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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO MANUEL AISPURO, Defendant and Appellant.	E080938 (Super.Ct.No. FVI1000293) OPINION

APPEAL from the Superior Court of San Bernardino County. John P. Vander Feer, Judge. Affirmed.

Matthew Aaron Lopas, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sevidal, Lynne G. McGinnis and Susan Elizabeth Miller, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant Armando Manuel Aispuro appeals from the order summarily denying his petition for resentencing pursuant to Penal Code section 1172.6.[1] In 2010, Aispuro and a codefendant, Jorje Adrian Gonzalez, were convicted of the first degree murder of Nelson Bestillo Mendoza. (§§ 187, subd. (a), 189.) The prosecution claimed Gonzalez shot and killed Mendoza, and Aispuro directly aided and abetted the murder. Aispuro's jury was instructed on aiding and abetting (CALCRIM Nos. 400 & 401), homicide (CALCRIM No. 500), murder and malice (CALCRIM N. 520), and two theories of first degree murder: (1) willful, deliberate, and premeditated murder, and (2) murder by means lying in wait (CALCRIM No. 521). The jury was not instructed on felony murder or the natural and probable consequences doctrine.

Aispuro claims he stated a prima facie case for resentencing relief. He claims the instructions, including CALCRIM Nos. 401, 520, and 521, permitted his jury to convict him as a direct aider and abettor to first degree murder by means of lying in wait, without finding he acted with express or implied malice, but by imputing malice to him based solely on his participation in the crime. He relies on *People v. Maldonado* (2023) 87 Cal.App.5th 1257 (*Maldonado*), where the court found that a section 1172.6 petitioner, who stood convicted as a direct aider and abettor to first degree murder in 2013, made a prima facie showing based on a similar record of conviction.

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[1] Undesignated statutory references are to the Penal Code.

Notwithstanding whether Aispuro's claim of instructional error at his 2010 trial is correct (see *Maldonado*, *supra*, 87 Cal.App.5th at pp. 1264-1267), his section 1172.6 petition was properly denied at the prima facie stage. Aispuro has not made a prima facie showing of entitlement to resentencing relief because he has not shown that he "*could not presently be convicted of murder . . . because of changes to section 188 or 189 made effective January 1, 2019*" by Senate Bill No. 1437 (2017-2018 Reg.Sess.) (Senate Bill 1437). (§ 1172.6, subd. (a)(3), added by Stats. 2018, ch. 1015, § 1, subd. (f).)

At the time of Aispuro's murder trial in 2010, a defendant could not lawfully be convicted as a direct aider and abettor to first degree lying-in-wait murder based solely on the defendant's participation in the crime—on imputed malice. Rather, the conviction had to be based on the defendant's own malice. (*People v. Berry-Vierwinden* (2023) 97 Cal.App.5th 921, 935-937 (*Berry-Vierwinden*); see *People v. McCoy* (2001) 25 Cal.4th 1111, 1118 (*McCoy*.) Senate Bill 1437 did not change this law. (*Berry-Vierwinden*, at pp. 936-937.) Thus, we affirm the order denying Aispuro's petition at the prima facie stage.

II. FACTS AND PROCEDURE

A. *Aispuro's First-degree-murder Conviction*

In 2010, Aispuro and Gonzalez were tried together before separate juries and convicted of the first degree murder of Mendoza. The prosecution claimed Gonzalez shot and killed Mendoza and Aispuro aided and abetted the murder. The convictions were

upheld on appeal in *People v. Gonzalez* (Nov. 10, 2012, E052704) [nonpub. opn.] (*Gonzalez*).[2]

The evidence presented to Aispuro's jury showed that, on February 5, 2010, Mendoza was found lying on the ground near a vacant lot in Victorville with a gunshot wound to the back of his head. Mendoza died of the wound. Near where Mendoza was found, police saw tire impressions consistent with the tires on Aispuro's Jeep Cherokee. The Jeep was found abandoned with a bullet hole in the glove-box lid and an expended bullet inside the glove box. The carpet had been removed from the front passenger compartment, and stains resembling blood were on the front and back of the front passenger seat. (*Gonzalez, supra,* E052704.)

In a police interview, Aispuro said he and Mendoza went to a liquor store to buy drinks and met Gonzalez there. Aispuro only knew Gonzalez by his first name and knew Gonzalez was " 'bad business.' " Gonzalez got into the back seat of Aispuro's Jeep and asked for a ride to Gonzalez's house. Aispuro knew Gonzalez had a problem with Mendoza but did not think anything would happen. As Aispuro was driving, with Mendoza in the front passenger seat and Gonzalez in the back seat behind Mendoza, Gonzales told Aispuro " 'to look this way or whatever.' " Aispuro looked the other way,

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[2] Aispuro was also convicted of active gang participation (§ 186.22, subd. (a).) In addition, Aispuro's jury found gang enhancement allegations true (former § 186.22, subd. (b)), and that a principal personally used and personally discharged a firearm in the commission of the murder (§ 12022.53, subds. (a), (d), (e)(1)). In a bifurcated trial, the court found Aispuro had one prior serious felony conviction (§ 667, subd. (a)), one prior strike (§ 667, subds. (b)-(i)), and two prison priors (former § 667.5, subd. (b)). Aispuro was originally sentenced in 2011 to 3 years plus 75 years to life. In 2013, on remand following his direct appeal, Aispuro was resentenced to 5 years plus 75 years to life.

heard a gunshot, then saw blood. Gonzalez then pointed the gun at Aispuro and told him to keep driving. Gonzalez told Aispuro to drive to a dirt field where Gonzalez took Mendoza out of the Jeep and left him. (*Gonzalez*, *supra*, E052704.)

At trial, a witness testified that, on the morning of February 5, 2010, Aispuro and Mendoza left a motel room in Victorville and appeared to be arguing before they left. Before trial, Aispuro eventually admitted to police that Gonzalez knew Mendoza was at the motel with Aispuro that morning because Gonzalez called Aispuro, saying he wanted Aispuro to bring " 'that fool' " (Mendoza) to a park where Gonzalez wanted to "beat Mendoza's ass" because Mendoza had called Gonzalez a " 'bitch.' " Aispuro told police he thought Gonzalez would give Aispuro some drugs in exchange for bringing Mendoza to the park. Aispuro knew Gonzalez carried a gun. (*Gonzalez*, *supra*, E052704.)

Aispuro's jury was instructed on aiding and abetting (CALCRIM Nos. 400 & 401), homicide (CALCRIM No. 500), the elements of murder and malice (CALCRIM No. 520), and on two types of first degree murder: (1) willful, deliberate, and premeditated murder, and (2) murder by means of lying in wait (CALCRIM No. 521). The jury was instructed that all other murders are murder in the second degree (CALCRIM No. 521) and that "[t]he specific mental state required for the crime of murder is malice aforethought" (CALCRIM No. 251). The jury was not instructed on felony murder or the natural and probable consequences doctrine.

B. *Senate No. Bill 1437 and Related Legislation*

Effective January 1, 2019, Senate Bill 1437 "eliminated natural and probable consequences liability for murder as it applies to aiding and abetting, and limited the

scope of the felony-murder rule" by amending sections 188 and 189. (*People v Lewis* (2021) 11 Cal.5th 952, 959 (*Lewis*); §§ 188, subd. (a)(3), 189, subd. (e); Stats. 2018, ch. 1015, §§ 2-3.) Under sections 188 and 189 as amended, murder liability cannot be "imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f); *Lewis* at p. 959; *People v. Johns* (2020) 50 Cal.App.5th 46, 54.)[3] Senate Bill 1437 also added section 1170.95 to the Penal Code, creating a new procedure for persons convicted of felony murder, or murder under the natural and probable consequences doctrine, to seek retroactive relief under the amended provisions of sections 188 and 189. (*People v. Strong* (2022) 13 Cal.5th 698, 708 (*Strong*).)

Effective January 1, 2022, Senate Bill No. 775 (2021-2022 Reg. Sess.) "expanded the scope" of section 1170.95 to allow persons convicted of murder, attempted murder, or manslaughter, under a theory of felony murder or the natural and probable

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[3] Senate Bill 1437 eliminated natural and probable consequences liability for murder by adding the following language to section 188: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); *People v. Gentile* (2020) 10 Cal.5th 830, 842-843 (*Gentile*).) Senate Bill 1437 limited the felony-murder rule by adding subdivision (e) to section 189, which states: " 'A participant in the perpetration or attempted perpetration of [qualifying felonies] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life . . . ." (See *Gentile*, at p. 842.)

consequences doctrine, " '*or other theory under which malice is imputed to a person based solely on that* person's *participation in a crime*' " to petition for resentencing relief. (*People v. Langi* (2022) 73 Cal.App.5th 972, 978, quoting section 1170.95, subd. (a), as amended by Stats. 2021, ch. 551, § 2, italics added; Senate Bill 775.) Effective June 30, 2022, section 1170.95 was amended and renumbered as section 1172.6. (Stats. 2021, ch. 551, § 1, subd. (b); see *Strong*, *supra*, 13 Cal.5th at p. 708, fn. 2.)

Under section 1172.6, "the process begins with the filing of a petition containing a declaration that all requirements for eligibility are met," including that " '[t]he petitioner could not presently be convicted of murder or attempted murder because of the changes to [Penal Code] Section 188 or 189 made effective January 1, 2019,' the effective date of Senate Bill 1437." (*Strong*, *supra*, 13 Cal.5th at p. 708; § 1172.6, subd. (a)(3).) " 'When the trial court receives a petition containing the necessary declaration and other required information, the court must evaluate the petition "to determine whether the petitioner has made a prima facie case for relief." [Citations.] If the petition and record in the case establish conclusively that the defendant is ineligible for relief, the trial court may dismiss the petition. [Citations.] If, instead, the defendant has made a prima facie showing of entitlement to relief, "the court shall issue an order to show cause." ' " (*People v. Keel* (2022) 84 Cal.App.5th 546, 556.)[4]

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[4] The court is required to hold a hearing to determine whether the petitioner has made a prima facie showing of entitlement to resentencing relief. (§ 1172.6, subd. (c).) If, following that hearing, the court issues an order to show cause, it must hold an

[footnote continued on next page]

"At the prima facie stage, a court must accept as true a petitioner's allegation that he or she could not currently be convicted of a homicide offense because of changes to section 188 or 189 made effective January 1, 2019, unless the allegation is refuted by the record." (*People v. Curiel* (2023) 15 Cal.5th 433, 463; *Lewis*, *supra*, 11 Cal.5th at p. 971.) "The jury instructions are part of the record of conviction and may be reviewed to make the prima facie determination." (*People v. Bodely* (2023) 95 Cal.App.5th 1193, 1200 (*Bodely*).)

C. *Aispuro's Resentencing Petition*

Aispuro filed his petition for resentencing on December 7, 2022 (§ 1172.6), claiming he could "not presently be convicted of murder" under Senate Bill 1437. The court appointed counsel to represent Aispuro, and briefs were filed in support of and in opposition to the petition. The court summarily denied the petition at a hearing on March 10, 2023. The court noted Aispuro "appeared" to be statutorily ineligible for relief because he was not convicted of murder under the felony-murder rule or the natural and probable consequence doctrine. Aispuro timely appealed.

III. DISCUSSION

Aispuro claims his petition for resentencing was erroneously denied at the prima facie stage. He claims he stated a prima facie case for resentencing relief because the instructions, including CALCRIM Nos. 401, 520 and 521, allowed his jury to convict him of lying-in-wait murder by imputing malice to him based solely on his participation

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evidentiary hearing to determine whether to vacate the murder conviction and resentence the petitioner on any remaining counts. (§ 1172.6, subds. (c) & (d)(1).)

in the crime of the murder, without necessarily finding he personally acted with malice aforethought, express or implied.

We independently review the denial of a section 1172.6 petition at the prima facie stage. (*Bodely*, *supra*, 95 Cal.App.5th at p. 1200; *People v. Coley* (2022) 77 Cal.App.5th 539, 543.) To state a prima facie case for resentencing relief under section 1172.6, a petitioner convicted of murder before January 1, 2019 must make three showings in a petition for resentencing: "(1) the accusatory pleading allowed prosecution on a theory of felony murder, the natural and probable consequences doctrine, or some other theory by which malice is imputed based solely on participation in a crime; (2) the conviction followed a trial or guilty plea; and (3) *the petitioner could not now be convicted of murder* '*because of changes to Section 188 or 189 made effective January 1, 2019.*' " (*People v. Flores* (2023) 96 Cal.App.5th 1164, 1171, italics added; § 1172.6, subd. (a).) Aispuro cannot satisfy the third condition. (§ 1172.6, subd. (a)(3).)

Under section 188, subdivision (a)(3), as amended effective January 1, 2019, by Senate Bill 1437, a defendant cannot be convicted of murder based on imputed malice. (See *Johns*, *supra*, 50 Cal.App.5th at p. 54.) But as our colleagues in Division One of this court recently explained, "Senate Bill 1437 did not *change* the law to prohibit direct aider and abettor liability on an imputed malice theory—this was already settled California law" in 2010. (*Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936.)

Berry-Vierwinden involved a petition for resentencing substantially similar to Aispuro's petition. Like Aispuro, the petitioner was convicted of first degree murder in 2010; he was prosecuted as a direct aider and abettor; his jury was instructed on direct

aiding and abetting, murder and malice, and lying-in-wait murder, pursuant to CALCRIM Nos. 401, 520, and 521, but not on felony murder or on the natural and probable consequences doctrine. (*Berry-Vierwinden*, *supra*, 97 Cal.App.5th at pp. 926-929.) Relying on *Maldonado*, as Aispuro does here, the petitioner claimed he was entitled to resentencing because the record of his conviction showed he may have been convicted of directly aiding and abetting a lying-in-wait murder based solely on his participation in the crime—that is, based on imputed malice, without a finding he acted with malice. (*Berry-Vierwinden*, at pp. 931-932; *Maldonado*, *supra*, 87 Cal.App.5th at pp. 1264-1267.)

Maldonado involved a section 1172.6 petitioner, convicted of first degree murder in 2013, who claimed he was entitled to resentencing relief because he could have been convicted of lying-in-wait murder as a direct aider and abettor based on his participation in the crime, that is, based on imputed malice. (*Maldonado*, *supra*, 87 Cal.App.5th at pp. 1259, 1265-1267.) *Maldonado* held the petitioner stated a prima facie case for relief because, under the instructions, including CALCRIM Nos. 401, 520, and 521, the petitioner's jury *could have* convicted him based solely on his participation in the crime, without finding he personally acted with malice. (*Maldonado*, at pp. 1264-1267; see *Berry-Vierwinden*, *supra*, 97 Cal.Ap.5th at p. 932 [discussing *Maldonado*].)

Maldonado relied on *People v. Powell* (2021) 63 Cal.App.5th 689 (*Powell*) and *Langi*, *supra*, 73 Cal.App.5th 972. (*Maldonado*, *supra*, 87 Cal.App.5th at pp. 1264-1267.) The court in *Berry-Vierwinden* aptly summarized the decisions in *Powell, Langi*, and *Maldonado*: "In *Powell,* a direct appeal, the court ruled that CALCRIM No. 401 on direct aiding and abetting liability was 'not tailored' for aiding and abetting a second

degree implied malice murder, because it did not make clear that the aider and abettor must 'intend the commission of the perpetrator's *act*, the natural and probable consequences of which are dangerous to human life, intentionally aid in the commission of that *act* and do so with conscious disregard for human life.' (*Powell*, at p. 714.) In *Langi*, the court extended this holding to a section 1172.6 proceeding and concluded that the instructional error identified in *Powell* permitted the jury to convict the defendant of aiding and abetting a second degree murder on a theory of imputed malice, making him eligible for relief under the statute as amended by Senate Bill No. 775. (*Langi*, at pp. 978–984.) *Maldonado* in turn found that, because first degree murder by lying in wait may also be based on implied malice, the reasoning of *Langi* similarly applied to a conviction of aiding and abetting first degree murder by lying in wait under CALCRIM Nos. 401, 520, and 521. (*Maldonado*, at p. 1266)." (*Berry-Vierwinden*, *supra*, 97 Cal.App.5th at pp. 932-933.)

Berry-Vierwinden declined to follow *Maldonado* and *Langi.* The court explained that when the petitioner in the case before it was tried for murder in 2013, "California law was already clear that a direct aider and abettor could not be convicted of lying-in-wait murder on an imputed malice theory. Specifically, our Supreme Court had ruled that: (1) the perpetrator of a first degree murder by means of lying in wait must act with malice aforethought [citations]; and (2) a direct aider and abettor of murder must at a minimum 'know and share the murderous intent of the actual perpetrator.' " (*Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 935, quoting *McCoy*, *supra*, 25 Cal.4th at p. 1118; see *Gentile*, *supra*, 10 Cal.5th at p. 844 [citing *McCoy* for the principal that "when a person

directly aids and abets a murder, the aider and abettor must possess malice aforethought"]; *Flores*, *supra*, 96 Cal.App.5th at p. 1173, & fn. 4; *People v. Burns* (2023) 95 Cal.App.5th 862, 868 (*Burns*).)

Thus, the *Berry-Vierwinden* court disagreed with *Maldonado* and *Langi* "to the extent" these decisions "can be read to suggest" that the claims of malice-related instructional error in those cases "may be asserted as a basis for section 1172.6 relief—even if the alleged error could have been raised on direct appeal under then-existing law not changed by Senate Bill No. 1437 . . . ." (*Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936.) The court noted that *Maldonado* and *Langi* "did not consider the language" of section 1172.6, subdivision (a)(3), which requires petitioners convicted of murder to show they " 'could not presently be convicted of murder . . . *because of changes* to Section 188 or 189' made effective by Bill No. 1437." (*Berry-Vierwinden*, at p. 936, quoting § 1172.6, subd. (a)(3).) These " ' "changes" ' " plainly " 'refer to the substantive amendments to sections 188 and 189' " enacted by Senate Bill 1437. (*Berry-Vierwinden,* at p. 935, quoting *Curiel*, *supra*, 15 Cal.5th at p. 461.) Because Senate Bill 1437 did not change the law in effect at the time of the petitioner's 2013 trial—that a direct aider and abettor to murder must act with malice—the petitioner in *Berry-Vierwinden* could not state a prima facie case for resentencing relief. (*Berry-Vierwinden*, at pp. 936-937.)

Here, too, Aispuro's petition does not state a prima facie case for resentencing relief. Like the petitioner in *Berry-Vierwinden*, Aispuro claims he is entitled to relief based on an ambiguity in CALCRIM Nos. 401, which, in combination with CALCRIM Nos. 520 and 521, permitted his jury to convict him of lying-in-wait murder based on

imputed malice. (*Berry-Vierwinden*, *supra*, 97 Cal.App.5th at p. 936 .) This claim is not cognizable in a section 1172.6 petition because it is not based on the substantive changes that Senate Bill 1437 made to sections 188 or 189, effective January 1, 2019. (*Berry-Vierwinden*, at p. 936; § 1172.6, subd. (a)(3).) Aispuro could have advanced the same claim in his direct appeal from his 2010 murder conviction, and he has forfeited the claim by failing to raise it in his direct appeal. (*Burns*, *supra*, 95 Cal.App.5th at pp. 867-868.) Aispuro's petition was properly denied at the prima facie stage.

IV. DISPOSITION

The March 10, 2023 order denying the section 1172.6 petition is affirmed.

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FIELDS
J.

We concur:

MILLER
Acting P. J.

MENETREZ
J.