reasonable doubt, that petitioner is guilty of attempted murder.

However, even if we presume the court independently determined petitioner is guilty of attempted murder, the record makes clear the court misunderstood the law applicable to that offense. As stated, to be guilty of attempted murder, an aider and abettor must intend to kill. (*Nguyen*, *supra*, 61 Cal.4th at p. 1054.) Here, the court did not expressly find that petitioner aided and abetted the attempted murder with intent to kill. Rather, the court found petitioner "would be guilty of the charges under . . . current law as an aider and abetter [*sic*] and a principle [*sic*] and a major participant in the events that led up to [William] being assaulted and injured."

Major participation in an underlying felony by a participant who acts with reckless indifference to human life is one basis for finding a person guilty of felony murder or a felony-murder special circumstance. (§§ 189, subd. (e)(3), 190.2, subd. (d).) As the parties agree, however, this is not a valid ground for finding a person guilty of attempted murder. The court's reliance on petitioner's major participation in a robbery to find him guilty of attempted murder was misplaced and erroneous. Many of the court's factual findings similarly appear to address factors specifically relevant to the felony-murder inquiry, such as a defendant's involvement in planning the underlying felony, awareness of weapons that would be used, and physical presence at the scene of the offense. (See *People v. Emanuel* (2025) 17 Cal.5th 867, 884 [reckless indifference factors]; *People v. Banks*, *supra*, 61 Cal.4th at p. 803 [major participation factors].)

The People nonetheless suggest the court's error is not a basis for reversal because the error was invited by defense counsel. (Citing *People v. Tapia* (1994) 25 Cal.App.4th 984, 1031.) It is true that defense counsel incorrectly argued in written briefing that petitioner was entitled to resentencing because he was not a major participant in the underlying felony and did not act with reckless indifference to human life. However, "[e]rror is invited only if defense counsel affirmatively causes the error and makes 'clear that [he] acted for tactical reasons and not out of ignorance or mistake' or forgetfulness."

(*Ibid*.) There is nothing here to suggest that defense counsel's reliance on inapplicable law had a tactical purpose.

Furthermore, it was the People's burden to prove petitioner guilty of attempted murder beyond a reasonable doubt (§ 1172.6, subd. (d)(3)) and it was the court's duty to apply the correct law (*People v. Tapia*, *supra*, 25 Cal.App.4th at pp. 1030–1031). Here, the People's hearing brief quoted from the pattern jury instruction on attempted murder, which includes reference to the requirement that the perpetrator intend to kill, but did not otherwise expressly argue this element with regard to petitioner's aiding and abetting liability. The court similarly discussed the jury instructions given in petitioner's trial, which required that the perpetrator of the attempted murder harbor specific intent to kill, but the court did not expressly find petitioner aided and abetted the attempted murder with intent to kill. The failure of both parties and the court to provide *any* analysis of the requisite intent-to-kill element means there is no basis in the record to conclude the court found petitioner acted with intent to kill, particularly in light of the court's misplaced reference to petitioner's major participation in the felony.

The People also argue the error was harmless because the court "also found [petitioner] guilty beyond a reasonable doubt as both a direct perpetrator and as an aider and abettor." We disagree that the court found petitioner guilty as a direct perpetrator of the attempted murder. The court repeatedly stated petitioner was prosecuted as an aider and abettor. The court described aiding and abetting as "the theory of the case." Nor does the court's description of petitioner as a "principle [*sic*]" necessarily suggest the court found petitioner guilty as a direct perpetrator. (§ 31 ["All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed."].) Furthermore, it is irrelevant that the court may have found petitioner guilty as an aider and abettor to attempted murder if it did so based on an invalid theory of petitioner being a major participant who acted with reckless indifference to human life. Because the

record reflects the court applied an incorrect standard and did not find petitioner acted with intent to kill, the court's findings are insufficient to support denial of the petition.

Finally, petitioner argues the evidence is insufficient to support an intent-to-kill finding. Under section 1172.6, subdivision (d)(3), the trial court acts as an independent fact finder to determine whether a petitioner is guilty of murder under a valid theory. We decline to consider whether substantial evidence supports factual findings the court has yet to make.

Accordingly, we once again reverse the order denying the petition. On remand, the court may consider the facts under a proper application of the elements of attempted murder, and we express no view on the merits of the petition under such application. (See *Reyes*, *supra*, 14 Cal.5th at p. 992 [where the court misunderstood the legal requirements of a particular theory of murder, the appropriate remedy was remand to consider the petition under a proper application of the elements of murder under such theory].)

II. Resentencing Pursuant to Section 1172.75

Petitioner also contends remand for resentencing is required because the court did not understand the scope of its sentencing discretion on the most recent remand. We agree with petitioner that the record reflects the court viewed the remand order as requiring the court to make corrections to errors in the abstract of judgment, rather than exercising its discretion to resentence petitioner. Accordingly, we reverse.

The trial court erred by failing to adhere to this court's directions on remand. In our prior opinion, we vacated the sentence on counts two and four and remanded for further resentencing proceedings pursuant to section 1172.75. We noted that our vacatur of the sentence on counts two and four entitled petitioner to a full resentencing.[17] We

[17] We therefore disagree with the People's contention that a full resentencing was outside the scope of remand.

expressly stated that, on remand, the court was required to "exercise its discretion as to which counts to stay pursuant to section 654." (*People v. Evans*, *supra*, F085206.) However, at the section 1172.6 hearing, the court incorrectly stated that it was merely required to correct the abstract of judgment to reflect that "a couple of the counts" should be stayed and to update petitioner's custody credits. At the putative resentencing hearing, the court stated the purpose of the hearing was to correct petitioner's custody credits. It then characterized the remittitur as requiring counts two and four to be vacated and stated it would review the abstract of judgment before it was sent to the Department of Corrections and Rehabilitation. Ultimately, the amended abstract of judgment indicated that counts two and four were stayed pursuant to section 654.

The record is clear that the court did not conduct a full resentencing. While petitioner may waive his right to a full resentencing, the record does not reflect that he did so.[18] To the contrary, petitioner's written briefing asked for a full resentencing and asked the court to strike his prior serious felony enhancement, consider postconviction factors at his resentencing, and exercise its discretion pursuant to section 654.

Moreover, even if petitioner had waived a full resentencing, the court was required to exercise sentencing discretion in choosing which terms to stay pursuant to section 654. " 'Defendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court.' " (*People v. Gutierrez*, *supra*, 58 Cal.4th at p. 1391.) Where the court has exercised its sentencing authority without being aware of the scope of its discretionary powers, our Supreme Court has held that "the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' " (*Ibid.*) Our Supreme Court has also opined that attempting to divine how a

[18] We reject the People's argument that petitioner's waiver of his right to a full resentencing under section 1172.75 in 2022 also waived his right to the full resentencing we directed the court to undertake in 2024.

court would have exercised its discretionary powers in the first instance is a " 'speculative inquiry.' " (*People v. Salazar* (2023) 15 Cal.5th 416, 425.) Here, because the court did not exercise any discretion in imposing sentence and, indeed, appeared to view its role at the resentencing hearing as purely administrative, the record does not indicate the sentence the court would have imposed had it been aware it was required to exercise its discretion pursuant to section 654. Accordingly, we must vacate the sentence and remand for resentencing.

In light of this disposition, we do not address petitioner's argument that his counsel was constitutionally ineffective in failing to advocate for a lesser sentence, specifically by (1) failing to advocate that the court stay all but one of the terms, including the life term on count one; (2) failing to advocate for a lower term on count two, on which the court imposed an upper-term sentence; and (3) failing to present argument in favor of striking the prior serious felony enhancement. The court may address these arguments at the resentencing proceedings on remand.

III. Corrections to Conduct Credits

Petitioner argues that the court erred when it awarded him presentence conduct credits. The People contend this issue is forfeited and, in any event, any error was harmless. Because we remand for resentencing on other grounds, we do not address the People's claims of forfeiture and harmlessness and instead direct the court to make the necessary calculations and corrections on remand.

Here, the original abstract of judgment listed 205 days of actual time credits and 102 days of local conduct credits. When the court resentenced petitioner in 2022, it did not alter these calculations. (*People v. Evans*, *supra*, F085206.) In petitioner's most recent appeal, we directed the trial court to recalculate petitioner's actual custody credits and to amend the abstract of judgment as necessary. (*Ibid.*) On remand, the court, on indication from the probation department, awarded petitioner 11,811 days of actual credit and 1,771 days of local conduct credit. Although the record contains no written record

regarding the probation department's method of calculating these credits, it appears the department may have calculated conduct credit at a rate of 15 percent of days actually served.

The parties agree that conduct credits that accrue after the initial imposition of sentence are to be calculated by the Department of Corrections and Rehabilitation. (*People v. Dean* (2024) 99 Cal.App.5th 391, 396–397; see *People v. Buckhalter*, *supra*, 26 Cal.4th at p. 31.) The court's calculation of additional conduct credits after the initial imposition of sentence was erroneous.

Upon resentencing petitioner on remand, the court must once again recalculate petitioner's actual custody credits. (*People v. Buckhalter*, *supra*, 26 Cal.4th at p. 23.) However, it also must correct the abstract of judgment to exclude any local conduct credits that may have accrued after the initial sentencing.

DISPOSITION

The order denying the petition for resentencing pursuant to section 1172.6 is reversed. The matter is remanded for the court to consider the petition under a correct application of the law, consistent with this opinion.

Additionally, the sentence is vacated and the matter is remanded for a full resentencing, in which the court is required to exercise its sentencing discretion regarding which counts to stay pursuant to section 654. During the resentencing proceedings, the court may apply any intervening changes in law that affect petitioner's sentence. Upon resentencing petitioner, the court shall recalculate petitioner's actual local custody credits but shall not calculate conduct credits accrued after the date of the initial sentencing. To the extent the court reimposes a section 12022, subdivision (a)(1) enhancement on remand, the court shall take care to associate this enhancement with one of the counts.

Upon completion of the resentencing proceedings, the court shall forward the amended abstract of judgment to the appropriate authorities.[19]

DETJEN, J.

WE CONCUR:

LEVY, Acting P. J.

PEÑA, J.

[19] Our disposition is more detailed than is typical because the trial court's comments indicate it may have read only the remittitur and concluding paragraph of our prior opinion. We urge the court and parties to read the analysis set forth herein to avoid yet another remand to correct errors we have already addressed.