

ACCOMPLICE LIABILITY FOR MURDER (SB 1437 and SB 775)



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Judge of the Superior Court
County of Placer (Ret.)

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I. INTRODUCTION

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), enacted by the Legislature and effective January 1, 2019, made substantial changes to the law relating to the liability of an accomplice under California’s felony-murder rule and doctrine of natural and probable consequences.¹ The legislation has three primary components: (1) a restriction on the ability to prosecute a person for murder when the person is not the actual killer; (2) elimination of the “natural and probable consequences” doctrine applicable to murder, and, possible elimination of second degree felony murder; and (3) the establishment of a resentencing procedure in Penal Code, section 1170.95² for certain persons convicted of murder under the law prior to January 1, 2019.

Briefly summarized, SB 1437 requires a principal in the commission of murder to act with malice aforethought unless the defendant was a participant in the commission or attempted commission of a designated felony where a person was killed *and either* (1) the defendant was the actual killer; (2) the defendant was not the actual killer but, *with intent to kill*, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in committing murder in the first degree; or (3) the defendant was a major participant in the underlying designated felony *and* acted with reckless indifference to human life. Malice may not be imputed to the defendant simply from participation in the designated crime.

Section 1170.95 has been further amended. Senate Bill No. 775 (2021-2022 Reg. Leg. Sess.) (SB 775), amends section 1170.95 regarding the procedure for resolving motions requesting resentencing based on the change of the law relating to accomplice liability. Section 1 of SB 775 states the Legislature’s intent:

“The Legislature finds and declares that this legislation does all of the following:

- (a) Clarifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories.
- (b) Codifies the holdings of *People v. Lewis* (2021) 11 Cal.5th 952, 961-970, regarding petitioners’ right to counsel and the standard for determining the existence of a prima facie case.

¹ Appendix I, *infra*, contains the full text of SB 1437 as amended by SB 775.

² Unless otherwise indicated, all further statutory references are to the Penal Code.

(c) Reaffirms that the proper burden of proof at a resentencing hearing under this section is proof beyond a reasonable doubt.

(d) Addresses what evidence a court may consider at a resentencing hearing (clarifying the discussion in *People v. Lewis, supra*, at pp. 970-972)."

II. LAW PRIOR TO JANUARY 2019

"Murder" is defined in section 187, subdivision (a), as "the unlawful killing of a human being, or a fetus, with malice aforethought." Malice "may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)

A. First degree felony murder

Murder may be of the first or second degree: "All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, *or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy], 287 [oral copulation], 288 [lewd act on a child], or 289 [sexual penetration], or former section 288a,⁴* or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree." (§ 189, subd. (a), italics added.) "All other kinds of murders are of the second degree." (*Id.*, subd. (b).)

The reference in section 189 to the designated crimes comprises the California first degree felony-murder rule. If the killing occurs while committing one of the designated crimes, a showing of actual malice is not required. (*People v. Dillon* (1983) 34 Cal.3d 441, 450, 475 (*Dillon*).) "Under the felony-murder rule, a killing, whether intentional or unintentional, is first degree murder if committed in the perpetration of, or the attempt to perpetrate, certain serious felonies. (Citations.) The ordinary mental-state elements of first degree murder—malice and premeditation—are eliminated by the doctrine. The only criminal intent required to be proved is the specific intent to commit the particular underlying felony." (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385 (*Chavez*).)

B. Second degree felony murder

A defendant also may be convicted of second degree felony murder. The Supreme Court explained the distinction between first degree and second degree felony murder in *People v.*

⁴ Section 288a has been amended and renumbered by SB 1494 as section 287, effective January 1, 2019.

Chun (2009) 45 Cal.4th 1172 (*Chun*): “We have said that first degree felony murder is a ‘creation of statute’ (i.e., § 189) but, because no statute specifically describes it, that second degree felony murder is a ‘common law doctrine.’ [Citation.] First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is ‘an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189’ [Citation.] [¶] In [*People v. Patterson* (1989) 49 Cal.3d 615], Justice Kennard explained the reasoning behind and the justification for the second degree felony-murder rule: ‘The second degree felony-murder rule eliminates the need for the prosecution to establish the *mental* component [of conscious-disregard-for-life malice]. The justification therefor is that, when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life because, by declaring the conduct to be felonious, society has warned him of the risk involved. The *physical* requirement, however, remains the same; by committing a felony inherently dangerous to life, the defendant has committed “an act, the natural consequences of which are dangerous to life” [citation], thus satisfying the physical component of implied malice.’ [Citation.]” (*Chun*, at p. 1182, italics original.)

C. Doctrine of natural and probable consequences

The doctrine of natural and probable consequences addresses the liability of an aider and abettor for a crime occurring during the commission of an intended offense. As our Supreme Court explained: “It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also ‘for any other offense that was a “natural and probable consequence” of the crime aided and abetted’ [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*)).

“We have described the mental state required of an aider and abettor as ‘different from the mental state necessary for conviction as the actual perpetrator.’ [Citation.] The difference, however, does not mean that the mental state of an aider and abettor is less culpable than that of the actual perpetrator. On the contrary, outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator. ‘To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted “with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” [Citation.] When the offense charged is a specific intent crime, the accomplice must “share the specific intent of the perpetrator”; this occurs when the accomplice “knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.” [Citation.] [Citation.]” (*McCoy, supra*, 25 Cal.4th at pp. 1117–1118, italics original.)

“The natural and probable consequences doctrine ‘allows an aider and abettor to be convicted of murder, without malice, even where the target offense is not an inherently dangerous felony.’ [Citation.]” (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1026.)

In *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), our Supreme Court held “an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]” (*Chiu*, at pp. 158–159, italics original.) Accordingly, persons convicted of murder based on the doctrine of natural and probable consequences will be deemed to have been convicted of murder in the second degree.

The natural and probable consequences doctrine can apply to any crime committed during the commission of another crime (the “target” offense). The doctrine is most frequently applied in homicide cases.

III. EFFECTIVE DATES OF SB 1437 AND SB 775

SB 1437 was passed by the Legislature and signed by the governor on September 30, 2018. Because the legislation contains no form of a “savings clause” requiring a different effective date, the legislation became effective on January 1, 2019. (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488.) Accordingly, the statute clearly applies to all crimes occurring on or after that date. Undoubtedly the new provisions also apply to any crimes committed prior to January 1, 2019 but sentenced after that date. (See *People v. Lara* (2019) 6 Cal.5th 1128, 1131, [persons convicted prior to but sentenced after the effective date of Proposition 47 are entitled to be sentenced under the new law].)

A. Effective date of resentencing provisions created by SB 1437

Section 1170.95, which establishes the right of a defendant convicted under a theory of felony murder or natural and probable consequences to petition for resentencing, became effective on January 1, 2019. The right is granted to “a person convicted” of such crimes without any restriction based on when the crime occurred. Accordingly, the right to request resentencing is available to any person whose conviction is final, regardless of when the crime or conviction occurred.

B. The application of *Estrada* to persons sentenced prior to January 1, 2019

There remains the question of the proper application of SB 1437 to persons who have been found guilty by plea or jury and sentenced prior to January 1, 2019, but whose cases are not final as of that date. The issue is whether the defendant will be entitled to an automatic dismissal of the homicide conviction and resentencing, or whether the defendant must first

apply for dismissal through the provisions of section 1170.95. Whether the amendments made by SB 1437 are applied retroactively to crimes committed prior to January 1, 2019, depends on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

People v. Gentile (2020) 10 Cal.5th 830, holds that a petition pursuant to section 1170.95 is the exclusive means for a defendant to obtain vacatur of a conviction of murder based on the theory of NPC. Because the Legislature created section 1170.95, that section, not *Estrada*, applies. The conviction may not be challenged by direct appeal even though the case was not final at the time AB 1437 was enacted. (*Gentile, supra*, 10 Cal.5th at pp. 851-854.)

People v. Thomas (2021) 64 Cal.App.5th 924, holds a defendant convicted of murder based on accomplice liability prior to January 1, 2019, but who is sentenced after that date, is entitled to a new trial.

C. Application of SB 775 to cases not final as of January 1, 2022

In anticipation of litigation over the application of *Estrada* to cases not final as of January 1, 2022, the effective date of SB 775, section 1170.95, subdivision (g), provides: “A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018).” Thus, the change to section 1170.95 clearly will be applicable to any sentence imposed after January 1, 2022, and to any case not final as of January 1, 2022.

Without reference to subdivision (g), *People v. Montes* (2021) 71 Cal.App.5th 1001 (*Montes*), applied the provisions of SB 775 to a case pending appeal. “The first question before us is whether the new legislation—Senate Bill No. 775—applies to appellant’s pending appeal. New legislation generally applies to all judgments which are not final as of the effective date of the new statute. [Citations.] Where it is unlikely that a judgment will be final by the effective date of new legislation, courts have remanded matters to the trial courts so that the new statute can be applied after its effective date. [Citation.] [¶] Both parties acknowledge in their supplemental briefs that the order here will not be final until after the effective date of Senate Bill No. 775. To promote judicial economy and efficiency, we opt to apply the revised provisions set forth in Senate Bill No. 775 to appellant’s case now. Doing so means that appellant is eligible for resentencing relief under section 1170.95 by virtue of his attempted murder conviction so long as appellant was convicted under a natural and probable consequences theory.” (*Montes, supra*, 71 Cal.App.5th at pp. 1006-1007.)

People v. Porter (2022) 73 Cal.App.5th 644, holds the amendment made by SB 775 to section 1170.95 to add attempted murder as an eligible offense applies to cases not final as of January 1, 2022.

IV. AMENDMENT OF FELONY-MURDER RULE

SB 1437 amends Section 189 in the following material respects:⁷

- (a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287⁸, 288, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.
- (b) All other kinds of murders are of the second degree.
- (c) As used in this section, the following definitions apply:
 - (1) “Destructive device” has the same meaning as in Section 16460.
 - (2) “Explosive” has the same meaning as in Section 12000 of the Health and Safety Code.
 - (3) “Weapon of mass destruction” means any item defined in Section 11417.
- (d) To prove the killing was “deliberate and premeditated,” it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.
- (e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) 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

⁷ Underscored text indicates language added by SB 1437.

⁸ Former section 288a, oral copulation, was repealed and renumbered by SB 1494 to section 287, effective January 1, 2019.

assisted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(4) The victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

IV. The felony-murder rule as amended by SB 1437

A. New felony-murder rule

SB 1437 substantially alters the traditional first degree felony-murder rule by permitting such a conviction only if the defendant commits or attempts to commit one of the designated offenses *and* at least one of the following circumstances is proven:

- (1) The defendant is the actual killer;
- (2) The defendant is 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
- (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in section 190.2, subdivision (d).
- (4) The victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

(§ 189, subds. (e), (f).)

It is important to understand that SB 1437 only changes first degree felony murder with respect to accomplices when the target offense is a felony designated in section 189, subdivision (a).

The new provisions make no change to the law when the defendant is being prosecuted as a direct accomplice to the crime of murder. As an example, if defendants A and B plan and participate in the crime of robbery and the victim is killed by defendant A, SB 1437 will define the circumstances under which defendant B may be convicted of first degree felony murder. SB 1437, however, makes no change to the liability of defendant B if both defendants A and B planned to murder the victim and it happens that defendant A pulled the trigger – under these circumstances, defendant B may be convicted of murder as a principal in the commission of the crime.

B. Exceptions to new rule

The following are factual exceptions to the new felony murder rule. If any of these circumstances are proven, the defendant still may be convicted of first degree murder with the application of the felony-murder rule.

1. Defendant is the killer (§ 189, subd. (e)(1))

The defendant, as a participant in one of the designated crimes, may be convicted of first degree felony murder if the defendant is the actual killer. (§ 189, subd. (e)(1).) The degree of the defendant's participation in the underlying felony is immaterial to the application of the rule. If a person is killed during the commission or attempted commission of one of the designated felonies and the defendant is the killer, the defendant may be convicted of first degree murder. If the killing occurs while committing one of the designated crimes, a showing of actual malice is not required. (*People v. Dillon* (1983) 34 Cal.3d 441, 450, 475.) "Under the felony-murder rule, a killing, whether intentional or unintentional, is first degree murder if committed in the perpetration of, or the attempt to perpetrate, certain serious felonies. (Citations.) The ordinary mental-state elements of first degree murder—malice and premeditation—are eliminated by the doctrine. The only criminal intent required to be proved is the specific intent to commit the particular underlying felony." (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385.)

2. Defendant is not the killer, but aided the killing (§ 189, subd. (e)(2))

The defendant, as a participant in one of the designated crimes, may be convicted of first degree felony murder if, with the intent to kill, the defendant aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (§ 189, subd. (e)(2).) To apply the felony-murder rule under these circumstances, it need be shown only that in assisting the actual killer, the defendant had the specific intent to kill the victim. As noted in *Dillon* and *Chavez*, a showing of actual malice and premeditation is not required.

The prosecution also must establish that the actual killer committed first degree murder. Presumably this element may be established by proof of the killing with malice and premeditation, or by the fact the actual killer committed the homicide while committing one of the felonies designated in section 189, subdivision (a).

3. Defendant was a major participant in the crime and acted with reckless indifference (§ 189, subd. (e)(3))

The defendant may be convicted of first degree felony murder if he is a major participant in the commission or attempted commission of one of the designated crimes and acts with reckless indifference to human life. (§ 189, subd. (e)(3).) As noted in *Dillon* and *Chavez*, a showing of actual malice and premeditation is not required.

Section 189, subdivision (e)(3), in its reference to “major participant” and “reckless indifference,” incorporates the description in section 190.2, subdivision (d): “Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.” The purpose of the cross-reference in section 189 to the language in section 190.2, subdivision (d), is unclear. However, at least as to the special circumstance allegation under section 190.2, subdivisions (c) and (d), the amendment aligns California law with the United States Supreme Court decision in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*).

a. Major participant

“Major participant” has been variously defined by the appellate courts:

- “We have recently examined the issue of ‘under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty.’ [Citation.] The ultimate question pertaining to being a major participant is ‘whether the defendant’s participation “in criminal activities known to carry a grave risk of death” [citation] was sufficiently significant to be considered “major” [Citation]’ [Citation.] Among the relevant factors in determining this question, we set forth the following: ‘What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a

position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used? [Citation.]” (*People v. Clark* (2016) 63 Cal.4th 522, 611 (*Clark*).

- Of the foregoing factors, *People v. Banks* (2015) 61 Cal.4th 788, 803, observed: “No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation ‘in criminal activities known to carry a grave risk of death’ [citation] was sufficiently significant to be considered ‘major’ [citations.]”
- “A major participant need not be the ringleader [citation], but a ringleader is a major participant [citation].” *Williams* (2015) 61 Cal.4th 1244, 1281.)
- “[I]t is significant to note there is significant overlap ‘between the two elements, being a major participant, and having reckless indifference to human life, . . . “for the greater the defendant’s participation in the felony murder, the more likely that he acted with reckless indifference to human life.” [Citation.]’ [Citation.] ‘The high court [in *Tison*] also stated: “Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.” [Citation.] In *Banks*, we observed that *Tison* did not specify “those few felonies for which any major participation would ‘necessarily exhibit[] reckless indifference to the value of human life.’ ” ’ [Citation.] We surmised a possible example would be “the manufacture and planting of a live bomb.” [Citation.] Yet we also concluded that armed robbery, by itself, did not qualify. [Citation.]’ [Citation.]” (*In re Bennett* (2018) 26 Cal.App.5th 1002, 1015–1016 (*Bennett*).

b. Reckless indifference to human life

“Reckless indifference to human life” also has been defined by the courts:

- “ ‘ “[R]eckless indifference to human life” is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.’ [Citation.] Thus, ‘the culpable mental state of “reckless indifference to life” is one in which the defendant “knowingly engag[es] in criminal activities known to carry a grave risk of death” [citation] . . . ’ [Citation.] [¶] ‘The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create.’

[Citation.] ‘[I]t encompasses a willingness to kill (or to assist in another killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.’ [Citation.]” (*Bennett, supra*, 26 Cal.App.5th at p. 1021.)

- In *Clark*, the Supreme Court highlighted a number of factors relevant to the determination of reckless indifference: the defendant’s knowledge of weapons, and the use and number of weapons; the defendant’s proximity to the crime and opportunity to stop the killing or aid the victim; the duration of the offense conduct, that is, whether a murder came at the end of a prolonged period of restraint of the victims by defendant; the defendant’s awareness his or her confederate was likely to kill; and the defendant’s efforts to minimize the possibility of violence during the crime. (*Clark, supra*, 63 Cal.4th at pp. 618-623.)

People v. Bradley (2021) 65 Cal.App.5th 1022 (*Bradley*), found sufficient evidence to uphold a finding the defendant acted with reckless indifference to human life in committing a robbery where the defendant was personally armed. “Defendants fail to identify a single case in which a defendant actively participated in a robbery, wielded a firearm during that robbery, and was present for the shooting, but an appellate court found insufficient evidence to support a finding that the defendant acted with reckless indifference for human life. Nor are we aware of any. In considering the *Clark* factors, defendants’ culpability is greater than that set forth in those cases on which they rely, namely *Banks, Clark, Scoggins, Taylor, In re Bennett*, and *Ramirez*. We conclude the evidence relevant to the *Clark* factors, when considered in total, sufficiently supports the judgment.” (*Bradley, supra*, 65 Cal.App.5th at p. 1036.)

4. Exception for death of a peace officer (§ 189, subd. (f))

The only exception to the new felony-murder rule is when the victim of the homicide is a peace officer: “Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.” (§ 189, subd. (f).) If the defendant is a participant in one of the designated crimes and while committing the felony a peace officer is killed, the defendant may be convicted of first degree felony murder without any additional showing of malice or premeditation. (*People v. Hernandez* (2021) 60 Cal.App.5th 94 (*Hernandez*). The defendant may be convicted of felony murder without proof the defendant was the actual killer, that the defendant, with the intent to kill, assisted in the commission of the killing, or that the defendant was a major participant in the underlying felony and acted with reckless indifference to human life. (*Id.*, at pp. 199-200.)

V. ELIMINATION OF THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

A. First degree murder

SB 1437 eliminates the natural and probable consequences (NPC) doctrine as applied to the crime of first degree murder. It amends section 188 in the following material respects:

- (a) For purposes of Section 187, malice may be express or implied.⁹
 - (1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.
 - (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
 - (3) 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.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

Section 1 of SB 1437, the legislation's preamble, provides, in part:

- (f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.
- (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

SB 1437 in its amendment of section 188, coupled with the declaration of intent in section 1, clearly indicates an intent to eliminate NPC and permit a conviction of first

⁹ Underscored text indicates language added by SB 1437.

degree murder only if there is something more than a person's participation in a non-homicide target offense. The elimination occurs as a result of two changes to section 188: (1) the addition of the requirement that to be convicted of any murder (except for felony murder according to section 189, subdivision (e)), the defendant must act with malice aforethought; and (2) the inability to use mere participation in a target offense as a basis to impute malice to the non-killer.

The continued use of NPC conflicts directly with the intent of SB 1437 as stated in its preamble. *Chiu, supra*, 59 Cal.4th 155 explained the nature of NPC regarding the intent of the perpetrator: "Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature. [Citations.] 'By its very nature, aider and abettor culpability under *the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor* to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is *irrelevant* and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.' [Citation.]" (*Chiu*, at p. 164, italics added.) The italicized language in *Chiu* conflicts directly with the stated intent of SB 1437 in section 1, subdivision (g), of the preamble that specifies a "person's culpability for murder must be premised upon that person's own actions and subjective mens rea." (Stats. 2018, ch. 1015, § 1, subd. (g).)

B. Second degree murder

People v. Gentile (2020) 10 Cal.5th 830 (*Gentile*), holds SB 1437 eliminates the doctrine of natural and probable consequences as applied to second degree murder. "The most natural meaning of [section 188(a)(3)], construed in the context of Senate Bill 1437 as a whole and in the context of the Penal Code, bars a conviction for first or second degree murder under a natural and probable consequences theory. Except for felony murder, section 188(a)(3) makes personally possessing malice aforethought a necessary element of murder. Natural and probable consequences liability for murder contains no such requirement. [¶] The language of section 188(a)(3) requires a principal to 'act with malice aforethought' in order to be convicted of murder, making no exception for accomplices or second degree murder. (§ 188(a)(3).) By its terms, section 188(a)(3) permits a second degree murder conviction only if the prosecution can prove the defendant acted with the accompanying mental state of mind of malice aforethought. The prosecution cannot 'impute[] [malice] to a person based solely on his or her participation in a crime.' (*Ibid.*)" (*Gentile, supra*, 10 Cal.5th at p. 846.)

Whether SB 1437 or SB 775 has eliminated the NPC doctrine as to attempted murder

People v. Sanchez (2022) 75 Cal.App.5th 191 (*Sanchez*), holds SB 775 eliminated the NPC doctrine to prove an accomplice committed attempted murder. “SB 775 amended section 1170.95. As relevant, it now reads: ‘A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018).’ (§ 1170.95, subd. (g).) Because section 188, subdivision (a)(3), prohibits imputing malice based solely on participation in a crime, the natural and probable consequences doctrine cannot prove an accomplice committed attempted murder. Accordingly, the natural and probable consequences doctrine theory urged in the underlying trial is now invalid.” (*Sanchez, supra*, 75 Cal.App.5th at p. 196, footnote omitted.)

VI. OTHER ISSUES RELATED TO AMENDMENT OF SECTIONS 188 AND 189

A. Whether SB 1437 eliminates second degree felony murder

It is not clear whether SB 1437 has eliminated the crime of second degree felony murder. Certainly there is nothing in the legislation that expressly eliminates the offense. However, there is language in SB 1437 that strongly suggests the crime, in fact, has been eliminated.

As observed by our Supreme Court in *People v. Chun* (2009) 45 Cal.4th 1172, 1182 (*Chun*): “We have said that first degree felony murder is a ‘creation of statute’ (i.e., § 189) but, because no statute specifically describes it, that second degree felony murder is a ‘common law doctrine.’ (*People v. Robertson* (2004) 34 Cal.4th 156, 166, 17 Cal.Rptr.3d 604, 95 P.3d 872 (*Robertson*)). First degree felony murder is a killing during the course of a felony specified in section 189, such as rape, burglary, or robbery. Second degree felony murder is ‘an unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189....’ [Citation.]”

In its preamble, SB 1437 states that “[t]he power to define crimes and fix penalties is vested exclusively in the Legislative branch.”¹⁰ (Stats. 2018, ch 1015, § 1, subd. (a).) In other words, unless the Legislature says that certain conduct is a crime, it is not a crime, notwithstanding a common law doctrine to the contrary.

Chun also observed that “the [second degree] felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life. [Citation.]” (*Chun, supra*, 45 Cal.4th at p. 1184.) The imputing of malice based on the defendant’s simple participation in a target felony is now prohibited by section 188, subdivision (a)(3). Mere participation in a felony “inherently dangerous to human

¹⁰ Perhaps the reference to the “exclusive” authority of the Legislature is a bit overbroad – it ignores the power of the voters to define crimes by initiative and referendum.

life” without any of the additional factors specified in section 189, subdivision (e), is insufficient to show the defendant acted with the requisite reckless indifference to human life. felony is now prohibited by section 188, subdivision (a)(3).

SB 1437 retained, but severely limited, the use of the first degree felony-murder rule (defined in section 189, subdivisions (a) and (e)), as the only exception to the requirement that a principal act with malice aforethought in committing the crime of murder. There is no similar exception for the crime of second degree felony murder. Indeed, the legislation expressly provides that the requisite malice may not be imputed to a person based solely on participation in the target felony. (§ 188, subd. (a)(3).) And, of course, if the prosecution can prove the defendant acted with malice, there is no need to use the felony-murder rule.

An argument can be made, however, that SB 1437 did not eliminate second degree felony murder. In *Chun*, the Supreme Court observed that “the Legislature’s replacement of the proviso language of section 25 of the Act of 1850 with the shorthand language ‘not amounting to felony’ in section 192 did not imply an abrogation of the common law felony-murder rule. The ‘abandoned and malignant heart’ language of both the original 1850 law and today’s section 188 contains within it the common law second degree felony-murder rule. The willingness to commit a felony inherently dangerous to life is a circumstance showing an abandoned and malignant heart. The second degree felony-murder rule is based on statute and, accordingly, stands on firm constitutional ground.” (*Chun, supra*, 45 Cal.4th at pp. 1187-1188.) Since SB 1437 did not remove the “abandoned and malignant heart” language from section 188, it may be argued that it did not remove the crime of second degree felony murder.

B. The relationship between the felony-murder rule and special circumstance felony-murder enhancement for accomplices

Some have claimed there is now no legal difference between the special circumstance felony-murder accomplice enhancement under section 190.2, subdivision (d), and first degree felony murder accomplice liability under section 189, subdivision (e)(3).

Under the law prior to the enactment of SB 1437, first degree murder was committed if the killing occurred in “the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206 [torture], 286 [sodomy], 288 [lewd act on a child], 288a [oral copulation], or 289 [sexual penetration].” (§ 189.) If the killing occurred while committing one of the designated crimes, a showing of actual malice was not required. (*People v. Dillon* (1983) 34 Cal.3d 441, 450, 475 (*Dillon*).) “Under the felony-murder rule, a killing, whether intentional or unintentional, is first degree murder if committed in the perpetration of, or the attempt to perpetrate, certain serious felonies. (Citations.) The ordinary mental-state elements of first degree murder—malice and premeditation—are eliminated by the doctrine. The only criminal intent required to be proved is the specific intent to commit the particular underlying felony.” (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385 (*Chavez*).)

As noted above, SB 1437 changed the felony-murder rule by limiting its application to when: (1) the defendant is the actual killer; (2) the defendant is not the actual killer, but with the intent to kill, aids the actual killer in the commission of the murder; or (3) the defendant is a major participant in the underlying crime and acts with reckless indifference to human life, as defined in section 190.2, subdivision (d).

Section 190.2 establishes the list of special circumstances where the defendant may receive the death penalty or life in prison without the possibility of parole. Section 190.2, subdivision (d), provides: “Notwithstanding subdivision (c) [requiring an accomplice to have an intent to kill], every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.” In other words, if the defendant is guilty of first degree murder by application of the felony-murder rule, and in committing the crime acts “with reckless indifference to human life and as a major participant,” aids in the commission of the underlying felony, the special circumstance enhancement may be imposed.

Application of sections 189 and 190.2 must observe their subtle distinctions:

- The defendant may be found guilty of first degree felony murder under section 189 if he commits or attempts to commit one of the designated felonies if it is proven *either* that (1) the defendant is the actual killer; (2) the defendant is not the actual killer, but with the intent to kill, aids the actual killer in the commission of the murder; *or* (3) the defendant is a major participant in the underlying crime and acts with reckless indifference to human life – *any one* of the proven circumstances will be sufficient for a first degree murder conviction based on the felony-murder rule.
- The defendant may receive the death penalty or life without parole pursuant to section 190.2, subdivision (d), if he commits or attempts to commit one of the designated felonies and it is proven in doing so the defendant (1) acts with reckless indifference to human life; *and* (2) the defendant as a major participant in the underlying crime, aids in the commission of the designated crime – *both* circumstances must be established. Note also that under section 190.2, subdivision (d), there is no requirement the defendant aid in the commission of the murder with the intent to kill.

C. Special findings by jury

Prior to the enactment of SB 1437, it has long been established that jurors need not agree on the particular theory under which the defendant is guilty of first degree murder. “It is settled . . . that “in a prosecution for first degree murder it is not necessary that all jurors agree on one

or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by statute.” [Citation.]’ [Citations.]” (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024-1025.)

Nothing in SB 1437 appears to change the foregoing rule. While juries obviously must be instructed on the new elements of the felony-murder rule as specified by section 189, subdivisions (e) and (f), nothing in the statute requires the jury to unanimously agree to any particular theory or to include any specific finding in its verdict.

VII. PETITION FOR RESENTENCING (§ 1170.95)¹¹

SB 1437 as amended by SB 775 enacts section 1170.95 to create a procedure for the resentencing of cases where a defendant could not be convicted of murder, attempted murder and manslaughter after the enactment of the changes made to sections 188 and 189 by the legislation. If the petition for relief is granted, the conviction and any related enhancements are vacated and any remaining counts are resentenced.

A. Eligibility for resentencing (§ 1170.95, subd. (a))

1. Persons currently serving a term for murder, attempted murder or manslaughter

As originally enacted by SB 1437, section 1170.95 provided that persons “convicted of felony murder or murder under a natural and probable consequences theory may file a petition” for resentencing if their conviction was based on the old law of accomplice liability. Whether the provision was sufficiently broad to include attempted murder was a matter of disagreement between the appellate courts. (See, e.g., *People v. Harris* (2021) 60 Cal.App.5th 557, 565-566 [granted review][§ 1170.95 is not available to persons convicted only of attempted murder]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008 [granted review] [persons convicted of attempted murder may petition for relief].) Appellate courts, however, agreed resentencing was not available to persons convicted of voluntary manslaughter, even if the conviction resulted from a plea after reduction of a murder charge. (See, e.g., *People v. Cervantes* (2020) 44 Cal.App.5th 884.)

SB 775 amends section 1170.95, subdivision (a), to expressly provide relief for persons convicted of attempted murder and manslaughter: “A person convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime, *attempted murder under the natural and probable*

¹¹ For a procedural check-list for a petition filed under section 1170.95, see Appendix II, *infra*.

consequences doctrine, or manslaughter may file a petition with the court that sentenced the petitioner to have the petitioner’s *murder, attempted murder, or manslaughter conviction* vacated and to be resentenced on any remaining counts. . . .” (Italics added.)

Note the requirement that to be entitled to relief, a person convicted of attempted murder must show the conviction was obtained under the doctrine of “natural and probable consequences” (NPC). Whether SB 1437 eliminated the NPC doctrine as to attempted murder has been a matter of some disagreement in the appellate courts. As observed in *People v. Love* (2020) 55 Cal.App.5th 273 (*Love*) [granted review], appellate courts are divided on the issue. “So far, the Courts of Appeal have split three ways on the question. The first group has held that Senate Bill 1437 did not eliminate the natural and probable consequences theory for attempted murder at all—either prospectively or retroactively. [Citations.] The second group has held that Senate Bill 1437 eliminated the natural and probable consequences theory for attempted murder prospectively, but not retroactively. [Citations.] The last group has held that Senate Bill 1437 eliminated the natural and probable consequences theory for attempted murder prospectively and retroactively as to nonfinal convictions, but not retroactively as to final convictions. [Citation.]” (*Love, supra*, 55 Cal.App.5th at pp. 278-279.) *Love* holds SB 1437 does not eliminate the natural and probable consequences theory for attempted murder on *any* basis—either prospectively or retroactively. (*Ibid.*) *Love* has been granted review. How the amendment to section 1170.95, subdivision (a), relates to the continued viability of the NPC doctrine for attempted murder will be a matter for further appellate determination.

People v. Medrano (2021) 68 Cal.App.5th 177, 179, holds: “[S]ection 1170.95 relief is unavailable to a petitioner concurrently convicted of first degree murder and conspiracy to commit first degree murder where both convictions involve the same victim. Why? Conviction of conspiracy to commit first degree murder shows, as a matter of law, that the ‘target offense’ is murder, not some other lesser offense.”

Murder based on provocative act

People v. Lee (2020) 49 Cal.App.5th 254 (*Lee*), held a petition filed under section 1170.95 was properly summarily denied because the petitioner was convicted of murder based on the provocative act doctrine. As *Lee* explained: “The provocative act doctrine is to be distinguished from the felony-murder rule.” [Citation.] The felony murder rule applies to killings ‘committed in the perpetration of, or attempt to perpetrate’ certain crimes. (§ 189, subd. (a).) ‘When a killing is not committed by [the defendant] or by his accomplice but by his victim,’ however, ‘malice aforethought is not attributable to the [defendant], for the killing is not committed by him in the perpetration or attempt to perpetrate’ the underlying felony. [Citation.] Thus, the felony murder rule cannot support a murder conviction when an accomplice is killed by a third party rather than by the defendant or another accomplice. [Citations.] [¶] Under such circumstances, the defendant may nonetheless be convicted of murder under the

provocative act doctrine. '[W]hen the perpetrator of a crime maliciously commits an act that is likely to result in death, and the victim kills in reasonable response to that act, the perpetrator is guilty of murder. [Citations.] "In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life." ' [Citation.] 'The classic provocative act scenario occurs when a perpetrator of the underlying crime instigates a gun battle, usually by firing first, and a police officer, or victim of the underlying crime, responds with privileged lethal force by returning fire and kills the perpetrator's accomplice' [Citation.] [¶] Unlike felony murder or murder under the natural and probable consequences doctrine, '[a] murder conviction under the provocative act doctrine ... requires proof that the defendant personally harbored the mental state of malice, and either the defendant or an accomplice intentionally committed a provocative act that proximately caused' the death of another accomplice. [Citation.] The malice requirement for provocative act murder was well established in 1996 when we affirmed Lee's conviction. [Citations.] [¶] Lee therefore cannot show that he 'could not be convicted of first or second degree murder because of changes to Section 188 or 189' as required for relief under section 1170.95, subdivision (a)(3). Section 188, as amended, establishes that 'in order to be convicted of murder, a principal in a crime shall act with malice aforethought.' Because Lee was convicted of provocative act murder, the jury necessarily found he acted with malice aforethought. Section 189, as amended, changed the felony murder rule, but Lee was not convicted under that rule." (*Lee, supra*, 49 Cal.App.5th at pp. 263-264, footnotes omitted.) *Lee* has been granted review.

Substantially in accord with *Lee* is *People v. Johnson* (2020) 57 Cal.App.5th 257. "Appellants cannot seek relief under the felony-murder provision of section 1170.95. They were convicted of provocative act murder, not felony murder. 'When someone other than the defendant or an accomplice kills during the commission or attempted commission of a crime, the defendant is not liable under felony-murder principles but may nevertheless be prosecuted for murder under the *provocative act* doctrine.... Under the *felony-murder rule*, if an accomplice is killed by a crime victim and not by the defendant, the defendant cannot be held liable for the accomplice's death. [Citations.] The provocative act doctrine is not so limited. Under the provocative act doctrine, ... "the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life." ' [Citation.]" (*Johnson, supra*, 57 Cal.App.5th at p. 266, italics original.)

People v. Mancilla (2021) 67 Cal.App.5th 854 (*Mancilla*), holds section 1170.95 relief is not available to a person convicted of murder under the provocative act doctrine. "Supreme Court case law . . . makes clear a murder conviction under the provocative act doctrine requires proof the defendant 'personally harbored the mental state of malice.' [Citations [the malice requirement for provocative act murder 'stands in marked contrast to the mens rea contemplated by the natural and probable consequences doctrine']; [citation] ['p]rovocative act murder requires proof of malice, which

distinguishes it from felony murder and natural and probable consequences murder’].) That is, the defendant (or his or her accomplice) must have acted with implied malice—the defendant knew his or her conduct endangered the life of another and acted with conscious disregard for life. [Citations.] Thus, section 188, subdivision (a)(3), which provides malice shall not be imputed to a person based solely on his or her participation in a crime, does not affect the theory of provocative act murder. Unlike natural and probable consequences liability for murder, which contained no requirement of proof of malice [citation] ([‘when a person aided and abetted a nonhomicide crime that then resulted in a murder, the natural and probable consequences doctrine allowed him or her to be convicted of murder without personally possessing malice aforethought’]), malice aforethought—conscious disregard for life—is a necessary element of a conviction for provocative act murder, as Mancilla’s jury was instructed.” (*Mancilla*, *supra*, 67 Cal.App.5th at pp. 867-868.)

Petitioner is sole killer

People v. Gallo (57 Cal.App.5th 594, holds petitioner, the sole killer, is not entitled to relief under section 1170.95 even though the conviction was based on the doctrine of natural and probable consequences.

2. Persons who have completed their sentence

The eligibility to file a petition for resentencing is less clear for persons who have completed their sentence and any period of post-sentencing supervision. Unlike Propositions 36 and 47, SB 1437 does not include a separate resentencing procedure for persons who have completed their sentence. However, because eligibility for resentencing is triggered simply by a “conviction” under designated circumstances, the plain language of the statute suggests such persons are equally eligible for relief. The conditions and procedure for obtaining relief is the same, whether or not the sentence has been completed.

B. Filing period; date of conviction

Section 1170.95 does not impose any filing deadline, nor does it have any restriction based on the date of conviction. The petition may be filed at any time after January 1, 2019, the effective date of SB 1437¹², regardless of the age of the crime or conviction.

C. Cases on appeal

People v. Martinez (2019) 31 Cal.App.5th 719 (*Martinez*) and *People v. Anthony* (2019) 32 Cal.App.5th 1102 (*Anthony*), hold that the changes made by SB 1437 are not cognizable on direct appeal, but must first be raised by a petition for resentencing brought in the trial court

¹² For a full discussion of the effective date of SB 1437, see Section II, *supra*.

pursuant to section 1170.95. Both cases relied extensively on the Supreme Court decisions in *People v. Conley* (2016) 63 Cal.4th 646, regarding Proposition 36, and *People v. DeHoyos* (2018) 4 Cal.5th 594, regarding Proposition 47.

As observed in *Martinez* at pages 727-728: “The analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal. [¶] The remainder of the procedure outlined in section 1170.95 underscores the Legislative intent to require those who seek retroactive relief to proceed by way of that statutorily specified procedure. The statute requires a petitioner to submit a declaration stating he or she is eligible for relief based on the criteria in section 1170.95, subdivision (a). (§ 1170.95, subd. (b)(1)(A).) Where the prosecution does not stipulate to vacating the conviction and resentencing the petitioner, it has the opportunity to present new and additional evidence to demonstrate the petitioner is not entitled to resentencing. (§ 1170.95, subd. (d)(3).) The petitioner, too, has the opportunity to present new or additional evidence on his or her behalf. (§ 1170.95, subd. (d)(3).) Providing the parties with the opportunity to go beyond the original record in the petition process, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials. This, too, indicates the Legislature intended convicted persons to proceed via section 1170.95’s resentencing process rather than avail themselves of Senate Bill 1437’s ameliorative benefits on direct appeal.” In accord with *Martinez* and *Anthony* is *People v. Cervantes* (2020) 46 Cal.App.5th 213.

People v. Burhop (2021) 65 Cal.App.5th 808, 814, concluded the trial court lacked subject matter jurisdiction to hear petitioner’s motion under section 1170.95 because the remittitur had not issued in the direct appeal of the underlying conviction.

Direct appeal of cases not final

Martinez and *Cervantes* likely are no longer valid. SB 775 added subdivision (g) to allow a challenge on direct appeal if the case is not final as of January 1, 2022: “A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018).” (§ 1170.95, subd. (g).)

Limited remand

Although *Martinez, supra*, 31 Cal.App.5th 719, did not permit the defendant to raise SB 1437 on direct appeal, it observed that a limited remand to the trial court might be appropriate.

“Although we hold the section 1170.95 petition procedure is the avenue by which defendants with nonfinal sentences of the type specified in section 1170.95, subdivision (a) must pursue relief, we are cognizant of the possibility that some defendants may believe themselves able to present a particularly strong case for relief under the changes worked by Senate Bill 1437 and wish to seek that relief immediately rather than await the full exhaustion of their rights to directly appeal their conviction. Our holding today does not foreclose such immediate relief in an appropriate case. ¶ Once a notice of appeal is filed, jurisdiction vests in the appellate court until the appeal is decided on the merits and a remittitur issues. [Citations.] But a defendant retains the option of seeking to stay his or her pending appeal to pursue relief under Senate Bill 1437 in the trial court. A Court of Appeal presented with such a stay request and convinced it is supported by good cause can order the pending appeal stayed with a limited remand to the trial court for the sole purpose of permitting the trial court to rule on a petition under section 1170.95. [Citation.] In those cases where a stay is granted and a section 1170.95 petition is successful, the direct appeal may either be fully or partially moot. If the petition is unsuccessful, a defendant may seek to augment the appellate record, as necessary, to proceed with any issues that remain for decision.” (*Martinez, supra*, 31 Cal.App.5th at pp. 729–730.)

Anthony, supra, 32 Cal.App.5th 1102, was less enthusiastic about the potential of a limited remand to the trial court: “There is nothing in the petition procedure enacted by Senate Bill 1437, which is outlined in section 1170.95, that indicates the Legislature intended that convicted defendants were entitled to immediate retroactive relief. [Citation.] Also, the [*People v. Scarbrough*] [(2015) 240 Cal.App.4th 916] court concluded regarding Proposition 47, ‘ “[i]t is reasonable for the voters to have designed a statutory process where the trial court considers a petition for a recall of sentence after final resolution of legal issues related to the conviction and original sentence (which may have components that are unaffected by [the Three Strikes Reform Act of 2012]).” ’ [Citation.] The same is true here. The *Scarbrough* court also deemed Proposition 47 voters to have been aware of this previous interpretation in *Yearwood* when they approved Proposition 47, further evidence of their intentions to design a petition process that was only available after the resolution of a pending appeal. [Citation.] This can be equally said about the Legislature’s awareness of *Scarbrough* and *Yearwood* when it adopted Senate Bill 1437. [¶] That defendants must wait until the resolution of their appeal before pursuing their petition does not deprive them of a remedy. As the *Scarbrough* court said about the same argument, ‘ [b]y concluding there is no concurrent jurisdiction to resentence a defendant . . . , we merely delay the resentencing; we do not preclude its application.’ [Citation.] Defendants also do not establish that concurrent jurisdiction would result in judicial economy. The *Scarbrough* court’s rejection of a similar argument applies with equal force here: ‘ [C]oncurrent jurisdiction would not support judicial economy. Our efforts to review the initial judgment may be rendered futile; we may be asked to review conflicting judgments, each with different errors to be corrected; and the trial court may be asked to effectuate a remittitur against a judgment

that has since been modified. These scenarios would lead to chaos, confusion, and waste—not judicial economy.’ [Citation.]” (*Anthony, supra*, 32 Cal.App.5th at p. 1156.)

Based on *Awad, Scarbrough* and *Martinez*, it seems likely a petitioner who is potentially eligible for relief under section 1170.95 could request a limited remand for resentencing or a stay of the sentence imposed on the murder conviction pending the motion for resentencing. While Proposition 47 motions for resentencing only involve the *reduction* of a felony charge, whereas motions brought under section 1170.95 potentially involve the *dismissal* of a felony charge, there does not appear to be a material difference in the two resentencing motions, at least for the purpose of obtaining permission of the appellate court for a limited remand of the case or a stay of the sentence. Certainly it may be of value to all parties and the court to determine the proper level of a petitioner’s criminal responsibility prior to the extensive work necessary to resolve an appeal.

Relief by writ of habeas corpus

In *In re Cobbs* (2019) 41 Cal.App.5th 1073 (*Cobbs*), the petitioner filed a habeas petition seeking relief from a first degree murder conviction pursuant to *Chiu, supra*, 59 Cal.4th 155. SB 1437 went into effect while the petition was pending, and the petitioner argued it affected the proper remedy in the event the court granted his petition. The court disagreed, explaining: “Since this habeas action is not a resentencing petition under section 1170.95, SB 1437 is inapplicable and *Chiu* . . . governs. In accordance with *Chiu*, petitioner’s first degree murder conviction is reversed, and the People have the option of either retrying petitioner for first degree murder or accepting a second degree murder conviction. If the People choose to retry defendant, then the retroactivity issue is no longer present and the changes enacted by SB 1437 apply to any retrial. The trial court shall resentence petitioner as needed. If petitioner remains convicted of murder following the proceedings pursuant to this disposition, he can, where appropriate, file a resentencing petition under section 1170.95.” (*Cobbs, supra*, 41 Cal.App.5th at p. 1081.)

D. Conditions for granting relief (§ 1170.95, subd. (a).)

The granting of resentencing is predicated on the conviction of the petitioner of felony murder or murder, attempted murder, or manslaughter under a natural and probable consequences theory and the existence of *all* of the following conditions:

(1) “A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime, or attempted murder under the natural and probable consequences doctrine.” (§ 1170.95, subd. (a)(1).) Proof of this requirement is made simply by showing a pleading was filed charging the petitioner with murder, attempted murder, or manslaughter.

Since the prosecution is not required to specify in the pleadings the theory under which the petitioner is being prosecuted for murder, the prosecution is allowed to merely charge a generic violation of section 187. Simply making the allegation of murder, for example, “allows” the prosecution to pursue a conviction based on any theory, including felony murder and/or the NPC doctrine.

(2) “The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder.” (§ 1170.95, subd. (a)(2).) This requirement has two options: (1) the petitioner was convicted of murder, attempted murder, or manslaughter following a trial; or (2) the petitioner accepted a plea offer to the crime of murder, attempted murder, manslaughter in lieu of a trial where he could have been convicted of murder or manslaughter. Under the first option, it is sufficient to show simply the fact of the conviction of murder, attempted murder, or manslaughter; it is not necessary to establish the theory under which the conviction was obtained.

The scope of the second option is less clear. It suggests a petitioner may be entitled to relief if he accepted a plea offer to a lesser crime in a case where he could have been convicted of murder or attempted murder. In other words, a petitioner, charged with murder, who accepts a plea to manslaughter, may have met this requirement. *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887, held section 1170.95 did not apply to a conviction for voluntary manslaughter, even when the conviction resulted from a plea down from the charge of murder. *Cervantes* likely is no longer valid after the passage of SB 775 which expands relief to persons convicted of manslaughter.

(3) “The petitioner could not be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (a)(3).) In other words, for resentencing to be granted, it must be established that the petitioner could not have been convicted of murder or attempted murder under the law as it reads after January 1, 2019. As discussed above, the only changes made by SB 1437 to sections 188 and 189 regard the liability of certain accomplices under first degree felony murder, the application of NPC, and, likely, conviction of second degree felony murder. Accordingly, relief must be granted if the only way to have convicted the petitioner of murder or attempted murder was through first degree felony murder, NPC, and, likely, second degree felony murder as they existed prior to January 1, 2019.

Although not one of the three conditions necessary for granting relief specified in section 1170.95, subdivision (a)(1)-(3), implicit is the requirement that to be entitled to relief, the petitioner must have been convicted based on the felony-murder rule and/or NPC: “A person convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime, attempted murder under the natural and probable consequences doctrine, or manslaughter may file a petition with the court that sentenced the petitioner to have the petitioner’s murder, attempted murder, or manslaughter conviction vacated and to be

resentenced. . . .” (§ 1170.95, subd. (a), italics added.) At least for the purposes of determining whether the petitioner has filed a facially sufficient petition, likely the petitioner’s simple allegation that he was convicted (or could have been convicted by his plea) under the prior felony-murder rule or NPC is sufficient.

E. Form and content of the petition (§ 1170.95, subd. (b)(1))

Section 1170.95 does not prescribe the use of any particular form of petition. It does, however, specify the content of the petition as follows:

- (1) “A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).” (§ 1170.95, subd. (b)(1)(A).)
- (2) “The superior court case number and year of the petitioner’s conviction.” (§ 1170.95, subd. (b)(1)(B).)
- (3) “Whether the petitioner requests the appointment of counsel.” (§ 1170.95, subd. (b)(1)(C).) *People v. Lewis* (2021) 11 Cal.5th 952 (*Lewis*), in interpreting section 1170.95, subdivision (b)(1)(C), held: “Notably, whether a petitioner ‘requests the appointment of counsel’ is part of the information that must be included in a petition for it to satisfy the court’s subdivision (b)(2) review. [Citation.] Subdivision (c)’s language regarding the appointment of counsel is mandatory: ‘If the petitioner has requested counsel, the court *shall* appoint counsel to represent the petitioner.’ [Citation.] The combined meaning is clear: petitioners who file a complying petition requesting counsel are to receive counsel upon the filing of a compliant petition.” (*Lewis, supra*, 11 Cal.5th at pp. 962-963, italics original.)

SB 775 codifies *Lewis* by adding section 1170.95, subdivision (b)(3): “Upon receiving a petition in which the information required by this subdivision is set forth or a petition where any missing information can readily be ascertained by the court, if the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner.” The amendment makes the court’s obligation clear: if the petition is facially sufficient as delineated in subdivision (b)(1), the court must appoint counsel if requested by the petitioner. “[W]e conclude that the statutory language and legislative intent of section 1170.95 make clear that petitioners are entitled to the appointment of counsel upon the filing of a facially sufficient petition. . . .” (*Lewis, supra*, 11 Cal.5th at p. 957.)

F. Filing and service of the petition (§ 1170.95, subd. (b)(1))

“The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the

attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted.” (§ 1170.95, subd. (b)(1).)

G. Assigned judicial officer (§ 1170.95, subd. (b)(1))

The petition should be assigned to the judge who originally sentenced the petitioner. If that judge is unavailable, the presiding judge of the court is to assign another judge to rule on the petition. (§ 1170.95, subd. (b)(1).) Undoubtedly the parties may stipulate to a different or central judge to rule on the petition.

Section 1170.95, subdivision (b)(1), means the judge that originally sentenced the petitioner, not the court or tribunal that sentenced the petitioner. (*People v. Santos* (2020) 53 Cal.App.5th 467 (*Santos*). “[T]he People also argue that the phrase ‘not available’ must be broadly interpreted to give a presiding judge latitude in assigning specific cases to specific trial judges. We are skeptical that the mere fact that a different bench officer is sitting in the original sentencing judge’s prior courtroom when the petition is filed satisfies the statutory requirement of unavailability. (See, e.g., “[citation][‘a showing of more than mere inconvenience is necessary before a judge can be deemed unavailable’]; [citation][‘We recognize that in multi-judge courts, a judge hearing criminal cases one month may be assigned to other departments in subsequent months. However a defendant’s reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience’].)” (*Santos, supra*, 53 Cal.App.5th at pp. 474-475.)

H. Procedure for the review of the petition and issuance of order to show cause (§ 1170.95, subd. (c))

As established by legislation and case law, there are four potential stages in the review of a petition and granting of relief under section 1170.95:

- a. A facial review of the sufficiency of the petition;
- b. A review of the petition (after appointment of counsel, if requested) to determine whether petitioner has stated a prima facie basis for relief;
- c. If a prima facie basis has been established, a fully contested hearing on the merits of the petition; and
- d. If the petitioner prevails on the merits of the petition, a resentencing on what remains after any improper conviction has been dismissed.

1. Facial sufficiency of the petition

The first step in the review process is to determine the facial sufficiency of the petition. Section 1170.95, subdivision (b)(1), specifies the petition is to contain three items:

- (a) “A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).” (§ 1170.95, subd. (b)(1)(A).) Likely it will be sufficient that the petitioner, in summary fashion, simply alleges the statutory basis of eligibility: “I hereby declare that I am eligible for relief under this section based on all of the requirements of section 1170.95, subdivision (a).” Nothing in section 1170.95 requires the petitioner to declare the specific facts under which he contends he is entitled to relief.
- (b) “The superior court case number and year of the petitioner’s conviction.” (§ 1170.95, subd. (b)(1)(B).)
- (c) “Whether the petitioner requests the appointment of counsel.” (§ 1170.95, subd. (b)(1)(C).)

If there is missing information, the court may deny the petition and invite the filing of a corrected pleading. “If any of the information required by [§ 1170.95, subdivision (b),] is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.” (§ 1170.95, subd. (b)(2).)

People v. Torres (2020) 46 Cal.App.5th 1168 (*Torres*) holds the jury’s finding on a special circumstance allegation—a part of the record of conviction—was properly considered by the trial court in determining whether the petitioner made a showing of eligibility for relief. (*Torres*, at p. 1178.) The court explained: “Under subdivision (b)(2), the trial court determines if the petition is facially sufficient. [Citation.] The trial court verifies that the petition contains the basic information required under subdivision (b)(1), and supplies any missing information that can be ‘readily ascertained’ (§ 1170.95, subd. (b)(2)). [Citation.] The reference to ‘readily ascertained’ information indicates the legislature’s intent that the trial court consider reliable, accessible information—specifically the record of conviction. [Citation.] The trial court may deny the petition without prejudice if the petition is not facially sufficient. [Citation.]” (*Torres*, at p.1177.) *Torres* has been granted review.

a. Right to counsel

Torres must now be considered in light of the right to counsel in section 1170.95, subdivision (b)(3), and *People v. Lewis* (2021) 11 Cal.5th 952 (*Lewis*). Section 1170.95, subdivision (b)(3), provides: “Upon receiving a petition in which the information required by this subdivision is set forth or a petition where any missing information can readily be ascertained by the court, if the petitioner has requested counsel, the court

shall appoint counsel to represent the petitioner.” *Lewis* holds “only *after* the appointment of counsel and the opportunity for briefing may the superior court consider the record of conviction to determine whether ‘the petitioner makes a prima facie showing that he or she is entitled to relief.’ [Citation.]” (*Lewis, supra*, 11 Cal.5th at p. 957, italics original.) The direction is clear: if the petition is facially sufficient, the court *must* appoint counsel.

b. Scope of facial review

The proper scope of the facial review is very limited. The court should examine the petition to determine whether it contains the three elements specified in section 1170.95, subdivision (b)(1), no matter how artfully they may be phrased. Particularly if counsel has been requested, the court should refrain from any review of the sufficiency of the factual allegations or review of the record of conviction until after counsel has been appointed and both parties have an opportunity to submit briefing.

Lewis addressed the matter of meritless petitions: “[N]oncomplying petitions may be quickly screened out under subdivision (b)(2) of section 1170.95. Further, the requirement that a petition include ‘[a] declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)’ [citation] should discourage frivolous petitions. Lastly, as *Lewis* himself concedes, after the appointment of counsel the parties’ briefing, as contemplated by subdivision (c), does not need to be extensive. ([Citation] [‘a brief need be no longer than the [summary] order the court prepared in this case’].) Additionally, appointed counsel may ultimately conclude that a petition is clearly meritless and recommend that the petition be withdrawn. Conversely, the parties may stipulate that the petitioner is entitled to relief. [¶] Of course, these devices will not screen out all meritless petitions. Subdivision (b)(2), for example, only screens out noncomplying petitions, not petitions that lack substantive merit. Similarly, despite the declaration requirement under subdivision (b)(1)(A), some petitioners may nonetheless file petitions even when they are not eligible for relief. Section 1170.95 is clearly not without expense. But it is for the Legislature to balance costs with rewards and, here, the Legislature appears to have concluded that the benefits to be gained from providing broad access to counsel, in order to ensure that all those entitled to resentencing are able to obtain relief, outweigh the costs of appointing counsel in many cases where no relief will prove available.” (*Lewis, supra*, 11 Cal.5th at p. 968.)

2. Determining the prima facie basis for relief

Section 1170.95, subdivision (c), as originally enacted, provided: “The court shall review the petition and determine if the petitioner has made a prima facie showing that the

petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause.”

In interpreting subdivision (c), *Lewis* rejected the argument that the two references to “prima facie showing” created “two distinct, sequential inquiries: one ‘that petitioner “falls within the provisions”’ of the statute,’ and a second ‘ “that he or she is entitled to relief.” [Citation.]’ “ (*Lewis, supra*, 11 Cal.5th at p. 961.) The court observed: “[W]e read subdivision (c) to describe only a single prima facie showing. [Citations.] Considering subdivision (c)’s language in the context of section 1170.95 as a whole [citation], subdivision (c) clearly describes a single process. More specifically, the first sentence of subdivision (c) does not require a distinct prima facie showing before the appointment of counsel. Under its natural reading, ‘ “[t]he first sentence [of subdivision (c)] states the rule” ‘ and ‘ “[t]he rest of the subdivision establishes the process for complying with that rule.” ‘ [Citations.]” [¶] Such a reading does not ‘disregard’ the first sentence of subdivision (c), as the People contend. Rather, the first sentence provides the rule: the court reviews the petition to determine ‘if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section.’ [Citation.] The last sentence describes what the court shall do if a petitioner makes a prima facie showing, namely, issue an order to show cause. This reading is in harmony with the remainder of section 1170.95. The People’s interpretation of the first sentence of subdivision (c), by contrast, endeavors to create a separate initial review process, but the initial review process is clearly laid out immediately prior in subdivision (b)(2), which permits a court to deny a noncomplying petition ‘without prejudice.’ [Citation.] Thus, to read the first sentence of subdivision (c) to thereafter provide for another pre-briefing review by the court, without the assistance of counsel, conflicts with the overall structure of section 1170.95.” (*Lewis, supra*, 11 Cal.5th at p. 962.)

SB 775 amended section 1170.95, subdivision (c), to conform the statutory language to *Lewis*. Subdivision (c) now provides: “Within 60 days after service of a petition that meets the requirements set forth in subdivision (b), the prosecutor shall file and serve a response. The petitioner may file and serve a reply within 30 days after the prosecutor’s response is served. These deadlines shall be extended for good cause. After the parties have had an opportunity to submit briefings, the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause. If the court declines to make an order to show cause, it shall provide a statement fully setting forth its reasons for doing so.” The amendment of subdivision (c) clarifies a number of points:

- The amendment eliminated the two references to establishing a prima facie basis for relief. Now there is only one required showing – to be made after briefing by the parties and a hearing conducted by the court.
- The prosecutor “shall” file a response within 60 days of service of the petition if the petitioner has filed a petition in facial compliance with subdivision (b). The petitioner thereafter “may” file a reply within 30 days after the prosecution’s response is served. The use of “shall” when addressing the prosecution’s duty to respond appears mandatory. Failure to file the required response should be considered by the court at least as a concession petitioner has stated a prima facie basis for relief, necessitating the court issuing an order to show cause.
- If the petition complies with subdivision (b), the court may not summarily deny the petition without an opportunity for briefing by the parties and a hearing conducted by the court.¹³
- If the petitioner makes the prima facie showing for relief, the court must issue an order to show cause. Although the court is not required to give its reasons for issuing an order to show cause, such a statement may nevertheless provide guidance for the parties and the court in conducting the hearing on the merits and may assist in any appellate review. If the court declines to issue the order to show cause, “it shall provide a statement fully setting forth its reasons for doing so.” The statement may be given orally or in writing.

Lewis provides guidance in the determination of the prima facie showing: “While the trial court may look at the record of conviction after the appointment of counsel to determine whether a petitioner has made a prima facie case for section 1170.95 relief, the prima facie inquiry under subdivision (c) is limited. Like the analogous prima facie inquiry in habeas corpus proceedings, ‘the court takes petitioner’s factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.’” ‘([Citation]) “[A] court should not reject the petitioner’s factual allegations on credibility grounds without first conducting an evidentiary hearing.’ [Citations.] “However, if the record, including the court’s own documents, “contain[s] facts refuting the allegations made in the petition,” then “the court is justified in making a credibility determination adverse to the petitioner” ‘ [Citation.]” (Lewis, supra, 11 Cal.5th at p. 971.)

To the extent they suggest more than one prima facie review, the following cases are likely abrogated by *Lewis* and SB 775: *People v. Drayton* (2020) 47 Cal.App.5th 965;

¹³ Even if the petition fails to allege the matters required by subdivision (b)(1), the court should consider denying the petition without prejudice and advising the petitioner of any deficiency as authorized by subdivision (b)(2).

People v. Tarkington (2020) 49 Cal.App.5th 892, 897 (granted review); *People v. Verdugo* (2020) 44 Cal.App.5th 320 (granted review);

a. Evidence considered in review of prima facie basis

Section 1170.95 is silent on the question of what evidence the court may consider in determining whether the petitioner has presented a prima facie basis for relief. *Lewis*, however, observed that the court may consider the record of conviction. “Having concluded that a petitioner is statutorily entitled to counsel, if requested, upon the filing of a facially sufficient petition, and that subdivision (c) describes only one prima facie showing, we now turn to the question of whether a trial court can rely on the record of conviction in determining whether that single prima facie showing is made. The answer is yes. In fact, Lewis agrees that ‘the court may — with the benefit of advocacy for both sides — consider the record of conviction at [the prima facie] stage.’ In Lewis’s view, appointed counsel and the prosecutor ‘can and should make use of the record of conviction.’ Notably, there is no disagreement amongst the Courts of Appeal regarding the propriety of the parties and the trial court looking at the record of conviction *after* the appointment of counsel. [Citations.] [¶] The record of conviction will necessarily inform the trial court’s prima facie inquiry under section 1170.95, allowing the court to distinguish petitions with potential merit from those that are clearly meritless. This is consistent with the statute’s overall purpose: to ensure that murder culpability is commensurate with a person’s actions, while also ensuring that clearly meritless petitions can be efficiently addressed as part of a single-step prima facie review process. [Citation.]” (*Lewis, supra*, 11 Cal.5th at pp. 970-971, italics original.)

What constitutes the “record of conviction” is well established. The “record of conviction” consists of “those record documents reliably reflecting the facts of the offense for which the defendant has been convicted.” (*People v. Reed* (1996) 13 Cal.4th 217, 223.) Depending on the circumstances, the record of conviction can include the abstract of judgment, the section 969b prison packet, the charging document and plea form, transcripts of the petitioner’s plea, the factual basis given for the plea, preliminary hearing and trial transcripts, and appellate opinions. (For a full discussion of the law related to the record of conviction, see Couzens & Bigelow, “California Three Strikes Sentencing,” *The Rutter Group* 2021, § 4:5, pp. 4-21 - 4-44 (2021).)

In considering the petition, all factual inferences should be made in favor of the petition. Certainly if the court has any questions regarding its responsibility, it should appoint counsel for the petitioner and receive briefing from the parties. If there is any need to resolve factual issues to determine whether the petitioner is entitled to relief, or petitioner has stated even a potential or colorable claim for relief, the order to show cause should be issued. Guidance may be found in California Rules of Court, rule 4.551 regarding habeas corpus proceedings. Rule 4.551(c)(1), provides: “The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner’s factual allegations as true

and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.” (See also *People v. Duvall* (1995) 9 Cal.4th 464, 474–475; *People v. Sledge* (2017) 7 Cal.App.5th 1089.)

Lewis held appellate opinions were part of the record of conviction and, with caution, could be used in the context of determining whether the petitioner has met the prima facie showing. “Appellate opinions, like *Lewis I*, are generally considered to be part of the record of conviction. [Citation.] However, as we cautioned in *Woodell*, the probative value of an appellate opinion is case-specific, and ‘it is certainly correct that an appellate opinion might not supply all answers.’ [Citation.] In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in ‘factfinding involving the weighing of evidence or the exercise of discretion.’ [Citation.] As the People emphasize, the ‘prima facie bar was intentionally and correctly set very low.’” (*Lewis, supra*, 11 Cal.5th at p. 972.)

People v. Verdugo (2020) 44 Cal.App.5th 320 (*Verdugo*), upheld the trial court’s use of the record of conviction, including the appellate opinion, in summarily denying a petition under section 1170.95: “Although subdivision (c) does not define the process by which the court is to make this threshold determination, subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature’s intent. As discussed, subdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the court in connection with the first prima facie determination required by subdivision (c). In particular, because a petitioner is not eligible for relief under section 1170.95 unless he or she was convicted of first or second degree murder based on a charging document that permitted the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine (§ 1170.95, subd. (a)(1), (2)), the court must at least examine the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment. Based on a threshold review of these documents, the court can dismiss any petition filed by an individual who was not actually convicted of first or second degree murder. The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding SB 1437’s amendments to sections 188 and 189 (see § 1170.95, subd. (a)(3))—for example, a petitioner who admitted being the actual killer as part of a guilty plea or who was found to have personally and intentionally discharged a firearm causing great bodily injury or death in a single victim homicide within the meaning of section 12022.53, subdivision (d).” (*Verdugo*, at pp. 329–330.) *Verdugo* has been granted review by the Supreme Court. In accord with *Verdugo* on this issue is *People v. Harris* (2021) 60 Cal.App.5th 939.

People v. Clements (2021) 60 Cal.App.5th 597, 612-613, held the court may consider an appellate court opinion as part of the record of conviction in the case. In accord with *Clements* is *People v. Harris* (2021) 60 Cal.App.5th 939.

People v. Gomez (2020) 52 Cal.App.5th 1 (*Gomez*), held it was proper for the trial court to consider the record of conviction in determining whether petitioner made a prima facie showing of eligibility for relief. (*Gomez, supra*, 52 Cal.App.5th at pp.15-16.) Since the jury in petitioner’s original trial found the special circumstances allegations of robbery and kidnapping true, “the jury necessarily found that Gomez either participated in the alleged robbery and kidnapping with the intent to kill Ravida, or that she was a major participant in those crimes who acted with reckless indifference to Ravida's life. Because either finding would allow Gomez to be convicted of first or second degree murder notwithstanding the changes to sections 188 and 189 made effective January 1, 2019, Gomez is not eligible for relief from her murder conviction under section 1170.95. (§ 1170.95, subd. (a)(3).)” (*Gomez, supra*, 52 Cal.App.5th at p. 15.) *Gomez* has been granted review.

People v. Soto (2020) 51 Cal.App.5th 1043 (*Soto*), held in determining the prima facie entitlement to relief under section 1170.95, subdivision (c), the trial court properly considered the instructions given to the jury in petitioner’s original trial. (*Soto, supra*, 51 Cal.App.5th at p. 1055.) Denial of the petition was proper because the jury was never instructed on the doctrine of natural and probable consequences with respect to petitioner’s second degree murder conviction. (*Id.*) *Soto* has been granted review.

b. Improper summary denial of petition

People v. Offley (2020) 48 Cal.App.5th 588 (*Offley*), discusses the circumstances where the petitioner is found guilty of committing a murder with the use of a firearm under section 12022.53, subdivision (d). The court found the proof of the gun enhancement alone does not make petitioner ineligible for relief. “The trial court erred by denying Offley’s petition because the existence of an enhancement under section 12022.53, subdivision (d) does not show that a defendant acted with malice aforethought. It therefore does not establish as a matter of law that Offley could still be convicted of murder under the new law and is ineligible for relief under section 1170.95. [¶] Both express and implied malice require proof of the defendant’s mental state. In the case of express malice, the defendant must have intended to kill. [Citation.] Implied malice also involves a mental component, namely a ‘ “conscious disregard for the danger to life that the [defendant’s] act poses.” ‘ [Citation.] This requires ‘ “examining the defendant’s subjective mental state to see if he or she actually appreciated the risk of his or her actions.” [Citation.] “It is not enough that a reasonable person would have been aware of the risk.” ‘ [Citation.] [¶] Section 12022.53, subdivision (d) provides that the defendant must have intended to discharge a firearm, but does not refer to an “intent to achieve any additional consequence.’ [Citation.] It is thus a general intent enhancement, and does not require the prosecution to prove that the defendant

harbored a particular mental state as to the victim's injury or death. [Citations.] The jury in this case was instructed accordingly. The trial court told the jury that it would need to decide 'whether the defendant intentionally and personally discharged a firearm and proximately caused great bodily injury or death,' but not whether he intended to kill or was aware of the danger to life that his act posed. [¶] Because an enhancement under section 12022.53, subdivision (d) does not require that the defendant acted either with the intent to kill or with conscious disregard to life, it does not establish that the defendant acted with malice aforethought." (*Offley, supra*, 48 Cal.App.5th at pp.598-599, footnotes omitted.)

Offley also concludes the gun enhancement under section 12022.53, subdivision (e)(1), does not disqualify a petitioner as a matter of law. The enhancement applies to all principals of a crime, whether they personally fired the weapon. The enhancement alone does not show petitioner played a direct role in the killing. (*Offley, supra*, 48 Cal.App.5th at pp. 599-600.)

People v. Smith (2020) 49 Cal.app.5th 85 (*Smith*), holds a jury's finding that the petitioner was a "major participant" in an underlying robbery and acted with "reckless indifference to human life" did not preclude the petitioner from making a prima facie showing for relief. The jury's findings were based on the law prior to the Supreme Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522, which substantially revised the definition of these phrases. (*Smith*, at pp. 93-94.) Since the facts of petitioner's conduct could not be determined as a matter of law, the trial court erred in not providing the petitioner with counsel and a postbriefing determination of his entitlement to an O.S.C hearing. "Here, without appointing counsel to Smith or permitting counsel to make a filing, the trial court reviewed our 1996 appellate opinion and considered the facts as described in our discussion of the sufficiency of the evidence supporting the special circumstance. The trial court made a determination that those facts were sufficient to establish that Smith was a major participant in the underlying felony and acted with reckless indifference to human life. But that factual record is not the only consideration that the trial court must take into account for purposes of section 1170.95. Where the record of conviction does not preclude a petitioner from making a prima facie showing that he falls within the statute's provisions as a matter of law, the petitioner is not confined to presenting evidence contained in the record of conviction in seeking relief. Section 1170.95 provides 'the petitioner may rely on the record of conviction or offer new or additional evidence to meet [his] burden[].' (§ 1170, subd. (d)(3).) It is conceivable that Smith may be able to provide evidence not presented at trial that would demonstrate either that he was not a major participant in the robbery or did not act with reckless indifference to human life. By ruling prior to the appointment of counsel, the trial court deprived Smith of the opportunity to develop, with the aid of counsel, a factual record beyond the record of conviction. Only after giving a petitioner the opportunity to file a reply, in which he may develop a factual record beyond the record of conviction, is a trial court in a position to evaluate whether there has been a prima facie showing of entitlement to relief."

(*Smith, supra*, 49 Cal.App.5th at p. 95; footnote omitted.) *Smith* has been granted review.

A conviction based on a jury's pre-*Banks/Clark* felony-murder special circumstance finding does not preclude relief as a matter of law. (*People v. Harris* (2021) 60 Cal.App.5th 939, 956. "Because the evidence supporting Harris's special circumstance finding has never been reviewed under the standards set forth in *Banks* and *Clark*, the superior court could properly determine he was ineligible for relief as a matter of law only after reviewing the available record of conviction in light of the *Banks* and *Clark* factors." (*Harris, supra*, 60 Cal.App.5th at p. 958.) *Harris* has been granted review.

Generally in accord with *Harris* is *People v. Secrease* (2021) 63 Cal.App.5th 231 (*Secrease*). "Because no court has ever determined whether the felony-murder special-circumstance finding rendered against Secrease meets the minimum standards of personal culpability enunciated in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), we hold that he is entitled to such a determination before his section 1170.95 petition may be denied summarily. We will therefore remand this case so the trial court can undertake a sufficiency-of-the-evidence review under those cases. If, upon review of the entire record of conviction, the court determines that the felony-murder special-circumstance finding rendered against Secrease in 1998 meets the standards of *Banks* and *Clark*, he will be barred from alleging prima facie entitlement to relief. If, on the other hand, the court concludes to the contrary and Secrease's felony-murder special-circumstance finding fails that test, an order to show cause must issue and the case must be set for an evidentiary hearing." (*Secrease, supra*, 63 Cal.App.5th at p. 236.) *Secrease* has been granted review.

People v. Rivera (2021) 62 Cal.App.5th 217, holds "a defendant who entered a plea to murder 'with malice aforethought' is not categorically incapable of making a prima facie showing of eligibility for relief under section 1170.95, subdivision (c) (section 1170.95(c)), because such a plea is not necessarily an admission that the crime was committed with actual malice. We also hold that a defendant who stipulated to a grand jury transcript as the factual basis of the plea may make a prima facie showing of eligibility for relief by identifying a scenario under which he or she was guilty of murder only under a now-invalid theory, even if the record of conviction does not demonstrate that the indictment rested on that scenario." (*Rivera, supra*, 62 Cal.App.5th at p. 224.) *Rivera* has been granted review.

People v. Duchine (2021) 60 Cal.App.5th 798, states the prima facie showing: (1) "[T]he prima facie showing the [petitioner] must make is that he [or she] did not, in fact, act [as required] or harbor the mental state required ... for a murder conviction under current law" and (2) "the time for weighing and balancing and making findings on the ultimate issues arises at the evidentiary hearing stage rather than at the prima facie stage, at least where the record is not dispositive on the factual issues. Thus, absent a record of conviction that conclusively establishes that the petitioner engaged in the requisite acts

and had the requisite intent, the trial court should not question [the petitioner's] evidence.” (*Id.* at p. 815.)

People v. Aleo (2021) 64 Cal.App.5th 865 (*Aleo*), concludes the court should have issued an order to show cause. “Aleo's petition alleged a complaint, information, or indictment was filed against him that allowed the prosecution to proceed under a theory of felony-murder or murder under the natural and probable consequences doctrine; he was convicted of first or second degree murder following a trial; and he could not be convicted of first or second degree murder because of changes to section 188 or 189 made effective January 1, 2019. (§ 1170.95, subd. (a).) And the parties do not argue, nor does the record before us conclusively establish, Aleo was ineligible for relief as a matter of law. Indeed, even if we were to accept as true defense counsel's concession Aleo was a major participant in the crime, the court also had to conclude Aleo acted with reckless indifference to human life to render him categorically ineligible for relief. (§ 189, subd. (e)(3).) The record does not reflect the court made this requisite determination or that such a conclusion is supported by the record as a matter of law. Rather, Aleo denied he acted with reckless indifference to human life and the record of conviction does not conclusively establish he acted with the requisite intent. Thus, our review of the record comports with the parties' representations; that is, Aleo established a prima facie showing he is entitled to relief and the record did not rebut Aleo's allegations as a matter of law. Accordingly, the court was required to issue an order to show cause and hold a hearing during which the prosecution bears the burden of proving, beyond a reasonable doubt, that Aleo is ineligible for resentencing.” (*Aleo, supra*, 64 Cal.App.5th at p. 254.)

In *People v. Barboza* (2021) 68 Cal.App.5th 955 (*Barboza*), petitioner was convicted of first degree murder with a gang special circumstance. The trial court reduced the conviction to second degree murder and struck the special circumstance finding. Thereafter petitioner requested resentencing pursuant to section 1170.95. The trial court summarily denied the petition based on the special circumstance finding by the jury. The appellate court reversed, holding the trial court improperly considered the first degree murder and special circumstance findings by the jury. “[T]he jury's decision to convict on first degree murder and the special circumstance finding are nullities and cannot foreclose the possibility of relief under section 1170.95. The defendant was convicted of second degree murder, sentenced for second degree murder, and he is serving time for second degree murder. What the jury found prior to the court's decision to set aside the first degree verdict and the special circumstance finding simply has no legal effect.” (*Barboza, supra*, 68 Cal.App.5th at p. 965.) Generally in accord with *Barboza* on this issue is *People v. Jenkins* (2021) 70 Cal.App.5th 924, 935.)

People v. Eynon (2021) 68 Cal.App.5th 967 (*Eynon*), held the trial court improperly relied on the transcript of the preliminary hearing in summarily denying a petition under section 1170.95. “[W]hen conducting a prima facie review, the trial court must assume the truth of the petition's allegations and must not engage in factfinding, weigh the

evidence, or reject the petition's allegations on the basis of adverse credibility determinations. [Citation.] If the record of conviction “ ‘contain[s] facts refuting the allegations made in the petition’ ” [citation], however, then the trial court is justified in rejecting them. Eynon alleged that he was not a major participant or did not act with reckless indifference to human life. The special circumstance allegation was to the contrary, and Eynon was held to answer on that allegation, but neither the allegation nor Eynon's being held to answer on it constitutes a “ ‘fact[] refuting’ ” Eynon's allegation in his petition. [Citation.] Being held to answer on an allegation does not constitute a factual finding that the allegation is true (and the allegation itself does not establish its own truth). Being held to answer does not even constitute a determination that the allegation is supported by substantial evidence. [Citation.] The trial court therefore erred.” (*Eynon, supra*, 68 Cal.App.5th at pp. 975-976, footnote omitted.)

Eynon also rejected the reliance on petitioner's admissions at the time of his plea. “At his change of plea hearing, Eynon pled guilty to committing first degree murder ‘willfully, unlawfully, and with deliberation, premeditation, and malice aforethought.’ As a factual basis for the guilty plea, Eynon admitted that he did ‘what Count 1 of th[e] Information says [he] did, when it says [he] did it.’ He further admitted ‘that this was a first-degree murder by virtue of being a felony murder[,] that being murder that occurred during the commission of a robbery.’ Eynon made no other factual admissions. The question is whether his factual admissions support the People's argument or otherwise refute his allegation that he is eligible for relief. We conclude that they do not.” (*Eynon, supra*, 68 Cal.App.5th at p. 976.) “When Eynon pled guilty, the law allowed him to be convicted of first degree premeditated murder on a natural and probable consequences theory, and it also allowed him to be convicted of first degree felony murder without being the actual killer, acting with intent to kill, or being a major participant in the underlying felony who acted with reckless indifference to human life. The accusatory pleading did not exclude either of those theories—the prosecution could have relied on natural and probable consequence, felony murder, or both if the case had proceeded to trial. Eynon's guilty plea, his admission that he did what was charged in the murder count, and his admission that the murder was committed in the course of a robbery consequently did not include any factual admissions that refute his allegation that he is eligible for relief under section 1170.95. Although he admitted that he was liable for a murder committed with malice, deliberation, and premeditation, he did not admit that *he acted with* malice, deliberation, or premeditation. And although he admitted that he was liable for a murder committed in the course of a robbery, he did not admit that he was the actual killer, acted with intent to kill, or was a major participant in the robbery and acted with reckless indifference to human life.” (*Eynon, supra*, 68 Cal.App.5th at p. 979, italics original.)

People v. Davenport (2021) 71 Cal.App.5th 476, 481, held the trial court improperly considered the facts as stated in the transcript of petitioner's preliminary hearing because petitioner did not stipulate to the transcript as a factual basis for his plea.

People v. Ervin (2021) 72 Cal.App.5th 90 (*Ervin*), held petitioner met the minimum standard for issuance of an order to show cause. “In this de novo review, under the test for prima facie evidence, we must accept Ervin's allegations as true. [Citation.] Here, the record of conviction supports Ervin's averments in his petition because—despite the prosecution's theory of the case (Ervin shot and killed the victim)—the jury did not find Ervin personally used a firearm in the commission of the murder. Ervin's section 1170.95 petition has ‘potential merit’ because the jury potentially found Ervin guilty of murder as an aider and abettor under the former first degree felony-murder rule, which is now an invalid theory of murder liability. [Citation.]” (*Ervin, supra*, 72 Cal.App.5th at p. 104.) “A felony-murder special-circumstance finding does not categorically bar a petitioner from making a prima facie showing of entitlement to relief under section 1170.95 as a matter of law.” (*Ervin, supra*, 72 Cal.App.5th at p. 105.)

People v. Langi (2022) 73 Cal.App.5th 972 (*Langi*), held the trial court improperly relied on the appellate opinion in summarily denying the petition. “Current law thus provides that the actual killer, or a direct aider and abettor of the killing who knew that his (or her) conduct endangered the life of another and acted with conscious disregard for life, may be guilty of second degree murder. In this case, the trial court treated this court's opinion in *Langi I* as conclusively establishing that the jury found appellant guilty as the actual killer. Although understandable in view of explicit statements in this court's prior opinion, the trial court erred in treating those statements as conclusive. The Supreme Court's subsequent decision in *Lewis, supra*, 11 Cal.5th 952, 281 Cal.Rptr.3d 521, 491 P.3d 309, held that although an appellate opinion affirming a conviction may be considered in determining whether a prima facie showing has been made under section 1170.95, on prima facie review such an opinion may not be conclusive. ‘While the trial court may look at the record of conviction ... to determine whether a petitioner has made a prima facie case for section 1170.95 relief, the prima facie inquiry ... is limited. Like the analogous prima facie inquiry in habeas corpus proceedings, “ ‘the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.’ “ [Citations.] [A] court should not reject the petitioner's factual allegations on credibility grounds without first conducting an evidentiary hearing.” [Citations.] “However, if the record, including the court's own documents, ‘contain[s] facts refuting the allegations made in the petition,’ then ‘the court is justified in making a credibility determination adverse to the petitioner.’ “ [Citations.] [¶] Appellate opinions ... are generally considered to be part of the record of conviction. [Citation.] However, as we cautioned in *Woodell*, the probative value of an appellate opinion is case-specific, and “it is certainly correct that an appellate opinion might not supply all answers.” [Citation.] In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in “factfinding involving the weighing of evidence or the exercise of discretion.” [Citation.] ... [T]he ‘prima facie bar was ... set very low.’ “ [Citation.]” (*Langi, supra*, 73 Cal.App.5th at pp. 979-980.)

People v. Harden (2022) 76 Cal.App.5th 262 (*Harden*), upheld the trial court’s determination that petition failed to establish a prima facie basis for relief based on the appellate opinion in the underlying case. “[W]e conclude that the prior appellate opinion establishes Harden’s ineligibility for relief under section 1170.95 as a matter of law. Specifically, in that appeal Harden asserted that ‘because there was evidence from which the jury could have inferred she was not Alfred’s actual killer, the trial court erred’ by omitting certain jury instructions applicable to persons who although ‘not the actual killer’ acted with either the intent to kill or with reckless indifference to human life. In *Harden I*, she asserted that the jury ‘could have found’ a man seen driving a truck after the incident was the actual killer, or could have had a reasonable doubt whether she actually killed Alfred. [¶] Rejecting these claims in *Harden I*, this court determined there was no evidence from which the jury could have convicted Harden of murder on any theory other than as being the actual killer, stating:

‘Considering the entire record in this case, we conclude there is insufficient evidence to support a reasonable inference that Harden was guilty of Alfred’s murder, but did not actually kill him. We are not persuaded by Harden’s argument that the jury could have found the male driver actually killed Alfred. [¶] ... [¶] ‘Because there is no evidence to support a reasonable inference the male was inside [Alfred’s] home, we conclude a rational jury could not reasonably infer that the male (or any person other than Harden) was Alfred’s actual killer. Accordingly, the trial court did not err by omitting from CALJIC No. 8.80.1 instructions setting for the substance of provisions that would apply only if Harden were not the actual killer’

This holding on insufficiency of the evidence is a *legal* determination. ([Citation] [‘legal sufficiency of evidence’ is an issue of law, not fact].) As such, it ‘established as the law of the case’ that Harden’s murder conviction is based on her being Alfred’s actual killer. ([Citation] [‘a decision on appeal that the evidence in the case was insufficient to go to the jury ... was the law of the case’].)” (*Harden, supra*, 76 Cal.App.5th at p. 271, italics original, footnote omitted.)

c. Prima facie basis not shown

In *People v. Cornelius* (2020) 44 Cal.App.5th 54 (*Cornelius*), the court affirmed summary denial of a section 1170.95 petition where the jury convicted the petitioner of second degree murder and found true that he personally and intentionally discharged a firearm causing death—*i.e.*, he was the actual killer. *Cornelius* has been granted review by the Supreme Court.

In *Verdugo, supra*, 44 Cal.App.5th at p. 333, the court affirmed summary denial of a section 1170.95 petition because the underlying appellate opinion found the petitioner acted with express malice. *Verdugo* has been granted review by the Supreme Court.

In *People v. Edwards* (2020) 48 Cal.App.5th 666, the court upheld the trial court’s summary denial of the petition under section 1170.95 that was based on a review of the record of conviction. Such a review showed as a matter of law petitioner was not

charged with or convicted of second degree felony murder or murder under the natural or probable consequences doctrine. *Edwards* has been granted review.

People v. Nguyen (2020) 53 Cal.App.5th 1154 (*Nguyen*), based on a reading of the transcript of the preliminary hearing prior to petitioner's plea to second degree murder, found there was a failure to establish a prima facie basis for granting the petition. Petitioner was being prosecuted solely on a theory he was a direct aider and abettor. (*Nguyen, supra*, 53 Cal.App.5th at pp. 1166-1167.)

People v. Allison (2020) 55 Cal.App.5th 440 (*Allison*), holds petitioner was not eligible for relief under section 1170.95 after he admitted a special circumstance allegation. "[We] believe that *People v. Verdugo* (2020) 44 Cal.App.5th 320, 257 Cal.Rptr.3d 510, review granted March 18, 2020, S260493, correctly describes the role of prior factual findings in the analysis of a petition under section 1170.95. According to *Verdugo*, relief under section 1170.95 is barred if a prior finding shows the petitioner "was convicted on a ground that remains valid notwithstanding Senate Bill No. 1437's amendments to sections 188 and 189." (*Verdugo, supra*, 44 Cal.App.5th at p. 330, 257 Cal.Rptr.3d 510.) *Verdugo's* interpretation is faithful to the language of subdivision (a)(3) of section 1170.95: If the prior finding shows the petitioner meets the requirements for murder liability under amended sections 188 and 189, then it is not true that the petitioner could not be convicted of murder *because of the changes to sections 188 and 189*, and the petition must be denied." (*Allison, supra*, 55 Cal.App.5th at pp. 461-462, italics original.)

In *People v. DeHuff* (2021) 63 Cal.App.5th 428 (*DeHuff*), the petitioner was convicted of murder based on two theories submitted to the jury: implied malice and second degree felony murder based on reckless evading a police officer. Petitioner cannot be convicted under the felony murder rule based on the law after January 1, 2019, but there was substantial evidence to support a finding of guilt based on the implied malice theory. The correct remedy is to remand the case the trial court to conduct a hearing to determine if petitioner is ineligible for relief beyond a reasonable doubt. (*DeHuff, supra*, 63 Cal.App.5th at p. 442.)

People v. Farfan (2021) 71 Cal.App.5th 942 (*Farfan*), holds the jury's true finding on the robbery-murder special circumstance makes the petitioner ineligible for relief under section 1170.95 as a matter of law. "In order to obtain relief from his or her felony murder conviction under section 1170.95, a petitioner must make a prima facie showing that he or she 'could not be convicted of first or second degree murder *because of changes to Section 188 or 189*' made by Senate Bill No. 1437. [Citations.] But the jury's special circumstance finding in this case means it necessarily found beyond a reasonable doubt that appellant either had the intent to kill *or* he was a major participant in the robbery who acted with reckless disregard for human life. Accordingly, the jury's true finding on the special circumstance establishes appellant is ineligible for section

1170.95 relief as a matter of law. [Citations.]” (*Farfan, supra*, 71 Cal.App.5th at p. 954, italics original.)

People v. Cortes (2022) 75 Cal.App.5th 198 (*Cortes*), held petitioner failed to establish a prima facie basis for relief under section 1170.95 because the jury was never instructed on the NPC doctrine. “We conclude that Cortes failed to make a prima facie showing that he was entitled to relief because the record of conviction demonstrates that he was convicted of murder and attempted murder either as a perpetrator or a direct aider and abettor, and not under the natural and probable consequences doctrine, or indeed any theory under which malice is imputed to a person based solely on that person's participation in a crime. In so doing, we decline to address the trial court's reasons for denying the petition, as we may affirm a ruling that is correct in law on any ground. [Citation.]” (*Cortes, supra*, 75 Cal.App.5th at p. 204, footnote omitted.)

d. Consideration of the response by the prosecution and reply by petitioner (§ 1170.95, subd. (c))

In determining whether the petitioner has shown a prima facie basis for relief, the court must consider any response filed by the prosecution and any reply by the petitioner. Section 1170.95, subdivision (c), provides, in part: “The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served.” The direction to the prosecution may be interpreted as requiring a response to every petition – but the prosecution could simply concede the merits of the petition and not file any response. If the prosecution wants to file a response, it must do so within 60 days of service of the petition. The petitioner must file a reply, if any, within 30 days after service of the prosecution response. The deadlines are to be extended on a showing of good cause. (§ 1170.95, subd. (c).) The court should not rule on the petition without considering the additional pleadings, or at least until the filing period for a response or reply has expired.

Even if the prosecution fails to file a response, nothing in section 1170.95 precludes the court from requesting further information or an informal response from the prosecution. Guidance for such a procedure may be found in California Rules of Court, rule 4.551(b). There, the court may request an informal response from either the respondent or real party in interest. The rule further provides: “(2) A copy of the request must be sent to the petitioner. The informal response, if any, must be served on the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response on the petitioner. If the informal response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner. (3) After

receiving an informal response, the court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day period provided for a reply under (b)(2) has expired.”

e. Issuance of order to show cause

If the petitioner has met the burden of establishing a prima facie eligibility for and entitlement to resentencing, the court must issue an order to show cause for a full evidentiary hearing. For full discussion of the issuance of the order to show cause and the evidentiary hearing, see discussion, *infra*.

f. Informal handling of petition by stipulation

SB 1437 expressly provides for the potential of informal handling of the petition: “The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. (§ 1170.95, subd. (d)(2).) Accordingly, prior to determining whether the petition states a prima facie basis for relief, the court should consider conducting an informal chambers conference with counsel to assess the possibility of a stipulated resolution. If petitioner has requested the appointment of counsel, the court should provisionally appoint an attorney for the purpose of the informal inquiry.

g. Prior finding of allegation under section 190.2, subdivision (d)

Section 1170.95, subdivision (d)(2), provides: “If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner’s conviction and resentence the petitioner.” Likely the only time this situation will arise is when the petitioner had been charged with a special circumstance allegation under section 190.2, subdivision (d), and the jury or court found the allegation *not true*. Presumably relief must be denied, however, if the prosecution is able to show the petitioner was the actual killer, or was not the actual killer but, with the intent to kill, aided in the commission of the murder.

Special circumstance findings by the jury were addressed in *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411 (*Gutierrez-Salazar*). In that case, the “jury was provided instructions allowing it to convict defendant of first degree murder . . . pursuant to a felony-murder theory and the natural and probable consequences doctrine, as both were defined prior to the effective date of Senate Bill 1437.” (*Id.* at p. 419.) The jury also found true a special circumstance that (1) the petitioner’s participation in the crime began before or during the killing, (2) the petitioner was a major participant in the crime and (3) the petitioner acted with reckless indifference to human life. (*Ibid.*) The court explained that “because the jury found true the special circumstance allegation, any

potential post-Senate Bill 1437 instructional error related to the felony-murder rule and the natural and probable consequences doctrine would be harmless beyond a reasonable doubt because the jury made the requisite findings necessary to sustain a felony-murder conviction under the amended law. Consequently, since defendant cannot benefit from a retroactive application of Senate Bill 1437, we need not resolve that issue, and instead we simply deny relief on this appeal.” (*Gutierrez-Salazar*, supra, 38 Cal.App.5th at p. 419.)

Where there is a finding on appeal that the petitioner was not a major participant in the underlying felony and did not act with reckless indifference to human life, the trial court must consider a subsequent petition under section 1170.95 to vacate the murder conviction and “proceed directly to resentencing” pursuant to section 1170.95, subdivision (d)(2). (*People v. Ramirez* (2019) 41 Cal.App.5th 923, 932.)

People v. Allison (2020) 55 Cal.App.5th 440 (*Allison*), holds petitioner was not eligible for relief under section 1170.95 after he admitted a special circumstance allegation. “[We] believe that *People v. Verdugo* (2020) 44 Cal.App.5th 320, 257 Cal.Rptr.3d 510, review granted March 18, 2020, S260493, correctly describes the role of prior factual findings in the analysis of a petition under section 1170.95. According to *Verdugo*, relief under section 1170.95 is barred if a prior finding shows the petitioner “was convicted on a ground that remains valid notwithstanding Senate Bill No. 1437’s amendments to sections 188 and 189.” [Citation.] *Verdugo*’s interpretation is faithful to the language of subdivision (a)(3) of section 1170.95: If the prior finding shows the petitioner meets the requirements for murder liability under amended sections 188 and 189, then it is not true that the petitioner could not be convicted of murder *because of the changes to sections 188 and 189*, and the petition must be denied.” (*Allison*, supra, 55 Cal.App.5th at pp. 461-462, italics original.)

In *People v. Clayton* (2021) 66 Cal.App.5th 145 (*Clayton*), the petitioner was convicted of murder and two counts of robbery, and that he was armed in the commission of the crimes. However, the jury found the special circumstance allegation that the murder was committed while the petitioner was engaged in a robbery “not true.” The trial court summarily denied the subsequent petition for relief under section 1170.95. The appellate court reversed, holding the trial court should proceed directly to resentencing as a matter of law. “[A] jury’s acquittal on the special-circumstance allegation means the jury found the evidence insufficient to prove beyond a reasonable doubt that the petitioner was an aider and abettor with the intent to kill or a major participant in the robbery who acted with reckless indifference to human life. In that case, the prosecution cannot sustain its burden of proving ineligibility under subdivision (d)(3) without invalidating the jury’s finding. [¶] Section 1170.95, subdivision (d)(2) addresses this situation by requiring the trial court to accept a jury’s prior finding that ‘the petitioner did not act with reckless indifference to human life or was not a major participant in the felony’ and grant the resentencing petition. [Citation.] The court is not authorized to reverse the prior finding or substitute its own factual findings for the

specific findings the jury already made.” (*Clayton, supra*, 66 Cal.App.5th 155, footnote omitted.) Generally in accord with *Clayton* on this issue are *People v. Harrison* (2021) 73 Cal.App.5th 429, 441-442, and *People v. Flint* (2022) 75 Cal.App.5th 607, 613.

People v. Bradley (2021) 65 Cal.App.5th 1022 (*Bradley*), found sufficient evidence to uphold a finding the petitioner acted with reckless indifference to human life in committing a robbery where the petitioner was personally armed. “Defendants fail to identify a single case in which a defendant actively participated in a robbery, wielded a firearm during that robbery, and was present for the shooting, but an appellate court found insufficient evidence to support a finding that the defendant acted with reckless indifference for human life. Nor are we aware of any. In considering the *Clark* factors, defendants’ culpability is greater than that set forth in those cases on which they rely, namely *Banks, Clark, Scoggins, Taylor, In re Bennett, and Ramirez*. We conclude the evidence relevant to the *Clark* factors, when considered in total, sufficiently supports the judgment.” (*Bradley, supra*, 65 Cal.App.5th at p. 1036.)

In *People v. Hampton* (2022) 74 Cal.App.5th 1092 (*Hampton*), petitioner was convicted of first degree murder and two counts of robbery. The jury was unable to reach a verdict on the robbery-murder special-circumstance allegation, which the prosecution later dismissed for insufficient evidence. The appellate court found the dismissal under these circumstances was equivalent to a dismissal. “Absent any contrary indication, we must presume the trial judge intended the phrase to carry its accepted, and precise, meaning -- that the evidence presented at the trial was not legally sufficient to support a conviction for the crime charged. There is no contrary indication. Although the trial judge previously denied defendant's motion for acquittal under section 1118.1, that ruling does not act as a bar to later reconsideration by the trial court of the sufficiency of the evidence. [Citation.] The Attorney General has not shown that in stating it was dismissing the case for insufficient evidence, the *trial court* failed to understand the legal import of the words used or that it meant some other words that it did not use. The words ‘insufficient evidence’ were not required to effectuate a dismissal under section 1385. This dismissal being on the People's motion, all that was required was that the dismissal be ‘in furtherance of justice,’ with reasons given. [Citation.] The trial court did not give, or even suggest, any other reason for dismissal. Instead, the court explicitly stated the dismissal was due to insufficient evidence. The most reasonable interpretation of this record is that the court used the specific language of insufficient evidence, given its accepted meaning, to convey that it had weighed the evidence in the light most favorable to the People and found it lacking. That is, that the court knew the legal import of its words and meant what it said. Because the original trial court dismissed the case for insufficient evidence, this dismissal acted as the equivalent of an acquittal and the court properly granted the petition for resentencing under section 1170.95.” (*Hampton, supra*, 74 Cal.App.5th at p 1106, italics original.)

People v. Flint (2022) 75 Cal.App.5th 607 (*Flint*), holds a jury’s finding of a special circumstance “not true” does not automatically entitle the petitioner to resentencing under section 1170.95, subdivision (d)(2), where the prosecution contends the victim was a peace officer, an exception to the new felony-murder rule. Flint observed that although the petitioner may technically qualify for resentencing under the language of the statute, to do so in this case would produce an absurd result. “The Legislature’s purpose in enacting section 1170.95 as the retroactive component of Senate Bill No. 1437 is also clear, and is stated in the preamble to the bill itself: to ‘provide a means of vacating the conviction and resentencing a defendant’ convicted of murder where ‘the defendant could not be charged with murder after the enactment of this bill.’ Indeed, one of the criteria for resentencing is that the petitioner ‘could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.’ [Citation.] Under section 189, subdivision (f), a defendant convicted of felony murder who knew or should have known that the victim was a peace officer engaged in the performance of her duties fails to meet this requirement regardless of whether or not he was a major participant in the felony who acted with reckless indifference to human life. [Citation.] Flint’s interpretation of the statute would make subdivision (d)(2) into a backdoor to guarantee resentencing for certain defendants who are not eligible, rather than a mechanism to ‘streamline the process’ of resentencing [citation] in cases where it is clear that the defendant is eligible. This is an absurd result, which we will not infer the Legislature intended.” (*Flint, supra*, 75 Cal.App.5th at p. 618.)

People v. Pacheco (2022) 76 Cal.App.5th 118 (*Pacheco*), held the jury’s “true” finding on a gang special circumstance allegation did not automatically disqualify petitioner from relief under section 1170.95. “Here, the jury’s true finding on the gang special circumstance certainly establishes Pacheco intended to kill Abraham Sanchez at the time of his killing (the mens rea). But the gang circumstance instruction does not establish—as a matter of law—that Pacheco *directly aided and abetted* the killing of Sanchez (the actus reus). In other words, without weighing the evidence, it is possible Pacheco intended to kill, but he did nothing to directly “aid, facilitate, promote, encourage, or instigate” the target crime of murder. [Citation.]” (*Pacheco, supra*, 76 Cal.App.5th at p. 128, italics original.)

h. Deadline for determining prima facie basis

Section 1170.95 does not specify a deadline for the court’s determination of the prima facie basis for relief. “There is no time limit by which the trial court must make a ruling [on the prima facie showing]. This means that courts can rule, and have ruled, on the so-called first-step prima facie review after 60 days have passed.” (*People v. Lewis* (2021) 11 Cal.5th 952, 965.) The prosecution has 60 days to file a response and petitioner an additional 30 days to file a reply. (§ 1170.95, subd. (c).) There is nothing in section

1170.95 that resembles California Rules of Court, rule 4.551(a)(3)(A), which requires a ruling on a habeas petition within 60 days. However, because the statute establishes a number of deadlines for filing of pleadings and setting of a hearing, it may be fairly inferred that the Legislature expects these petitions to be handled expeditiously, depending on the extent and availability of the information necessary to determine whether the petitioner has shown a prima facie basis for relief.

i. Ruling by the court

If the court determines the petitioner has made a prima facie showing for relief, it must issue an order to show cause and set the matter for hearing. (§ 1170.95, subd. (c); see discussion, *infra*.) If the petitioner has failed to make the prima facie showing for relief, the court should summarily deny the petition.

Section 1170.95 does not require any formal statement or any on-the-record statement of reasons why a petition is denied. The better practice, however, is to give some indication why the petition is denied. Section 1170.95, subdivision (b)(2), encourages such an explanation: “If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.” Furthermore, such a practice is consistent with the requirements of California Rules of Court, rule 4.551(g), for habeas proceedings: “Any order denying a petition for writ of habeas corpus must contain brief statement of the reasons for the denial. An order only declaring the petition to be ‘denied’ is insufficient.”

3. Hearing on the merits of the petition (§ 1170.95, subd. (d)(1))

If the court finds the petitioner has shown a prima facie basis for relief, the court must set a hearing on the merits of the petition. “Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.” (§ 1170.95, subd. (d)(1).)

a. Burden of proof

Prior to its amendment by SB 775, section 1170.95, subdivision (d)(3), provided, in relevant part: “At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for relief.” Appellate courts disagreed over what had to be proved beyond a reasonable doubt. (See, *e.g.*, *People v. Duke* (2020) 55 Cal.App.5th

113 [granted review] [The prosecution must prove beyond a reasonable doubt that the petitioner *could* be convicted under the new law of accomplice liability]; *People v. Lopez* (2020) 56 Cal.App.5th 936 [granted review] [Each element of the murder conviction must be proved beyond a reasonable doubt under the new law].)

As amended by SB 775, subdivision (d)(3), now provides, in relevant part: “At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019. . . . A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.” As made clear by the amendment, to prevail at the hearing on the merits of the petition the prosecution must convince the court, beyond a reasonable doubt, that the petitioner, in fact, is guilty of the crime of conviction.¹⁵

People v. Garrison (2021) 73 Cal.App.5th 735 (Garrison), held petitioner was ineligible for relief under section 1170.95 as a matter of law because the record established he was the actual killer. Petitioner pled to the charge of murder and admitted he personally used a firearm; the evidence submitted at the preliminary hearing supported the conclusion there was only one shooter. Petitioner was not prejudiced by the fact the trial court may have used the wrong burden of proof. (*Garrison, supra*, 73 Cal.App.5th at p. 745-747.)

b. Evidence at the hearing (§ 1170.95, subd. (d)(3))

As originally enacted, section 1170.95 did not fully address the evidence admissible at the hearing on the merits of the petition. Section 1170.95, subdivision (d)(3), provided: “The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.”

SB 775 amended subdivision (d)(3): “The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case recited in any prior appellate opinion. However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. The

¹⁵ Subdivision (d)(3) requires the prosecution is to prove, beyond a reasonable doubt, that the petitioner is guilty of “murder or attempted murder” under the new law of accomplice liability. There is no mention of a manslaughter conviction. Presumably the omission is a drafting error; likely the prosecution has the same burden of proof as to murder, attempted murder, and manslaughter.

prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens.” Although a broader scope of evidence may be admissible at the actual resentencing of petitioner (see discussion, *infra*), it appears the amendment to section 1170.95, subdivision (d)(3), limits evidence at the hearing on the merits of the petition to what is admissible according to the traditional rules of evidence. Excepted from the general rule of admissibility is the following evidence:

- Evidence admitted at any prior hearing or trial which is admissible in the current proceeding, including:
 - Witness testimony.
 - Evidence admitted by stipulation.
 - Matters subject to judicial notice.
- The “procedural history” of the case recited in any prior appellate opinion.
- Hearsay from a preliminary hearing conducted pursuant to section 872, subdivision (b), only if it is admissible pursuant to another exception to the hearsay rule.

The role of the record of conviction at the hearing on the merits is unclear. As observed by an analysis of SB 567 by the Assembly Committee on Public Safety: “[SB 775] would specify that the rules of evidence apply at the hearing on eligibility. It is not entirely clear whether this means a statement in the record of conviction that is offered to prove the truth of the matter stated would have to fall within an exception to the hearsay rule in order to be admissible at the hearing. This raises a concern that parties would be required to recall witnesses from the trial to testify again at the Evidence Code section 1170.95 evidentiary hearing, even where there is a prior transcript of the trial testimony as part of the record of conviction; this may not be possible in older cases in which witnesses are no longer available.” (Report of Assembly Committee on Public Safety, SB 775 (Becker), July 13, 2021, page 10.) Regardless of the ambiguity expressed in the Assembly analysis, what is clear is that SB 775 removed the reference to “record of conviction” originally contained in subdivision (d)(3). Subdivision (d)(3), as originally enacted by SB 1437 provided: “The prosecutor and the petitioner may *rely on the record of conviction* or offer new or additional evidence to meet their respective burdens.” (Italics added.) Subdivision (d)(3), as amended by SB 775, now provides: “The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens.” Likely the amendment is intended to preclude the use of the record of conviction unless otherwise allowed by section 1170.95, subdivision (d)(3), such as under other established exceptions to the hearsay rule.

SB 1437 does not specify the exact scope and nature of the “new evidence” the parties may offer. The statute appears to permit live testimony and admission of new physical evidence.

People v. Williams (2020) 57 Cal.App.5th 652 (*Williams*), holds a court may consider reliable hearsay in determining whether petitioner is entitled to relief under section

1170.95. “Accordingly, the superior court here was permitted to consider hearsay such as that found in our prior opinion in *Williams I* and the section 1203.01 statement, ‘provided there is a substantial basis for believing the hearsay information is reliable.’ (See *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1094-1095, 213 Cal.Rptr.3d 265 (*Sledge*) [rejecting similar argument, concluding that reliable hearsay may be considered to resolve Proposition 47 (Safe Neighborhoods and Schools Act) petition to dismiss or resentence petitioner after reduction of felony conviction to misdemeanor]; *People v. Saelee* (2018) 28 Cal.App.5th 744, 756, 239 Cal.Rptr.3d 475 [rejecting similar argument, concluding reliable hearsay may be considered to resolve Proposition 64 (Control, Regulate and Tax Adult Use of Marijuana Act) petition to dismiss or resentence petitioner after reduction of felony marijuana conviction to misdemeanor]; see also *People v. Guilford* (2014) 228 Cal.App.4th 651, 660-661, 175 Cal.Rptr.3d 640 [prior appellate court opinion, although hearsay, was admissible to resolve Proposition 36 (Three Strikes Reform Act of 2012) petition to recall and reduce sentence imposed on third-strike conviction].)” (*Williams, supra*, 57 Cal.App.5th at p. 662.) The continued validity of *Williams* in light of the amendment of section 1170.95, subdivision (d)(3), likely depends on whether the current court is considering only the “procedural history” of the case.

People v. Myles (2021) 69 Cal.App.5th 688 (*Myles*), held the trial court did not error in considering a parole risk assessment and the transcript of petitioner’s parole hearing in denying a petition under section 1170.95 on the merits. “[T]he plain language of the statute allows both the petitioner and the prosecutor to rely on ‘the record of conviction or offer *new or additional evidence* to meet their respective burdens.’ [Citation.] The term ‘new or additional evidence’ is not defined in the statute, but the ordinary meaning of the word ‘new,’ unbounded by further definition or restriction in the statutory text, suggests the Legislature intended to allow both the prosecution and defendant to rely on evidence that becomes available after a trial or plea, whether the evidence previously existed or not. ([Citation] [‘In allowing for the section 1170.95 postconviction proceeding, the Legislature gave the superior court unfettered discretion to consider “evidence” without any restriction at the subdivision (d)(3) hearing to determine the petitioner’s eligibility for resentencing.’]; Couzens et al., *Sentencing California Crimes* (The Rutter Group 2021) § 23:51 [‘[Senate Bill] 1437 does not specify the exact scope and nature of the “new evidence” the parties may offer. The statute appears to permit live testimony and admission of new physical evidence.’].)” (*Myles, supra*, 69 Cal.App.5th at p. 698, italics original.)

People v. Cooper (2022) ___ Cal.App.5th ___ [A161632] (*Cooper*), held the trial court improperly found the petitioner to be a “major participant” who acted “with reckless indifference to human life.” Petitioner had been convicted after jury trial of first degree murder, kidnapping and that he was an armed principal in the commission of the two crimes; he was acquitted of being a felon in possession of a firearm. The hearing on the merits of the petition was based primarily on the original appellate opinion affirming petitioner’s convictions and on the trial transcript. The trial court’s denial of the

petition under section 1170.95 was based in part on its conclusion that petitioner possessed and fired a gun. The appellate court reversed. “We hold that a trial court cannot deny relief in a section 1170.95 proceeding based on findings that are inconsistent with a previous acquittal when no evidence other than that introduced at trial is presented.” (*Cooper, supra*, ___ Cal.App.5th at p. ___.)

c. Presence of the petitioner

Likely the hearing on the merits of the petition, and certainly the actual resentencing of the petitioner if the request for relief is successful, are critical stages of the criminal process that would entitle the petitioner to be personally present. An eligibility hearing in the context of a petition for resentencing under Proposition 47 was held to be a critical stage of the criminal process requiring the petitioner’s personal presence without a proper waiver. (*People v. Simms* (2018) 23 Cal.App.5th 987, 996-998.) However, the court should not order the production of the petitioner from prison without consultation with the petitioner’s counsel. Because of housing and prison program considerations, the petitioner may choose to remain in prison during the proceedings. This may be particularly true if the petitioner will remain in prison custody even if the petition is successful. If the petitioner does choose to remain in prison, the court should obtain a proper waiver of personal appearance through counsel.

A proper waiver can be obtained under the provisions of section 977, subdivision (b). The difficulty with such a procedure, however, is that the waiver technically must be made in open court – a process that defeats the purpose of getting the waiver. In *People v. Price* (1991) 1 Cal.4th 324, 406, our Supreme Court upheld a waiver made by the petitioner in writing from his jail cell: “Defendant was absent from jury voir dire during the morning of July 31, 1985, and again on August 5, 1985. Each time, defendant sent a note to the court explaining his absence and signed a waiver form. On July 31, defendant said in the note that he preferred to use the morning for a doctor's appointment and for court-ordered recreation at the jail. On August 5, defendant said in the note he preferred to use the time for exercise. Although the waiver forms were not executed in open court and did not use the precise language of section 977, they substantially complied with that provision. Accordingly, the waiver was valid under sections 977 and 1043, subdivision (d).” It will be sufficient under section 1170.95 if the petitioner waives his appearance through counsel with the use of a form in substantial compliance with the specifications of section 977, subdivision (b)(2).

d. The issues at the hearing

The hearing under section 1170.95 is not a trial *de novo* on all the original charges; rather, it is “a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner on

any remaining counts. . . .” (§ 1170.95, subd. (d)(1).) The hearing potentially will involve the following issues:

Whether the petitioner was convicted based on the felony-murder rule or by the doctrine of natural and probable consequences

A threshold issue is whether the petitioner was convicted of murder, attempted murder, or manslaughter based on the felony-murder rule or by the doctrine of natural and probable consequences. It is not clear how the petitioner will be able to show he was convicted of felony murder or by the application of NPC. Jurors are not required to disclose the theory under which they convict the petitioner of murder or make any such special findings – indeed, they are not even required to agree on the theory of conviction. Proof problems magnify when the petitioner is convicted by plea. As to persons convicted after a trial, the most the petitioner will be able to establish is that the prosecution actually sought the murder conviction based on a felony-murder theory and/or NPC. Such a fact can be established by resort to the jury instructions and argument of counsel. For persons convicted of murder, attempted murder, or manslaughter by plea, likely the most that can be shown is that under the facts of the case there is a plausible basis for conviction based on a felony-murder theory and/or NPC.

Whether the petitioner could be convicted of murder, attempted murder, or manslaughter under the law after January 1, 2019

Likely most of the litigation under section 1170.95 will be to determine whether the petitioner could be convicted of murder, attempted murder, or manslaughter after the changes made by SB 1437. For the petitioner to be eligible for relief, it must be shown that “[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (a)(3).) Because the prosecution carries the burden of proof, however, the issue is more precisely whether the prosecution can establish beyond a reasonable doubt, that the petitioner could be found guilty of murder, attempted murder, or manslaughter under any one or more of the following theories:

- (1) The petitioner was the actual killer, having killed the victim with malice aforethought.
- (2) The petitioner was not the actual killer, but as a principal aided and abetted the commission of the murder.
- (3) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was the actual killer.

- (4) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner 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.
- (5) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.
- (6) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the victim was a peace officer who was killed while in the course of his or her duties, where the petitioner knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

People met burden of proof

People v. Bascomb (2020) 55 Cal.App.5th 1077, and *People v. Douglas* (2020) 56 Cal.App.5th 1, found sufficient evidence to support petitioner's conviction of murder based on the allegation he was a major participant in the underlying crime and acted with reckless indifference to human life. The underlying convictions met the standards of *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522. The trial court properly denied relief under section 1170.95.

People did not meet burden of proof

People v. Ramirez (2021) 71 Cal.App.5th 970 (*Ramirez*), found the trial court's finding that petitioner acted with reckless indifference was not supported by substantial evidence under the standard set by *Banks*, *Clark* and *Scoggins*. "Considering the totality of the circumstances in the light most favorable to the judgment [citation], substantial evidence does not support the superior court's finding Ramirez acted with the requisite mental state of reckless indifference to human life. There is no evidence Ramirez was armed during the felony or supplied the sole murder weapon. Rather, it was Rios who instigated and planned the carjacking, provided the gun, and fired it. Although Ramirez was aware Rios had a gun and intended to use it during the carjacking, that is not sufficient to prove the requisite mental state. [Citation.] ['The mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life.']; [citation] [aiders and abettors with simple awareness that confederates were armed and the armed felony carried a risk of

death ‘lack the requisite reckless indifference to human life’]; [citation] [‘Although [petitioner] was aware that [the shooter] had a gun, [petitioner] did not use a gun himself, and there was no evidence he supplied the gun to [shooter].’].)” (*Ramirez, supra*, 71 Cal.App.5th at pp. 987-988.)

Whether the Petitioner was potentially convicted under multiple theories of liability

The record may reflect that the prosecution sought the petitioner’s murder conviction based on multiple theories, including application of the felony-murder rule and/or NPC. In cases where the petitioner was convicted after a jury trial, instructions and argument of counsel will likely reflect consideration of all available theories of liability. It is not the obligation of the petitioner to convince the court that the felony-murder rule or NPC was actually used by the jury in whole or in part in the petitioner’s conviction. Indeed, since the jury need not disclose its theory of liability or even agree on any particular theory, neither of the parties will be able to show the actual basis of the petitioner’s conviction. It is the burden of the prosecution to show, beyond a reasonable doubt, the petitioner could be found guilty of murder under a valid theory of the law effective January 1, 2019. (See § 1170.95, subs. (a)(3), (d)(3).)

4. Relief granted by the court and resentencing (§ 1170.95, subd. (d)(3).)

a. Vacating of conviction

If the prosecution fails to meet its burden of proof to show that the petitioner could have been convicted of murder under the law effective January 1, 2019, “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 .” (§ 1170.95, subd. (d)(3).) In other words, the court must vacate the underlying murder conviction, and any count-specific conduct enhancements such as the use of weapons and any special circumstance allegations under section 190.2.

b. Resentencing of petitioner

If the petitioner successfully challenges the murder conviction, the court is to “resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence.” (§ 1170.95, subd. (d)(1).) If the target offense was identified in the murder count of the complaint, that offense will then form the basis of the resentencing. “The petitioner’s conviction shall be redesignated as the target offense or underlying felony for resentencing purposes if the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged. Any applicable statute of limitations shall not

be a bar to the court’s redesignation of the offense for this purpose.” (§ 1170.95, subd. (e).)

Because section 1170.95, subdivision (d)(1), provides that resentencing is to occur “as if petitioner had not previously been sentenced,” the court will be free to resentence all counts, including the consecutive or concurrent structure of the sentence on multiple counts. The only restriction is that the new sentence may be equal to, but not greater than, the total original sentence.

People v. Ramirez (2021) 71 Cal.App.5th 970 (*Ramirez*), holds petitioner, a juvenile at the time of the underlying crime, who successfully petitions the court pursuant to section 1170.95, is entitled to “resentencing” in juvenile court pursuant to Proposition 57 and Senate Bill 1391. (*Ramirez, supra*, 71 Cal.App.5th at pp. 996-1000.) “Because Ramirez was 15 at the time of the offenses, pursuant to the changes made by Senate Bill 1391 to Welfare and Institutions Code section 707, subdivision (a), Ramirez's remaining counts are not subject to a motion to transfer to adult criminal court. Therefore, we remand with directions for the trial court to transfer the matter to the juvenile court. The juvenile court shall treat Ramirez's remaining convictions as juvenile adjudications and impose an appropriate disposition.” (*Ramirez, supra*, 71 Cal.App.5th at p. 1000.)

Determining target offense

If the petitioner had been charged with a generic allegation of murder, without the target offense having been specified in the complaint, the court must identify a target offense for the purpose of the resentencing. “If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner’s conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court’s redesignation of the offense for this purpose.” (§ 1170.95, subd. (e).) It is unclear whether the redesignation of the target offense for the new base term includes the count-specific conduct enhancements. In granting relief, the court is to vacate the underlying conviction and “any allegations and enhancements attached to the conviction.” (§ 1170.95, subd. (d)(3).) It seems the intent of the Legislature is to place the petitioner after resentencing in a situation where the murder and any related enhancements no longer exist. It is consistent with this intent that the resentencing should not include any count-specific conduct enhancements or other allegations previously charged against the petitioner, unless they can be established relative to the target offense by evidence established at the hearing on the petition. For example, if defendants A and B (the petitioner) participated in a robbery where A, the only armed person, shot and killed the victim, but the prosecution failed to meet its burden of proving petitioner was ineligible for resentencing, B could be convicted and sentenced on the robbery, the target offense, and a gun enhancement for being armed within the meaning of section 12022, subdivision (a)(1).

Although the language of section 1170.95, subdivision (d)(3), is ambiguous, it seems to suggest that if the target offense was not charged in the complaint, the court must determine the target offense either by reference to the fact of a conviction of a specific offense in a separate count of the complaint, or to the underlying felony (target offense) identified in the instructions. As an example, if the petitioner is convicted of first degree murder based on a generic allegation of murder¹⁶, and the prosecution relied on a felony-murder theory because of a robbery, the target offense can be taken from the fact the petitioner was convicted of the robbery in a separate count, or from the reference to robbery as the underlying felony in the jury instructions. If the target offense was separately charged in the complaint, likely the sentence for that count was stayed under section 654.

Determining the proper target offense if the petitioner was convicted by plea may be more difficult. If the complaint charges the target offense either in the murder count or a separate count, likely there will be little difficulty in determining the target offense. If the target offense is not identified in the complaint in any way, the parties and the court must determine the target offense from any other available evidence.

If it is necessary to resentence the petitioner on a crime not charged in the original complaint, section 1170.95, subdivision (e), provides that “[a]ny applicable statute of limitations shall not be a bar to the court’s redesignation of the offense for [resentencing] purpose[s].”

People v. Howard (2020) 50 Cal.App.5th 727 (*Howard*), addresses the determination of the target offense. The petitioner was convicted of first degree felony murder after the victim of a residential burglary was shot by the petitioner’s accomplice. In the underlying trial, the petitioner was not separately charged with residential burglary and the jury was only instructed on the general law of burglary without reference to degree. Because the petitioner was not charged with or convicted of residential burglary, the defense argued the target offense could only be second degree burglary. The court rejected the argument: “In our view, the absence of a first degree burglary instruction and verdict did not preclude the court from redesignating Howard’s conviction as first degree burglary, because the evidence at trial demonstrated beyond any dispute the building was a residence. As Howard acknowledges, the plain language of section 1170.95, subdivision (e) contemplates a situation where—as here—the underlying felony was not charged. It follows that where the underlying felony is not charged, there will be no jury instruction or verdict form. Additionally, we question the practicality of requiring a trial court to ignore evidence established at trial when designating the underlying felony pursuant to section 1170.95, subdivision (e). (In re I.A. (2020) 48

¹⁶ An example of a generic allegation of murder is: “Defendants X and Y, did in the County of Placer, State of California, on or about _____, commit a violation of Penal Code, section 187, in that said defendants did willfully, unlawfully and with malice aforethought murder V, a human being.” It is a generic allegation because it does not expressly predicate liability based on the felony-murder rule or NPC.

Cal.App.5th 767, 775, 262 Cal.Rptr.3d 234 [examining evidence offered at contested adjudication to determine whether the juvenile court’s section 1170.95 subdivision (e) finding was supported by sufficient evidence; suggesting a court cannot redesignate an offense ‘for which there is no support in the record’].) [¶] To the extent Howard contends section 1170.95 subdivision (e) requires the trial court to designate the lesser degree of the underlying felony—even when the evidence at trial shows the commission of the greater degree—we disagree. Subdivision (e) states the court ‘redesignate[s] ... the ... underlying felony for resentencing purposes.’ (§ 1170.95, subd. (e).) It does not direct the court to impose the lesser degree of the felony offense. Had the Legislature intended to dictate such a result, ‘it easily could have done so.’ (People v. Flores (2020) 44 Cal.App.5th 985, 993, 258 Cal.Rptr.3d 205 [declining to expand section 1170.95 to include offenses not mentioned in statute].)” (Howard, at p. 738.)

“When the court redesignates the murder conviction as the underlying felony (§ 1170.95, subd. (e)), may the court impose enhancements relative to that felony? As discussed above, section 1170.95 subdivision (e) is silent with respect to how a court resentences a defendant after redesignating the underlying felony. Consistent with the legislative goal of placing Howard after resentencing in a situation where the murder and any related enhancements no longer exist, Howard’s resentencing may not include count-specific enhancements *unless* the People establish them related to the underlying felony by evidence presented at the hearing on the section 1170.95 petition. Our conclusion finds support in the principle that ‘[t]o the extent the court is determining the sentence to impose after striking the murder conviction, the traditional latitude for sentencing hearings should be allowed.’ [Citation.]” (Howard, at pp. 741-742, italics original.)

People v. Watson (2021) 64 Cal.App.5th 474 (Watson), holds the underlying felony as designated at the time of resentencing can be more than one felony. “[F]elony-murder liability may be predicated on more than one felony. Viewed in this context, it is reasonable to apply section 7’s rule [“the singular number includes the plural, and the plural the singular”] here and construe ‘underlying felony’ in section 1170.95, subdivision (e) to include a plural meaning. The plain language of the statute thus confirms that the Legislature did not intend to require courts to designate only one felony in all cases.” (Watson, *supra*, 64 Cal.App.5th at p. 487.)

People v. Howard (2020) 50 Cal.App.5th 727 (Howard), found the judicial fact-finding process necessary for the redesignation of the crimes did not violate the petitioner’s right to a jury trial. “The retroactive relief provided by section 1170.95 reflects an act of lenity by the Legislature ‘that does not implicate defendants’ Sixth Amendment rights.’ [Citations.] [¶] Here, the process by which a trial court redesignates the underlying felony pursuant to section 1170.95, subdivision (e) does not implicate Howard’s constitutional jury trial right under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 or *Alleyne v. United States* (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314. The redesignation does not increase Howard’s sentence. We reject Howard’s

argument that the residential burglary designation violated his constitutional due process rights.” (Howard, *supra*, 50 Cal.App.5th at p. 740.)

In *People v. Silva* (2021) 72 Cal.App.5th 505 (*Silva*), petitioner was convicted of two felony murders arising out of a home invasion robbery involving six victims. The trial court granted petitioner’s motion under section 1170.95 to set aside the murder convictions. The trial court then designated the six robbers for sentencing, although the robberies were never submitted to the jury for decision. Petitioner contended he could be resentenced only on two robberies derived from the two dismissed murder convictions. *Silva* relied heavily on *Howard* in rejecting petitioner’s Sixth Amendment claims. (See *Silva, supra*, 72 Cal.App.5th at p. 520.)

Silva, however, observes petitioner still has a due process right to notice of the charges that may be redesignated. “Though . . . cases establish broad notice and sentencing rights in criminal prosecutions, we do not find them controlling in proceedings under section 1170.95. *Silva* cannot legitimately claim the robbery offenses the court chose to include in its resentencing package were ‘uncharged’; they were charged in the original information. Thus, it is an overstatement to say he had no notice whatsoever, at any point, that he might once again be put in jeopardy of conviction for them. The factual basis for *Silva*’s lack of notice complaint appears to be that the *amended* information [italics in original] not only gave him no notice he might eventually be sentenced for five robberies and an attempted robbery, but it led him to believe he would not be resentenced for anything other than a lesser offense to murder or a charge supported by sentencing enhancement findings returned against him at trial. While we reject any claim that the amended information constrained the court to selecting redesignated offenses that were charged and actually litigated at trial—section 1170.95, subdivision (e) on its face refutes that notion [citation]—*we think a section 1170.95 petitioner is entitled to explicit notice of any offense the court or prosecutor proposes to redesignate as an underlying felony or target offense under subdivision (e) in lieu of a murder conviction.* Though subdivision (e) is silent on the procedure to be employed when the parties waive an evidentiary hearing under section 1170.95, subdivision (d)(2), we believe such notice reasonably in advance of the subdivision (e) determination is required as a matter of fundamental fairness. The Attorney General disagrees that due process is implicated here, but his only authority is *Howard, supra*, 50 Cal.App.5th at page 740, 264 Cal.Rptr.3d 388, where there was no question the petitioner knew he might be resentenced to some form of the single burglary at issue, since that offense provided the basis of the special circumstance finding against him at trial [citation]. In this case, by contrast, *Silva* was never called upon in the original prosecution to meet and prepare a defense to the individual robbery offenses for which he was resentenced.” (*Silva, supra*, 72 Cal.App.5th at pp. 521-522, italics added, except as otherwise noted.)

Silva further observes: “[W]e conclude a redesignation and resentencing procedure that abandons the most basic tenets of notice and an opportunity to be heard would be

fundamentally unfair and would violate due process, and we refuse to so construe section 1170.95. Under section 1170.95, the resentencing judge retains much discretion to impose a range of possible sentencing choices, and his or her discretionary choices have a direct impact on the petitioner's liberty interests, depending on the choice of redesignated crime(s) and the structure of the sentence imposed. In this case, for instance, the parties have proposed resentencing Silva to somewhere between six and 24 years in prison, and though any sentence in that range would be a reduction from his former sentence, the vast range available implicates the petitioner's liberty interest. We conclude, as in any sentencing proceeding, the protections for "life, liberty, or property" embodied in the due process clauses of the Fifth and Fourteenth Amendments demand fundamental fairness in a section 1170.95 resentencing." (*Silva, supra*, 72 Cal.App.5th at p. 523.) "*What we hold here, specifically, is that as a matter of procedural due process Silva was entitled to know, reasonably in advance of the court resentencing him, which crimes the prosecution sought to have redesignated as underlying felonies, the length of sentence the prosecution proposed, and how that recommended sentence was calculated.*" (*Silva, supra*, 72 Cal.App.5th at p. 523, italics added.)

"As a matter of statutory construction, we reject Silva's claim that a redesignation cannot be made of past alleged crimes that remain unadjudicated. In cases in which the underlying felony or target offense was never charged, the resentencing judge necessarily must identify the appropriate redesignated offense and make factual findings on the petitioner's guilt. (§ 1170.95, subd. (e).) If a judge may redesignate a murder as a crime that was never charged, as is implicit in subdivision (e), we see no reason why he or she cannot redesignate a murder as a charge once made but dropped in circumstances where the dismissal was not for lack of evidence, but in reliance on the felony-murder rule then in effect." (*Silva, supra*, 72 Cal.App.5th at pp. 529-530.)

Evidence that can be considered at resentencing

In resentencing the petitioner, the court likely may use any evidence admissible in the original sentencing proceeding. In that regard, if it is apparent the petitioner will be remaining in custody on other charges, the court may find it useful to refer the petitioner to the probation department for a supplemental report. Because the court may consider adding a parole period after the completion of the sentence (§ 1170.95, subdivision (g)), likely the court will be able to consider the petitioner's performance in prison in setting any new term or period of post-sentence supervision.

To the extent the resentencing process is similar to Propositions 36 and 47, the strict rules of evidence do not apply. "An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. [Citations.]"

(*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095; see *People v. Banda* (2018) 26 Cal.App.5th 349, 357.)

In *People v. Hall* (2019) 39 Cal.App.5th 831 (*Hall*), the court approved the use of reliable hearsay from probation and police reports in the context of a petition for resentencing under Proposition 64, the marijuana initiative. The court observed: “In determining whether a convicted felon is eligible for resentencing to a misdemeanor under Proposition 47 (Pen. Code, § 1170.18), reliable hearsay statements in a probation report are admissible. [Citation.] The structure of Proposition 47 is similar to Proposition 64. ‘Proposition 47 . . . “created a new resentencing provision: [Penal Code] section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47 [Citation.]” [Citations.]’ [Citation.] [¶] Since reliable hearsay statements in a probation report are admissible to show whether a petitioner is eligible for resentencing under Proposition 47 [citation], it logically follows that they are also admissible to show whether a petitioner is eligible for relief under Proposition 64. The Court of Appeal in *Sledge* reasoned: ‘An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. [Citations.]’ [Citation.] In *People v. Saelee* (2018) 28 Cal.App.5th 744, 756 . . . , the court applied similar reasoning to Proposition 64: ‘Nothing in Proposition 64 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. [Citation.]’ [Citation.]” (*Hall*, at p. 838.)

In approving the trial court’s use of a portion of the arrest report, *Hall* also rejected any application of *People v. Sanchez* (2016) 63 Cal.5th 665 and *Crawford v. Washington* (2004) 541 U.S. 36: “ ‘In [*People v.*] *Sanchez* . . . , the [California] Supreme Court held that an expert’s opinion testimony concerning defendant’s gang membership was inadmissible in a criminal trial because the expert had relied on testimonial hearsay in police reports. [Citation.] The holding was based on *Crawford v. Washington* (2004) 541 U.S. 36 . . . , in which ‘the United States Supreme Court held . . . that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses.’ [Citation.] [¶] Appellant cites no authority suggesting that *Crawford* applies to a proceeding in which a convicted felon is seeking to dismiss or redesignate his felony conviction because of the electorate’s post-conviction act of lenity, e.g., Proposition 64. In *Crawford* the United States Supreme Court observed: ‘The Sixth Amendment’s Confrontation Clause provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. [Citations.]’ [Citation.] Appellant’s Proposition 64

application to dismiss or redesignate his 1996 felony marijuana conviction is not a criminal prosecution.” (*Hall, supra*, 39 Cal.App.5th at p. 844.)

Notice to victim

The court should ensure that all proper notification of the new sentencing proceeding be given to the victims as required by California Constitution, article I, section 28, subdivision (b)(7) and (8).

No violation of *Apprendi* in court determination of target offense

“The retroactive relief provided by section 1170.95 reflects an act of lenity by the Legislature “that does not implicate defendants’ Sixth Amendment rights.” [Citations.] [retroactive application of Proposition 36, the Three Strikes Reform Act of 2012, is a legislative act of lenity that does not implicate Sixth Amendment rights].) [¶] Here, the process by which a trial court redesignates the underlying felony pursuant to section 1170.95, subdivision (e) does not implicate Howard’s constitutional jury trial right under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 or *Alleyne v. United States* (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314. The redesignation does not increase Howard’s sentence. We reject [the defendant’s] argument that the residential burglary designation violated his constitutional due process rights.” (*Howard*, at p. 740.)

Court-ordered parole supervision

As originally enacted, section 1170.95 allowed the court, after resentencing, to place the petitioner on parole for up to three years. (§ 1170.95, subd. (g).) SB 775 amended section 1170.95, subdivision (h), to provide for a parole period of up to two years.

Credit for time served; post-sentence supervision (§ 1170.95, subd. (g))

Section 1170.95, subdivision (h), directs the court to give the petitioner credit for time served. *People v. Wilson* (2020) 53 Cal.App.5th 42 (*Wilson*), addressed the allocation of custody credits when, because of resentencing under section 1170.95, the petitioner ends up with more credit than the new sentence. *Wilson* observes that section 1170.95, subdivision (g), provides: “A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to [two] years following the completion of the sentence.” (Italics added.) *Wilson* concludes “the only reasonable reading of section 1170.95 is that the trial court has discretion to impose a period of parole and that the court’s discretion is not constrained by excess custody credits.” (*Wilson, supra*, 53 Cal.App.5th at p. 52.) The excess credits will not reduce the period of parole imposed under section 1170.95, subdivision (g).

Generally in accord with *Wilson* is *People v. Lamoureux* (2020) 57 Cal.App.5th 136 (*Lamoureux*). “[W]e conclude section 1170.95, subdivision (g) does not require a court

to automatically apply a person's excess custody credits to offset the person's parole supervision period. We conclude, instead, that a court has discretion to order a resentenced person to be subject to parole supervision for up to three years in duration upon the person's release from custody." (*Id.* at p. 150.) *Lamoureux* further held the excess custody credit should be applied to the restitution fine ordered in the case. (*Id.* at p. 152.)

In calculating the custody credits on resentencing, the court should be guided by *People v. Buckhalter* (2001) 26 Cal.4th 20, 23: "When . . . an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the "subsequent sentence." (§ 2900.1.) On the other hand, a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for correction of sentencing errors. Instead, he remains 'imprisoned' (§ 2901) in the custody of the Director "until duly released according to law' (*ibid.*), even while temporarily confined away from prison to permit his appearance in the remand proceedings. Thus, he cannot earn good behavior credits under the formula specifically applicable to persons detained in a local facility, or under equivalent circumstances elsewhere, "'prior to the imposition of sentence' for a felony. (§ 4019, subds. (a)(4), (b), (c), (e), (f); see fn. 6, *post.*) Instead, any credits beyond *actual custody time* may be earned, if at all, only under the so-called worktime system separately applicable to convicted felons serving their sentences in prison. (§§ 2930 et seq., 2933.)" (*Italics original.*) In other words, the court should determine the *actual time* credit earned in county jail prior to the original sentencing, the *actual time* earned in state prison, and the *conduct credit* earned in county jail pending the original sentencing; *conduct credit* for time spent in prison is determined by the Department of Corrections and Rehabilitation.

Abstract of conviction to CDCR

A copy of the court's order and an amended abstract of conviction should be sent to CDCR.

Disposition report to DOJ

The court should report a resentencing under SB 1437 to the Department of Justice as required by section 13151.

I. Whether prosecution is entitled to new trial if relief granted

There is some speculation the prosecution may be entitled to a new trial on the murder conviction if relief under section 1170.95 is granted. Such a right is unlikely under the double jeopardy clause.

While determining whether the petitioner has established grounds for resentencing, the court is given limited jurisdiction to hear evidence proving the crime of murder. Section 1170.95, subdivision (d)(3), provides “[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.” Certainly the authority to hear new evidence and reconsider previously admitted evidence related to the murder is similar to a retrial – but it is being done solely in the context of determining eligibility for resentencing, and is triggered by the petitioner’s request for relief. Under these circumstances, the double jeopardy clause is not implicated.

If the court hears all the evidence, whether from the record of conviction or new evidence presented by the parties, and thereafter grants relief, the court is making a factual determination that the petitioner is not guilty of murder. In essence, the court finds the prosecution has failed to present sufficient evidence to establish, beyond a reasonable doubt, the petitioner’s guilt of murder based on the law after January 1, 2019. As the court observed in *People v. Hatch* (2000) 22 Cal.4th 260, 271–272 (*Hatch*): “Over 20 years ago, the United States Supreme Court held that the Fifth Amendment precludes retrial if a court determines the evidence at trial was insufficient to support a conviction as a matter of law. [Citation.] Thus, an appellate ruling of legal insufficiency is functionally equivalent to an acquittal and precludes a retrial. [Citation.] An analogous trial court finding is also an acquittal for double jeopardy purposes. [Citations.]”

If in the context of a motion for resentencing under section 1170.95, the trial court determines the evidence is legally insufficient to establish the crime of murder based on the law effective January 1, 2019, such a finding likely is equivalent to an acquittal, establishing a double jeopardy bar to any retrial of the crime.

J. Right to appeal

Ruling denying relief

If the trial court denies the motion, likely the petitioner may appeal the decision, subject to review by an appellate court under the “substantial evidence” rule discussed in *Hatch*: “Specifically, . . . appellate courts must review ‘the whole record in the light most favorable to the judgment’ and decide ‘whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] Under this standard, the court does not ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.” [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.]” (*Hatch, supra*, 22 Cal.4th at p. 272, italics original.)

Ruling granting relief

People v. Hampton (2022) 74 Cal.App.5th 1092 (*Hampton*), concludes the People have the right to appeal the decision granting petitioner’s request for resentencing. “W]e conclude . . . the People may appeal the trial court's determination that defendant is entitled to relief. The order was indisputably made ‘after judgment’; judgment was imposed in defendant's case when he was originally sentenced. It also affects the People's substantial rights in that it determines whether the trial court will exercise its powers to recall the previous judgment and resentence defendant. [Citation.] Ultimately, the order resulted in a substantial modification of the original judgment. ([Citation] [order is ‘obviously’ appealable when its effect is ‘to modify substantially the judgments originally entered’].) Thus, the trial court's order determining defendant is entitled to relief qualifies as ‘[a]n order made after judgment, affecting the substantial rights of the people,’ and is appealable under section 1238, subdivision (a)(5).” (*Hampton, supra*, 74 Cal.App.5th at p. 1101.)

No right to *Wende* review

“ ‘In an indigent criminal defendant's *first appeal as a matter of right*, the Court of Appeal must independently review the record if appointed counsel represents he or she has found no arguable issues.’ (Conservatorship of Ben C. (2007) 40 Cal.4th 529, 535, italics added; see *People v. Wende* (1979) 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (*Wende*).)” (*People v. Flores* (2020) 54 Cal.App.5th 266, 268 (*Flores*), italics added by *Flores*.)” However, appellate courts are in general agreement that a petitioner has no right to a *Wende* review following the denial of a motion under section 1170.95. *Flores* holds there is no right to such a review, but the court should do so in the interests of justice. “[W]e hold that when an appointed counsel files a *Wende* brief in an appeal from a summary denial of a section 1170.95 petition, a Court of Appeal is not required to independently review the entire record, but the court can and should do so in the interests of justice. This is a pure question of law, so our review is *de novo*. (Citation.) (*Flores, supra*, 54 Cal.App.5th at p. 269.) Substantially in accord with *Flores* is *People v. Gallo* (2020) 57 Cal.App.5th 594, 598, 599.

People v. Figueras (2021) 61 Cal.App.5th 108 (*Figueras*), holds because an appeal from an order denying section 1170.95 relief is in the context of a postconviction proceeding, there is no right to effective assistance of counsel, the right which triggers a *Wende* review on a direct appeal. (*Figueras, supra*, 61 Cal.App.5th at p. 111.) Based on a similar holding in *People v. Cole* (2020) 52 Cal.App.5th 1023 (*Cole*), *Figueras* instructs appellate counsel: “ ‘[C]ounsel appointed in [a section 1170.95] appeal[] is required to independently review the entire record and, if counsel so finds, file a brief advising the appellate court that there are “no arguable issues to raise on appeal”; [counsel must inform] the defendant [that he or she] has a right to file a supplemental brief [within 30 days of the filing of counsel's brief]; and this court has the duty to address any issues raised by the defendant but otherwise may dismiss the appeal without conducting an independent review of the record.’ ” (*Figueras, supra*, 61 Cal.App.5th at pp. 112-113; *Figueras* and *Cole* have been granted review.)

VII. Constitutionality of SB 1437

Soon after the enactment of SB 1437, district attorneys across the state requested dismissal of petitions brought under section 1170.95. They primarily argued the legislation conflicted with initiatives enacted by the voters without a proper vote of either the public or the Legislature. Trial courts disagreed over the outcome of these issues.

Two companion opinions resolved all constitutional challenges in favor of the legislation. *People v. Lamoureux* (2019) 42 Cal.App.5th 241 (*Lamoureux*), and *People v. Superior Court (Gooden)*(2019) 42 Cal.App.5th 270 (*Gooden*), in divided opinions, concluded the legislation was constitutional; the Supreme Court subsequently denied petitions for review and denied requests not to publish the cases. Substantially in accord with these cases are *People v. Solis* (2020) 46 Cal.App.5th 762 [the elimination of the NPC doctrine by SB 1437 was constitutional]; *People v. Cruz* (2020) 46 Cal.App.5th 740 [SB 1437 did not amend Propositions 7 or 115]; *People v. Bucio* (April 2020) 48 Cal.App.5th 300 [SB 1437 did not amend Propositions 7 or 115; it did not violate victims' rights under Marcy's Law; it did not encroach on the governor's clemency power; and it did not infringe on the judicial power to resolve disputes]; *People v. Smith* (2020) 49 Cal.App.5th 85 [SB 1437 did not unconstitutionally amend section 190] [*Smith* has been granted review]; *People v. Alaybue* (2020) 51 Cal.App.5th 207 [SB 1437 did not amend Propositions 7 and 115 and does not violate the doctrine of separation of powers]; *People v. Lopez* (2020) 51 Cal.App.5th 589 [SB 1437 did not amend Propositions 7 and 115]; and *People v. Superior Court (Ferraro)* (2020) 51 Cal.App.5th 896 [SB 1437 did not amend Proposition 7 and 115]; *People v. Nash* (2020) 52 Cal.App.5th 1041 [SB 1437 did not unconstitutionally amend voter-approved initiatives, or violate the separation of powers]; *People v. Lippert* (2020) 53 Cal.App.5th 304 [split decision held SB 1437 did not unconstitutionally amend voter-approved initiatives, or violate the separation of powers or Marsy's Law]; *People v. Lombardo* (2020) 54 Cal.App.5th 553 [SB 1437 did not unconstitutionally amend voter-approved initiatives, or violate the separation of powers or Marsy's Law, and was not impermissible early release policy]; *People v. Marquez* (2020) 56 Cal.App.5th 40 [SB 1437 not in conflict with Marsy's Law].

People v. Prado (2020) 49 Cal.App.5th 480 (*Prado*), also upheld the constitutionality of SB 1437. As observed by Pardo: "Sections 188 and 189 were enacted by the Legislature; ergo, sections 188 and 189 are *legislative statutes*. The Legislature did not violate the constitutional limitation on amending *initiative statutes* when it passed Senate Bill 1437 and amended sections 188 and 189 because they are not *initiative statutes*. [¶] Section 1170.95 is a new statute that establishes a procedure for eligible defendants convicted of murder to petition for relief. The Legislature did not violate the constitutional limitation on amending or repealing an *initiative statute* when it passed Senate Bill 1437 and enacted section 1170.95 because it is itself a *legislative statute* that neither amends nor repeals any other statute." (*Prado*, at p. 483, italics original.)

People v. Johns (2020) 50 Cal.App.5th 46 (*Johns*), also upholds the constitutionality of SB 1437: "We agree with Johns that S.B. 1437 is constitutional and he is entitled to have the trial court consider his petition. Proposition 7 addressed the punishment appropriate for murder, not the elements of the offense, and Proposition 115 added predicates for applying the felony-murder

rule, which S.B. 1437 left intact. We therefore conclude S.B. 1437 addressed related but distinct areas of the law which the initiatives left in the power of the Legislature to amend. (*People v. Kelly*(2010) 47 Cal.4th 1008, 103 Cal.Rptr.3d 733, 222 P.3d 186 (Kelly).) The new statutory provisions therefore did not amend either ballot initiative. We also conclude retroactive application of S.B. 1437 through the petitioning process doesn't violate the separation of powers doctrine or the Victims' Bill of Rights of 2008 (Marsy's Law), as the district attorney argues.” (*Johns*, at pp.54-55.)

People v. Wilkins (2021) 68 Cal.App.5th 153 (Wilkins), upholds SB 1437 against a challenge based on cruel and unusual punishment. “We conclude the felony-murder special circumstance statute continues to narrow the class of death-eligible murderers notwithstanding the enactment of Senate Bill No. 1437. It circumscribes the overall class of murderers by rendering a mere subclass of murderers—namely, those convicted of first degree felony murder—eligible for the death penalty. Thus, we conclude Senate Bill No. 1437 neither repealed the felony-murder special circumstance statute in practice nor amended any voter-approved initiative.” (*Wilkins*, *supra*, 68 Cal.App.5th at p. 157.)

A. SB 1437 is not an invalid amendment of Propositions 7 and 115

Gooden rejected the People’s argument that SB 1437 improperly amended Propositions 7 and 115. The court summarized the changes made by those propositions: “Proposition 7. . . increased the punishment for first degree murder from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. (Prop. 7, §§ 1–2.) It increased the punishment for second degree murder from a term of five, six, or seven years to a term of 15 years to life. (*Ibid.*) Further, it amended section 190.2 to expand the special circumstances under which a person convicted of first degree murder may be punished by death or life imprisonment without the possibility of parole (LWOP). (*Id.*, §§ 5–6.) Proposition 7 did not authorize the Legislature to amend or repeal its provisions without voter approval. [¶] Proposition 115 . . . amended section 189 to add kidnapping, train wrecking, and certain sex offenses to the list of predicate offenses giving rise to first degree felony-murder liability. (Prop. 115, § 9.) Proposition 115 authorized the Legislature to amend its provisions, but only by a two-thirds vote of each house. (*Id.*, § 30.)” (*Gooden*, *supra*, 42 Cal.App.5th at p. 278.)

Gooden observed that “[w]hen confronted with the task of determining whether legislation amends a voter initiative, the Supreme Court has asked the following question: ‘[W]hether [the legislation] prohibits what the initiative authorizes, or authorizes what the initiative prohibits.’ [Citations.] [¶] In undertaking this analysis, the Supreme Court has cautioned that not all legislation concerning ‘the same subject matter as an initiative, or event augment[ing] an initiative’s provisions, is necessarily an amendment’ to the initiative. [Citation.] On the contrary, ‘ “[t]he Legislature remains free to address a “related but distinct area” ’ [citations] or a matter that an initiative measure ‘does not specifically authorize or prohibit.’ ” ’ [Citations.]” (*Gooden*, *supra*, 42 Cal.App.5th at pp. 279–280.)

Gooden concluded SB 1437 did not amend Proposition 7. The court explained the purpose of Proposition 7 was to increase the punishment for murder, yet nothing in SB 1437 changed that punishment. Instead, SB 1437 addresses the mental state requirements for murder, a subject “related to, but distinct from, an area addressed by an initiative.” (*Gooden*, 42 Cal.App.5th at p. 282.) Nothing in Proposition 7 indicated an intent of the voters to “freeze” the definition of murder.

The court also rejected the argument that section 1170.95 violates Proposition 7 because it allows a court to set aside a murder conviction that was valid when obtained. The court reasoned: “The People’s constitutional attack on the resentencing procedure established in section 1170.95 assumes a petitioner’s murder conviction is fixed and the resentencing procedure merely provides an avenue by which a petitioner may obtain a more lenient sentence for the extant conviction. However, that is not the case. The effect of a successful petition under section 1170.95 ‘ “is to vacate the judgment . . . as if no judgment had ever been rendered.’ ” [Citations.] Thus, the resentencing procedure established by section 1170.95—like the remainder of the statutory changes implemented by Senate Bill 1437—does not amend Proposition 7.” (*Gooden, supra*, 42 Cal.App.5th at p. 286.)

Similarly, *Gooden* rejected claims that SB 1437 amended Proposition 115. The court found the purpose of the initiative was to add certain crimes to the list of predicate offenses triggering the first degree felony-murder rule: “Senate Bill 1437 did not augment or restrict the list of predicate felonies on which felony murder may be based, which is the pertinent subject matter of Proposition 115. It did not address any other conduct which might give rise to a conviction for murder. Instead, it amended the mental state necessary for a person to be liable for murder, a distinct topic not addressed by Proposition 115’s text or ballot materials.” (*Gooden, supra*, 42 Cal.App.5th at p. 287, footnote omitted.)

In closing, *Gooden* observed: “[W]e reiterate a bedrock principle underpinning the rule limiting legislative amendments to voter initiatives: ‘[T]he voters should get what they enacted, not more and not less.’ [Citation.] Here, the voters who approved Proposition 7 and Proposition 115 got, and still have, precisely what they enacted—stronger sentences for persons convicted of murder and first degree felony-murder liability for deaths occurring during the commission or attempted commission of specified felony offenses. By enacting Senate Bill 1437, the Legislature has neither undermined these initiatives nor impinged upon the will of the voters who passed them.” (*Gooden, supra*, 42 Cal.App.5th at pp. 288–289.)

B. SB 1437 does not violate the separation of powers

The People asserted in *Lamoureux* that SB 1437 usurped the governor’s clemency power because section 1170.95 “legally erases” the conviction and penalties. The court rejected the argument, relying on *Way v. Superior Court* (1977) 74 Cal.App.3d 165 (*Way*), and *Younger v. Superior Court* (1978) 21 Cal.3d 102 (*Younger*).

“We conclude the rationale of the *Way* and *Younger* decisions is directly applicable here. Like the challenged laws in the *Younger* and *Way* cases, section 1170.95 can produce outcomes resembling the consequences of an executive commutation. Specifically, in cases where a petitioner makes a prima facie showing of entitlement to relief (§ 1170.95, subd. (c)), and the prosecution fails to carry its burden of proving the petitioner is ineligible for resentencing (*id.*, subd. (d)(3)), murder sentences may be vacated and sentences recalled (*id.*, subd. (d)(1)). Although section 1170.95 requires resentencing on remaining counts, such that a given prisoner’s overall sentence may not actually be shortened (*id.*, subd. (d)(1)), it is apparent and undisputed that at least some successful petitioners will obtain shorter sentences or even release from prison.

However, the objective of the Legislature in approving section 1170.95—like the legislative aims underpinning the challenged laws in the *Way* and *Younger* cases—was not to extend “an act of grace” to petitioners. [Citations.] Rather, the Legislature’s statement of findings and declarations confirms it approved Senate Bill 1437 as part of a broad penal reform effort. The purpose of that undertaking was to ensure our state’s murder laws “fairly address[] the culpability of the individual and assist[] in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.” (Stats. 2018, ch. 1015, § 1, subd. (e); see *People v. Munoz* (2019) 39 Cal.App.5th 738, 763, 252 Cal.Rptr.3d 456 (*Munoz*) [discussing “the Legislature’s dual intents [in enacting Senate Bill 1437]—making conviction and punishment commensurate with liability, and reducing prison overcrowding”].)

(*Lamoureux, supra*, 42 Cal.App.5th at pp. 255-256.)

Lamoureux also rejected a claim that section 1170.95 interfered with the court’s “core function of resolving controversies between parties insofar as section 1170.95 permits prisoners serving final sentences to seek relief.” (*Lamoureux, supra*, 42 Cal.App.5th at p. 256.) The People relied primarily on *People v. Bunn* (2002) 27 Cal.4th 1 (*Bunn*) and *People v. King* (2002) 27 Cal.4th 29 (*King*). In disagreeing with the People’s claim, the court observed: “Unlike legislation authorizing the refiling of criminal charges against a previously-acquitted defendant, or the refiling of actions between private parties, section 1170.95 does not present any risk to individual liberty interests. On the contrary, it provides potentially ameliorative benefits to the only individuals whose individual liberty interests are at stake in a criminal prosecution—the criminal defendant himself or herself. In such cases, we do not believe the separation of powers analysis conducted in *Bunn* and *King* controls. Indeed, the parties have directed us to no decisions applying the *Bunn* and *King* separation of powers analysis to bar legislation allowing the reopening of already-final judgments of conviction (as distinct from already-final judgments of dismissal), and we have found none.” (*Lamoureux*, at p. 261.) The court also relied on cases upholding similar resentencing procedures utilized in Propositions 36 and 47. (*Id.* at pp. 262-263.)

C. SB 1437 does not violate Marsy's Law

Lamoureux also rejected the People's argument that section 1170.95 interfered with the victims' right, under Marsy's Law, to "a speedy trial and prompt and final conclusion of the case and any related post-judgment proceedings." (Cal. Const., art. I, § 28, subd. (b)(9).) The court observed that it was not the intent of SB 1437 to eliminate postjudgment proceedings, including certain procedural rights available to victims: "Both the Legislature and courts have recognized that victims may exercise these rights during postjudgment proceedings that existed at the time the electorate approved Marsy's Law, as well as postjudgment proceedings that did not exist when Marsy's Law was approved. [Citations.] It would be anomalous and untenable for us to conclude, as the People impliedly suggest, that the voters intended to categorically foreclose the creation of any new postjudgment proceedings not in existence at the time Marsy's Law was approved simply because the voters granted crime victims a right to a 'prompt and final conclusion' of criminal cases. (Cal. Const., art. I, § 28, subd. (b)(9).)" (*Lamoureux, supra*, 42 Cal.App.5th at p. 265, footnote omitted.)

The People also argued that section 1170.95 deprives victims of the right to have their safety and the safety of the public considered prior to granting a petition for relief. The court stated, however, that "the decision whether to vacate the murder conviction and resentence the petitioner is not the only determination required by section 1170.95. If a court rules a petitioner is entitled to vacatur of his or her murder conviction, it must then resentence the petitioner on any remaining counts. (*Id.*, subd. (d)(1).) During resentencing, the court may weigh the same sentencing factors it considers when it initially sentences a defendant, including whether the defendant presents 'a serious danger to society' and '[a]ny other factors [that] reasonably relate to the defendant or the circumstances under which the crime was committed.' (Cal. Rules of Court, rule 4.421(b)(1), (c).) At minimum, the trial court's ability to consider these factors during resentencing ensures the safety of the victim, the victim's family, and the general public are 'considered,' as required by Marsy's Law. (Cal. Const., art. I, § 28, subd. (b)(16).)" (*Lamoureux, supra*, 42 Cal.App.5th at p. 266.)

D. People may not raise challenge based on denial of petitioner's rights

Finally, *Lamoureux* rejected the People's argument that section 1170.95 violates the principle of double jeopardy because the statute permits the prosecution to present evidence during the resentencing process, and may interfere with the petitioner's right to due process and jury trial. The argument was summarily rejected: "[W]e need not decide these matters to resolve this appeal. The People are the individuals on whose behalf violations of criminal laws are prosecuted. [Citation.] But they do not represent the particularized interests of persons who have been accused of criminal offenses or petitioners seeking relief from convictions. Therefore, the People lack standing to challenge the hearing and remedy provisions of section 1170.95 based on any alleged infringement on petitioners' constitutional rights. [Citations.]" (*Lamoureux, supra*, 42 Cal.App.5th at p. 267.)

APPENDIX I: TEXT OF SB 1437 AS AMENDED BY SB 775

SECTION 1 [OF SB 1437].

The Legislature finds and declares all of the following:

- (a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.
- (b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.
- (c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.
- (d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.
- (e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.
- (f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.
- (g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person’s culpability for murder must be premised upon that person’s own actions and subjective mens rea.

SECTION 1 [OF SB 775].

The Legislature finds and declares that this legislation does all of the following:

- (a) Clarifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories.
- (b) Codifies the holdings of *People v. Lewis* (2021) 11 Cal.5th 952, 961-970, regarding petitioners’ right to counsel and the standard for determining the existence of a prima facie case.
- (c) Reaffirms that the proper burden of proof at a resentencing hearing under this section is proof beyond a reasonable doubt.

(d) Addresses what evidence a court may consider at a resentencing hearing (clarifying the discussion in *People v. Lewis*, supra, at pp. 970-972).

SECTION 2.

Section 188 of the Penal Code is amended to read:

188.

(a) For purposes of Section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

(3) 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.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.

SECTION 3.

Section 189 of the Penal Code is amended to read:

189.

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287¹⁷, 288, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

(b) All other kinds of murders are of the second degree.

(c) As used in this section, the following definitions apply:

¹⁷ Former section 288a, oral copulation, was repealed and amended by SB 1494 to section 287, effective January 1, 2019.

- (1) "Destructive device" has the same meaning as in Section 16460.
- (2) "Explosive" has the same meaning as in Section 12000 of the Health and Safety Code.
- (3) "Weapon of mass destruction" means any item defined in Section 11417.

(d) To prove the killing was "deliberate and premeditated," it is not necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

(e) A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven:

- (1) The person was the actual killer.
- (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.
- (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(f) Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

SECTION 4.

Section 1170.95 is added to the Penal Code, to read:

1170.95 [AS AMENDED BY SB 775]

(a) A person convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, attempted murder under the natural and probable consequences doctrine, or manslaughter may file a petition with the court that sentenced the petitioner to have the petitioner's murder, attempted murder, or manslaughter conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

- (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, or attempted murder under the natural and probable consequences doctrine.
- (2) The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder.

(3) The petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.

(b) (1) The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition. The petition shall include all of the following:

(A) A declaration by the petitioner that the petitioner is eligible for relief under this section, based on all the requirements of subdivision (a).

(B) The superior court case number and year of the petitioner's conviction.

(C) Whether the petitioner requests the appointment of counsel.

(2) If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.

(3) Upon receiving a petition in which the information required by this subdivision is set forth or a petition where any missing information can readily be ascertained by the court, if the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner.

(c) Within 60 days after service of a petition that meets the requirements set forth in subdivision (b), the prosecutor shall file and serve a response. The petitioner may file and serve a reply within 30 days after the prosecutor's response is served. These deadlines shall be extended for good cause. After the parties have had an opportunity to submit briefings, the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause. If the court declines to make an order to show cause, it shall provide a statement fully setting forth its reasons for doing so.

(d) (1) Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause.

(2) The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have the murder, attempted murder, or manslaughter conviction vacated and to be resentenced. If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner.

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019. The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case recited in any prior appellate opinion. However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens. A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter 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.

(e) The petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes if the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose.

(f) This section does not diminish or abrogate any rights or remedies otherwise available to the petitioner.

(g) A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018).

(h) A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to two years following the completion of the sentence.

APPENDIX II: CHECKLIST FOR HEARING UNDER PEN. CODE, § 1170.95

I. PROPER VENUE FOR MOTION

The petition is filed in the court where the conviction occurred. (§ 1170.95, subd. (b)(1).)

II. ELIGIBILITY TO FILE PETITION

- A. Petitioner was convicted of first or second degree murder, attempted murder or manslaughter by felony-murder rule and/or doctrine of natural and probable consequences. (§ 1170.95, subd. (a).)
- B. “A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime, or attempted murder under the natural and probable consequences doctrine.” (§ 1170.95, subd. (a)(1).)
- C. “The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder.” (§ 1170.95, subd. (a)(2).)
- D. “The petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.” (§ 1170.95, subd. (a)(3).)

III. REQUIRED CONTENT OF PETITION [Facial review]

- A. “A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a).” (§ 1170.95, subd. (b)(1)(A).)
- B. “The superior court case number and year of the petitioner’s conviction.” (§ 1170.95, subd. (b)(1)(B).)
- C. “Whether the petitioner requests the appointment of counsel.” (§ 1170.95, subd. (b)(1)(C).)
- D. “If any of the information required by [§ 1170.95, subdivision (b),] is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information.” (§ 1170.95, subd. (b)(2).)

IV. SERVICE OF THE PETITION (§ 1170.95, subd.(b)(1))

- A. Service of the petition on the district attorney or agency that prosecuted petitioner.

B. Service on petitioner’s former attorney or public defender.

V. DETERMINATION OF PRIMA FACIE BASIS FOR RELIEF (§ 1170.95, subd. (c))

A. Appoint counsel if requested. (§ 1170.95, subd. (c).)

B. Set informal conference for potential resolution. (§ 1170.95, subd. (d)(2).)

C. Filing of response by prosecution (60 days) and reply by petitioner (30 days). (§ 1170.95, subd. (c).)

D. Set hearing to determine if prima facie basis for relief established. (§ 1170.95, subd. (c).)

1. Consider petition, court file, record of conviction, response by prosecution, reply by petitioner.

2. If prima facie basis shown – issue order to show cause and set matter for hearing within 60 days of issuance of o.s.c., unless extended for good cause. (§ 1170.95, subd. (d)(1).)

3. If prima facie basis not shown – summarily deny the petition, giving reasons.

VI. HEARING ON MERITS OF PETITION (§ 1170.95, subd. (d))

A. **Burden of proof:** “At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019.” “A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).)

B. **Evidence:** “The prosecutor and the petitioner may . . . offer new or additional evidence to meet their respective burdens.” (§ 1170.95, subd. (d)(3).) Admission of evidence is governed by the Evidence Code, except:

1. The court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed.

2. The court may consider the procedural history of the case as recited in an appellate opinion.

3. Hearsay admitted at a preliminary hearing under section 872, subdivision (b) is inadmissible, unless admissible under another exception to the hearsay rule.

C. **Presence of petitioner:** Petitioner has right to be present if requested. Do not issue order of production without consulting petitioner's counsel. Obtain waiver of appearance if necessary.

D. **Issues at the hearing:**

1. Whether petitioner was convicted with the use of the felony-murder rule or by the doctrine of natural and probable consequences.
2. Whether petitioner could be convicted of murder under the law after January 1, 2019, under any of the following theories:
 - a. The petitioner was the actual killer, having killed the victim with malice aforethought.
 - b. The petitioner was not the actual killer, but as a principal aided and abetted the commission of the murder.
 - c. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was the actual killer.
 - d. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner 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.
 - e. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.
 - f. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the victim was a peace officer who was killed while in the course of his or her duties, where the petitioner knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.
3. If prosecution does not meet burden of proof, grant relief (next section); if prosecution meets burden of proof, deny petition.

E. **If relief granted:**

1. Vacate murder conviction and any count-specific enhancement or allegation. (§ 1170.95, subd. (d)(3).)
2. Determine target offense (§ 1170.95, subd. (e))
 1. From the complaint if alleged in the murder count.

2. From conviction of separate count in complaint.
3. From jury instructions.
4. From other available evidence, if the conviction resulted from a plea.
3. Consider referral to probation department for supplemental report.
4. Resentence petitioner on remaining counts “in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.” (§ 1170.95, subd. (d)(1), (3).)
5. Credit petitioner with time served – Court to determine presentence actual and conduct credit, and actual time credit for time in CDCR; CDCR to determine conduct credit while in prison. (§ 1170.95, subd. (h).)
6. Determine whether to impose up to two years of post-sentence parole. (§ 1170.95, subd. (h).)
7. Send copy of order and amended abstract of conviction to CDCR.

Send disposition report to DOJ.