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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. PHON MEY, Defendant and Appellant.	A169159 (Alameda County Super. Ct. No. 171030B)

Defendant Phon Mey appeals from an order denying his petition for resentencing under Penal Code former section 1170.95, now section 1172.6, at the prima facie stage.[1] He contends that the trial court erred by failing to appoint counsel for him. Respondent disagrees and claims that Mey did not timely file his appeal.

We conclude that Mey's appeal was timely. We further conclude that his record of conviction shows that he was convicted of murder under a provocative act theory that is valid under current law. Therefore, he is ineligible for relief under section 1172.6 as a matter of law and he fails to

[1] All statutory references are to the Penal Code. Effective June 30, 2022, Assembly Bill No. 200 (2021–2022 Reg. Sess.) renumbered section 1170.95 as section 1172.6 without substantive change. (Stats. 2022, ch. 58, § 10.) Except where needed for clarity, we refer to section 1172.6 throughout the opinion.

establish that the decision not to appoint counsel was prejudicial error. Accordingly, we affirm.

I. FACTS AND PROCEDURAL HISTORY

In 2014, Mey and codefendants Saun Oeurn, Scott Moeun, Aaron Kheav, and Danny Vo were charged with the murder of Jordan Chhit (§ 187, subd. (a)); the attempted murders of Lana Turn, Von Neak, and Saravy Phournsopha (§§ 187, subd. (a), 664); and shooting at an inhabited dwelling (§ 246).[2] As to each count and as to all defendants, the information alleged multiple firearm and great bodily injury enhancements. (§§ 12022.5, subd. (a), 12022.53, subds. (b)–(d), (g), 12022.7, subd. (a).)

Mey, Oeurn, Moeun, and Vo were tried together before a jury.[3] The evidence showed that Mey and his codefendants were members or associates of the Asian Streetwalkers gang (ASW). They learned that ASW members had been attacked by rival gang members (OTC). Oeurn drove them to a location around the corner from a residence owned by the Neak family, where OTC members were attending a birthday party. Mey was armed with a semiautomatic rifle with an extended banana clip and others had semiautomatic pistols. Some of the group, including Mey, walked to a location across the street from the Neak residence. An ASW member standing next to Mey fired a shot at someone at the residence, followed by shots from other ASW members. Neak was struck in the chest but returned fire and survived. A group from the Neak residence also returned fire with

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[2] Mey filed a request to judicially notice the record in case Nos. A147159 and A172326. The People responded that, if we reach the merits of the appeal, they join in the request. Case No. A147159 contains the record of Mey's conviction. Case No. A172326 is the record in Mey's appeal from the denial of his first section 1172.6 petition. We grant the request.

[3] Kheav entered a plea in exchange for giving truthful testimony at trial. He later refused to testify and the plea agreement was rescinded.

semiautomatic weapons, and one gunshot killed Chhit of the ASW. Turn, an associate of OTC, was grazed by a bullet. During the gunfight, Mey fired 35 to 38 rounds from his rifle and other ASW members fired more than 50 additional rounds.

Before the jury's verdict, the trial court dismissed the charge of attempted murder of Phournsopha and struck the enhancements for inflicting great bodily injury.

In 2015, the jury convicted Mey of first degree provocative act murder of Chhit, attempted murder of Neak, and shooting at an inhabited dwelling. He was acquitted of attempted murder of Turn. The jury found true the allegations that Mey personally used and intentionally discharged a firearm, causing great bodily injury. The trial court sentenced him to 60 years eight months to life in prison.

Mey appealed (case No. A147159). In November 2017, we reversed Mey's first degree murder conviction because the trial court had not properly instructed the jury on the premeditation requirement. (*People v. Oeurn* (Nov. 29, 2017, A147159) [nonpub. opn.].) On remand in May 2018, the court reduced the conviction to second degree murder and modified Mey's sentence to 35 years to life.

Effective January 1, 2019, Senate Bill No. 1437 (2017–2018 Reg. Sess.) (SB 1437) " 'amend[ed] 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.' " (*People v. Curiel* (2023) 15 Cal.5th 433, 448 (*Curiel*).) Thereafter, "Senate Bill [No.] 775 [(2021–2022 Reg. Sess.) (SB 775)] expanded section 1172.6 to apply to individuals not only

convicted of felony murder and murder under the natural and probable consequences theory, but to those convicted under any 'other theory under which malice is imputed to a person based solely on that person's participation in a crime.' " (*People v. Antonelli* (2025) 17 Cal.5th 719, 725 (*Antonelli*).) Section 1172.6, as amended by SB 775, establishes a procedure for defendants convicted of murder and attempted murder under the old law to seek resentencing in the trial court if they believe that they could not be convicted of the crime given the amendments to sections 188 and 189. (Stats. 2022, ch. 551, § 2; § 1172.6, subd. (a)(1)–(3).)

In February 2019, Mey filed a petition for resentencing. The trial court denied the petition in March 2022, after the SB 775 amendments took effect. The court concluded that Mey failed to make a prima facie case because he was convicted of murder under the provocative act doctrine and former section 1170.95 did not provide relief for defendants convicted under that theory. The court explained that the jury was instructed on the provocative act murder doctrine and not on felony murder or the natural and probable consequences theory of aiding and abetting. Mey did not appeal.

In June 2023, Mey filed a second petition for resentencing under section 1172.6 and requested the appointment of counsel, without alleging new facts or law. By written order filed on August 17, the trial court denied the petition without appointing counsel.

To the extent Mey's petition sought reconsideration of its March 2022 order, the trial court concluded that Mey provided no authority for reconsideration and that his failure to timely appeal from the March 2022 order showed his acquiescence in that ruling and barred reconsideration. To the extent Mey's petition sought resentencing on the ground that the law had changed, the court ruled that there had been no such change since the March

2022 order and that Mey failed to meet the requirements for section 1172.6 relief as a matter of law.[4] The court concluded: "Because (1) [Mey] was convicted of murder under the provocative act theory, (2) the court has previously determined he is ineligible for relief, and (3) there has been no intervening change in the law, [Mey] is not entitled to the appointment of counsel or further proceedings on the petition."

The trial court did not serve Mey with notice of its order until September 11, 2023, when Mey was in prison. The notice indicated that the order denying his petition was signed and filed on September 1 rather than August 17. Mey filed a notice of appeal on October 27, less than 60 days after September 1 but more than 60 days after the actual entry of the order.

In January 2025, Mey filed a request that his notice of appeal be deemed timely filed on grounds that we discuss below. We provisionally granted the request but ordered the parties to discuss the issue in their appellate briefs.[5]

II. DISCUSSION

A. Timeliness of Appeal

In a criminal case, the notice of appeal must be filed within 60 days after the "rendition of the judgment" or the "making of the order" being

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[4] On this point, the trial court cited *People v. Antonelli* (2023) 93 Cal.App.5th 712, which was reversed on a different ground in *Antonelli, supra,* 17 Cal.5th 719. In *Antonelli*, our high court held that provocative act murder convictions before *People v. Concha* (2009) 47 Cal.4th 653 (*Concha*) did not render petitioners categorically ineligible for relief under section 1172.6, because it was *Concha* that clarified that a provocative act murder conviction required personal malice. (*Antonelli*, at pp. 730–731.) Mey's conviction occurred in 2015, long after *Concha* was decided.

[5] In January 2025, Mey applied for relief from his failure to file a timely notice of appeal from the March 2022 denial of his first resentencing petition (case No. A172326). We denied the application and dismissed the appeal.

appealed. (Cal. Rules of Court, rule 8.308(a).)[6] "Except as provided in rule 8.66 [pertaining to public emergencies], no court may extend the time to file a notice of appeal." (*Ibid.*) The deadline is jurisdictional. (*In re Chavez* (2003) 30 Cal.4th 643, 650.)

The order denying Mey's second resentencing petition was signed and filed on August 17, 2023. Under rule 8.308(a), his deadline to file a notice of appeal was October 16. The trial court clerk did not receive his notice of appeal for filing until October 27. By this calculation, Mey's appeal would be untimely.

But Mey was incarcerated when he filed his notice of appeal, potentially implicating the "prison-delivery" rule. Under that rule, a notice of appeal is deemed filed as of the date a prisoner gives it to prison authorities for delivery to the trial court for filing. (Rule 8.25(b)(5).) As Mey acknowledges, however, his October 23, 2023 notice of appeal would still be untimely under the prison-delivery rule because he did not give the notice to prison authorities until after the October 16 filing deadline.

Mey argues, however, that he was without counsel and absent from the August 2023 hearing when his petition was denied, so he had no way of knowing about the ruling until the trial court clerk sent notice of the order on September 11. Because he delivered his notice of appeal to prison authorities on October 23, within 60 days after the clerk sent the notice, he urges that his notice of appeal should be deemed timely under *Conservatorship of Ben C.* (2006) 137 Cal.App.4th 689, 695–696 (*Ben C.*).

In *Ben C.*, the trial court issued an order in a conservatorship proceeding and placed it in the court file but did not announce the order in

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[6] All uncodified references to a "rule" in this opinion refer to the California Rules of Court.

open court or serve it on the parties. The client's attorney did not learn about the order until the judge mentioned it at a subsequent hearing. The Court of Appeal held that the notice of appeal, filed within 60 days after that hearing, was timely because that hearing was when the order was first pronounced in open court. (*Ben C., supra*, 137 Cal.App.4th at pp. 695–696.) More specifically, the Court of Appeal did "not find the [trial] court's action of placing its order in the court file to be sufficient to have provided *reasonable notice* to the Conservatees or their attorney of the court's ruling." (*Ibid.*, italics added.) In doing so, the Court of Appeal suggested that the order was not made for purposes of former rule 30.1(a), now rule 8.308(a), until the trial court "made an oral pronouncement of the order in open court" in the absence of any "indication of [the] order being served on or mailed to any of the Conservatees or their attorney." (*Ben C.*, at p. 695.) Although *Ben C.* is a conservatorship case, such cases follow the criminal rules for notices of appeal. (*Ibid.*; rule 8.308.)

Ben C. involved different facts than this case. There, neither the defendant nor his counsel learned of the order until *after* the deadline to file a notice of appeal. (*Ben C., supra*, 137 Cal.App.4th at p. 695.) Here, Mey learned about the order from the trial court clerk when he still had time to file a notice of appeal — albeit less time than allowed by rule 8.308(a). But like the appellants in *Ben C.*, Mey had no way of knowing about the order until notice was served by the clerk, and it is unclear from the record whether the court orally pronounced the order at any time. It is also unclear when Mey actually received notice of the order and how long he actually had to file the notice of appeal. The notice of order states it was mailed on September 11, 2023, and it can be expected that there would be delays before he received the paperwork in prison.

Moreover, the trial court clerk's notice of entry of the August 17, 2023 order inaccurately stated in bold print: "Enclosed, please see endorsed filed copy of Order Denying Petition, signed and *filed September 1, 2023*." (Italics added.) This might have misled Mey into thinking that the August 17 order was deemed filed on September 1 and that the deadline to appeal was accordingly October 31. Under this reasoning, his notice of appeal, which was filed before October 31, would have been timely.

Despite the jurisdictional requirement of a timely notice of appeal, California courts have found that in "compelling circumstances . . . an appellant's efforts should be deemed to be a *constructive* filing of the notice within the prescribed time limits." (*Silverbrand v. County of Los Angeles* (2009) 46 Cal.4th 106, 113.) Because of Mey's incarceration, his lack of counsel and absence from the hearing, the trial court's tardy service of the order, and the court's representation that the order was filed on September 1, 2023 rather than August 17, we deem Mey's notice of appeal to be constructively filed in a timely manner. Accordingly, we have jurisdiction to decide the appeal.

B. Merits and Harmless Error

Mey contends that the trial court erred when it denied his section 1172.6 resentencing petition at the prima facie stage without appointing him counsel. The People counter that any such error was harmless because there is no reasonable probability that counsel's presence would have made any difference in the outcome of the prima facie hearing. We agree.

The section 1172.6 process begins with the petitioner filing a petition containing a declaration that the eligibility requirements of section 1172.6 are met. (*Antonelli*, *supra*, 17 Cal.5th at p. 724.) "[P]etitioners who file a complying petition requesting counsel are to receive counsel upon the filing of

a compliant petition." (*People v. Lewis* (2021) 11 Cal.5th 952, 963 (*Lewis*).) After counsel is appointed, the parties may file briefs and the trial court holds a hearing to determine if the petitioner has made a prima facie case for relief. (§ 1172.6, subd. (c); *Lewis*, at pp. 957, 966.) Here, the court held that hearing and ruled on the petition without appointing counsel.

Where a trial court errs in failing to appoint counsel at the prima facie stage, the burden is on the petitioner to " 'demonstrate there is a reasonable probability that in the absence of the error he . . . would have obtained a more favorable result.' " (*Lewis*, *supra*, 11 Cal.5th at p. 974.) There is no such reasonable probability here. The record of Mey's conviction shows that he was not entitled to relief under section 1172.6 as a matter of law, and that he could not have made a prima facie showing even with counsel.

At the prima facie stage, if the record of conviction contains facts refuting the allegations of the section 1172.6 petition, the trial court may reject those allegations. (*Lewis, supra*, 11 Cal.5th at p. 971.) The record of conviction includes the jury instructions, from which the court may ascertain the theories underlying the conviction. (See *People v. Harden* (2022) 81 Cal.App.5th 45, 54–56.) It also includes the evidence and arguments of counsel at trial, to the extent they demonstrate the theories underlying the conviction without the need for factfinding. (See *People v. Morales* (2024) 102 Cal.App.5th 1120, 1132.)

Here, the record of conviction shows that Mey was convicted of murder based on a provocative act theory, and Mey does not contend otherwise. The jury was instructed on a provocative act theory and not on any theory of imputed malice, such as felony murder or natural and probable consequences. The prosecutor urged a provocative act theory in closing argument. Indeed, in rejecting Mey's first petition for sentencing relief, the trial court found that

Mey was convicted on a provocative act theory, and Mey did not timely appeal from that ruling.

The provocative act murder doctrine provides that a defendant is liable for murder if the defendant's conduct provoked the killer and the defendant personally harbored malice. (*Concha, supra,* 47 Cal.4th at pp. 661–663.) The defendant who committed the provocative act is deemed the legal cause of the resulting death. (*Ibid.*) Any accomplice in the underlying crime shares responsibility for the murder as an aider and abettor, even if the accomplice did not commit his own provocative act, if the accomplice acted with personal malice. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 603, 612; *People v. Gonzalez* (2012) 54 Cal.4th 643, 655, superseded by SB 1437 as stated in *People v. Wilson* (2023) 14 Cal.5th 839, 868–869.)

Because post-*Concha* provocative act murder requires proof that the defendant personally harbored malice, it is a theory of murder that survives the changes to the murder laws made by SB 1437. (See, e.g., *People v. Mancilla* (2021) 67 Cal.App.5th 854, 867–868 ["For good reason, the argument provocative act murder is properly understood as a subset of the natural and probable consequences doctrine for purposes of Senate Bill 1437 and [former] section 1170.95 has been rejected by every court of appeal that has considered it"]; *People v. Swanson* (2020) 57 Cal.App.5th 604, 612–617 [same]; *People v. Johnson* (2020) 57 Cal.App.5th 257, 267–268 [same]; *People v. Venancio* (2025) 114 Cal.App.5th 593, 611 [post-*Concha* conviction for provocative act murder is valid and the petitioner is ineligible for section 1172.6 relief as a matter of law]; see *Antonelli, supra*, 17 Cal.5th at p. 729 [under *Concha*, "a nonprovocateur accomplice must personally harbor malice to be liable for murder"].) Accordingly, Mey was precluded from obtaining relief under section 1172.6 as a matter of law, and there is no indication that

the appointment of counsel could have changed the outcome of the prima facie hearing.

Mey nonetheless contends that he was not ineligible as a matter of law because the trial court's CALJIC No. 8.12 instruction allowed the jury to convict Mey as a nonprovocateur accomplice based on imputed rather than personal malice. We are not persuaded.

Pursuant to CALJIC No. 8.12, the jury was instructed that "[a] homicide committed during the commission of a crime by a person who is not a perpetrator of that crime, in response to an intentional provocative act by a perpetrator of the crime other than the deceased perpetrator, is considered in law to be an unlawful killing by the surviving perpetrators of the crime. [¶] . . . Where the underlying crime requires an intent to kill, . . . conduct necessary to commit the crime is sufficient to constitute the provocative act. [¶] *An aider and abettor to the underlying crime is equally liable for a provocative act committed by a surviving accomplice*." (Italics added.) The instruction defined an intentional provocative act as one that was intentionally committed, the natural consequences of which were dangerous to human life, and "deliberately performed with knowledge of the danger to, and with conscious disregard for, human life."

The instruction continued: "In order to prove this crime, each of the following elements must be proved: [¶] The crime of attempted murder and/or shooting into an inhabited dwelling was committed; [¶] During the commission of the crime, a surviving perpetrator, the defendant, also committed an intentional provocative act; or [¶] The crime committed included conduct comprising an intentional provocative act; [¶] Another person not a perpetrator of the attempted murder and/or shooting of an inhabited dwelling in response to the provocative act killed a perpetrator of

the crime; [¶] The defendant's surviving perpetrator's commission of the intentional provocative act was a cause of the death of the victim, Jordan Chhit."

Mey argues that the jury could have decided that he was not the provoker who shot first but a nonprovocateur accomplice who was found liable as an aider and abettor. Because the trial court's CALJIC No. 8.12 instruction stated that "[a]n aider and abettor to the underlying crime is equally liable for a provocative act committed by a surviving accomplice" without explicitly requiring that he be a direct aider and abettor who personally harbored malice, Mey insists that the jury could have found him guilty based on the imputed malice of others. To this end, he speculates that the jury could have concluded that he did not join the gunfight until after Chhit was shot because Mey was armed with a rifle and all the recovered rifle shells were found about a block farther from the house than the shells from the other firearms.

We find no likelihood that the jury construed CALJIC No. 8.12 to convict Mey on an imputed malice theory. (See *People v. Allen* (2023) 97 Cal.App.5th 389, 397 [applying reasonable likelihood standard]; *People v. Rushing* (2025) 109 Cal.App.5th 1025, 1032 [same]; but see *People v. Langi* (2022) 73 Cal.App.5th 972, 984 (*Langi*) [considering under section 1172.6 whether the jury instructions "conclusively negate the possibility that the jury" relied on a now-invalid theory].) The prosecutor did not argue to the jury that Mey should be convicted under this theory. Nor did defense counsel suggest that imputed malice would be sufficient, instead arguing that Mey was not guilty based on self-defense and insufficient evidence regarding identity. In fact, when addressing the prosecutor's provocative act murder theory, Mey's counsel agreed that the murder charge required "either a

specific intent to kill or a specific intent to go down there and shoot this place up." Furthermore, it is unlikely that the jury thought that Mey joined the fight after the first barrage of gunfire from the rival gang that killed Chhit, because it rejected Mey's self-defense claim.

Moreover, even if Mey could have been convicted as a nonprovocateur accomplice, the instructions as a whole informed the jury that to be liable on that basis, Mey must have personally harbored malice. Using CALJIC No. 3.00, the trial court instructed the jury that "the aider and abettor's guilt is determined by the combined acts of all the participants as well as *that person['s] own mental state*." (Italics added.) There is no reasonable likelihood that the jury construed CALJIC No. 3.00 to mean that Mey's guilt could be predicated upon the mental states of other participants in the crime. (See *Langi, supra*, 73 Cal.App.5th at p. 983 & fn. 13 [holding that aiding and abetting instruction (CALJIC No. 3.01), which did not require that an accomplice act with conscious disregard, was insufficient to preclude the possibility that the jury convicted appellant of murder by imputing malice, but noting that the post-trial amendment of CALJIC No. 3.00 now requires that the accomplice's liability turn on " '*that person['s] own mental state*' "].) Furthermore, the court's instruction based on CALJIC No. 3.14 told the jury that criminal intent is required for a defendant to be deemed an accomplice: "Merely assenting to or aiding or assisting in the commission of a crime without knowledge of the unlawful purpose of the perpetrator *and without the intent or purpose of committing, encouraging or facilitating the commission of the crime* is not criminal. Thus a person who assents to, or aids, or assists in, the commission of a crime without that knowledge and without that intent or purpose is not an accomplice in the commission of the crime." (Italics added.) Although SB 1437 and 775 "eliminate[d] liability for

murder as an aider and abettor under the natural and probable consequences doctrine" (*Curiel*, *supra*, 15 Cal.5th at p. 449), murder liability on a theory of direct aiding and abetting remains valid (*id*. at p. 462; *People v. Reyes* (2023) 14 Cal.5th 981, 990–991).

In sum, there is no reasonable probability that the instructions would have misled the jury into finding that Mey was liable as a nonprovocateur without personal malice. To the contrary, the jury instructions "conclusively negate the possibility that the jury" relied on an imputed malice theory. (*Langi, supra,* 73 Cal.App.5th at p. 984.) Because Mey was convicted under a provocative act theory post-*Concha*, as a matter of law, he was not entitled to relief under section 1172.6. Any error in failing to appoint counsel for Mey before the prima facie hearing was therefore harmless.

III. DISPOSITION

The order is affirmed.

CHOU, J.

We concur.

JACKSON, P. J.
SIMONS, J.

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