ACCOMPLICE LIABILITY FOR MURDER (SB 1437)

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REVISIONS TO MEMORANDUM

In addition to non-substantive additions or corrections to the previous memorandum, the memorandum revised in April 2019 contains the following changes:

Page 20 – *P v. Gentile* – Legislation did not eliminate NPC re murder in second degree

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I. INTRODUCTION

Senate Bill 1437 (Skinner; Stats. 2018, ch. 1015), enacted by the Legislature and effective January 1, 2019, makes 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 of the ability to prosecute a person for murder when the person is not the actual killer; (2) elimination of the "natural and probable consequence" doctrine applicable to murder, and, ~~likely~~ possible elimination of second degree felony murder; and (3) the establishment of a resentencing procedure 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.

II. LAW PRIOR TO JANUARY 2019

"Murder" is defined in Penal Code,[2] 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 which 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 which is committed in the perpetration*

[1] Appendix I, *infra*, contains the full text of SB 1437.
[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

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*[3] [oral copulation]*, or 289* [sexual penetration]*,* or any murder which 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. All other kinds of murders are of the second degree." (§ 189; italics added.) The reference in section 189 to the designated crimes comprises the California first degree felony-murder rule. If the killing occurs in the course of committing one of the designated crimes, a showing of actual malice in 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 rule is explained in *People v. Chun* (2009) 45 Cal.4th 1172, 1182: "A defendant may also be found guilty of murder under the felony-murder rule. The felony-murder rule makes a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state. The rule has two applications: first degree felony murder and second degree felony murder. 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....' (*Robertson, supra,* 34 Cal.4th at p. 164, 17 Cal.Rptr.3d 604, 95 P.3d 872.) ¶ 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" ([*People v.*] *Watson, supra,* 30 Cal.3d at p. 300[, 179 Cal.Rptr. 43, 637 P.2d 279]), thus satisfying the physical component of implied malice.' (*Patterson, supra,* 49 Cal.3d at p. 626, 262 Cal.Rptr. 195, 778 P.2d 549.)" (Italics in original.)

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

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. "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." (*People v. Prettyman* [(1996) 14 Cal.4th 248,] 260.) 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. (*Id.* at p. 267.)" (*People v. McCoy* (2001) 25 Cal.4th 111, 1117.)

"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.' (*People v. Mendoza* [(1998) 18 Cal.4th 1114,] 1122.) 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." ([*People v. Beeman* (1984) 35 Cal.3d 547,] 560 [199 Cal.Rptr. 60, 674 P.2d 1318], italics in original.) 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." (*Ibid.*)' (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 259.)" (*McCoy*, *supra*, at pp. 1117-1118.)

"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.' (*People v. Culuko* (2000)78 Cal.App.4th 307, 322.)" (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1026.)

In *People v. Chiu* (2014) 59 Cal.4th 155, 158-159, our Supreme Court observed: "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. (See *McCoy, supra,* 25 Cal.4th at pp. 1117–1118, 108 Cal.Rptr.2d 188, 24 P.3d 1210.)" (Italics in 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 consequence 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 DATE OF SB 1437

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 becomes effective on January 1, 2019. (*People v. Henderson* (1980) 107 Cal.App.3d 475, 488.) Accordingly, the statute clearly will apply to all crimes occurring on or after that date. Undoubtedly the new provisions also will apply to any crimes committed prior to January 1, 2019, where the defendant has not been convicted and sentenced. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).)

A. Effective date of resentencing provisions[4]

Section 1170.95, establishing the right of a defendant convicted under a theory of felony murder or natural and probable consequences to petition for resentencing, becomes 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 the rule of *Estrada*

There remains the question of the proper application of SB 1437 to persons who have been found guilty by plea or jury prior to January 1, 2019, but whose case is 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 1st depends on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740.

Estrada teaches that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise

[4] For a full discussion of the resentencing provisions of SB 1437, see Section VII, *infra*.

would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, at p. 745.) Our Supreme Court has reviewed the application of *Estrada* in the context of two statutory schemes where the punishment for designated offenses was reduced and previously convicted persons were given an opportunity to be resentenced under the new law. *People v. Conley* (2016) 63 Cal.4th 646, addresses the retroactivity of Proposition 36, an amendment to the Three Strikes law; *People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*), addresses the retroactivity of Proposition 47, a reduction in the punishment of certain drug and property offenses. The position of the court is best summarized in *DeHoyos* at pages 601-603:

> "In the decades since *Estrada* was decided, we have clarified that the absence of an express savings clause does not necessarily resolve the question whether a lawmaking body intended a statute reducing punishment to apply retrospectively. '[W]hile such express statements unquestionably suffice to override the *Estrada* presumption,' we have explained, 'the "absence of an express saving clause ... does not end 'our quest for legislative intent.' " ' (*People v. Conley* (2016) 63 Cal.4th 646, 656, 203 Cal.Rptr.3d 622, 373 P.3d 435 (*Conley*), quoting *People v. Nasalga*, *supra*, 12 Cal.4th at p. 793, 50 Cal.Rptr.2d 88, 910 P.2d 1380, quoting *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049, 36 Cal.Rptr.2d 74, 884 P.2d 1022.) This is because '[o]ur cases do not "dictate to legislative drafters the forms in which laws must be written" to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require "that the [legislative body] demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." ' (*Conley*, *supra*, 63 Cal.4th at pp. 656–657, 203 Cal.Rptr.3d 622, 373 P.3d 435, quoting *In re Pedro T.*, *supra*, 8 Cal.4th at pp. 1048–1049, 36 Cal.Rptr.2d 74, 884 P.2d 1022.)
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> "Proposition 47 contains no express savings clause. It does, however, address the question of retrospective application in conspicuous detail. Separate provisions articulate the conditions under which the new misdemeanor penalty provisions apply to completed sentences (§ 1170.18, subds. (f)-(j)), sentences still being served (*id.*, subds. (a)-(e)), and sentences yet to be imposed (Pen. Code, §§ 459.5, subd. (a), 473, subd. (b), 476a, subd. (b), 490.2, subd. (a), 496, subd. (a), 666, subd. (a); Health & Saf. Code, §§ 11350, subd. (a), 11377, subd. (a)). The question is whether these provisions sufficiently demonstrate the electorate's intent concerning whether defendants who were sentenced before Proposition 47's effective date, but whose judgments were not yet final, are entitled to automatic resentencing, or must instead petition for resentencing under section 1170.18.
> "We considered a similar question in *Conley*, *supra*, 63 Cal.4th 646, 203 Cal.Rptr.3d 622, 373 P.3d 435. That case concerned the Three Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012); hereafter Reform Act), which prospectively ameliorated sentencing under the statutes collectively known as the 'Three Strikes' law. (Pen. Code, §§ 667, subds. (b)-(j), 1170.12.) The Reform Act also offered a possibility of resentencing to third strike prisoners who were

currently serving indeterminate life terms for offenses that, if committed after the Act's effective date, would no longer support life terms. The Act's resentencing provision, Penal Code section 1170.126, permitted '[a]ny person serving an indeterminate term of life imprisonment ... [to] file a petition for a recall of sentence ... [and] to request resentencing in accordance with' the new, ameliorated penalty provisions. (*Id.*, subd. (b).) This statute, like Proposition 47's resentencing provision (§ 1170.18), also conditioned relief on the court's determination whether resentencing 'would pose an unreasonable risk of danger to public safety.' (Pen. Code, § 1170.126, subd. (f).) (Footnote omitted.)

"The issue in *Conley*, *supra*, 63 Cal.4th 646, 203 Cal.Rptr.3d 622, 373 P.3d 435, was whether life prisoners whose judgments were not final on the Reform Act's effective date could obtain relief only under the Act's resentencing provision (Pen. Code, § 1170.126), or whether they were entitled to be resentenced automatically because of the *Estrada* presumption that laws ameliorating punishment apply to nonfinal sentences. We concluded that the resentencing provision was the exclusive avenue for resentencing of persons who had been sentenced before Proposition 36's effective date. Three considerations led us to this conclusion.

"First, we explained, 'unlike the statute at issue in *Estrada*, *supra*, 63 Cal.2d 740 [48 Cal.Rptr. 172, 408 P.2d 948], the Reform Act [was] not silent on the question of retroactivity. Rather, the Act expressly addresse[d] the question in [its resentencing provision], the sole purpose of which is to extend the benefits of the Act retroactively.' (*Conley*, *supra*, 63 Cal.4th at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435; see Pen. Code, § 1170.126.) That provision, we noted, 'dr[ew] no distinction between persons serving final sentences and those serving nonfinal sentences, entitling both categories of prisoners to petition courts for recall of sentence under the Act.' (*Conley*, *supra*, at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Moreover, we explained, 'the nature of the [Reform Act's] recall mechanism and the substantive limitations it contains call[ed] into question the central premise underlying the *Estrada* presumption,' namely, that the lawmaking body had 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' (*Conley*, at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435, quoting *In re Pedro T.*, *supra*, 8 Cal.4th at p. 1045, 36 Cal.Rptr.2d 74, 884 P.2d 1022.) We emphasized that, instead of mandating lesser punishment in all cases, voters had conditioned relief on a judicial assessment of the risk that resentencing would pose to public safety. (Pen. Code, § 1170.126, subd. (f); see *Conley*, at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Finally, we noted, our understanding of the recall mechanism was reinforced by consideration of the remainder of the statutory scheme. We noted the sentencing provisions of the Reform Act had established a new set of factors related to the nature of the defendant's current offense that must be ' "plead[ed] and prov[ed]" by the prosecution.' (*Conley*, at p. 659, 203 Cal.Rptr.3d 622, 373 P.3d 435, quoting Pen. Code, § 1170.12, subd. (c)(2)(C).) The Reform Act did not, however, specify how

that requirement was to be satisfied in the case of a defendant who had already been sentenced. This omission, we concluded, reinforced the conclusion that voters had not contemplated that previously sentenced defendants would be resentenced automatically under these new sentencing procedures, but instead contemplated that such defendants would seek relief under the Reform Act's resentencing provision, which contained no comparable pleading-and-proof requirements. (*Conley*, at pp. 660–661, 203 Cal.Rptr.3d 622, 373 P.3d 435.)

"Similar considerations lead us to a similar conclusion in this case. Like the Reform Act, Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the statute's benefits retroactively. (*Conley*, *supra*, 63 Cal.4th at p. 657, 203 Cal.Rptr.3d 622, 373 P.3d 435.) Those provisions include, as relevant here, a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. (§ 1170.18, subd. (a).) Like the parallel resentencing provision of the Reform Act, section 1170.18 draws no express distinction between persons serving final sentences and those serving nonfinal sentences, instead entitling both categories of prisoners to petition courts for recall of sentence. (*Ibid*.) And like the resentencing provision of the Reform Act, section 1170.18 expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters "categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' (*Conley*, at p. 658, 203 Cal.Rptr.3d 622, 373 P.3d 435; see § 1170.18, subd. (b).)

"Proposition 47, unlike the Reform Act, does not create new sentencing factors that the prosecution must 'plead[ ] and prove[ ]' (Pen. Code, § 1170.12, subd. (c)(2)(C)) to preclude a grant of leniency. We can therefore draw no inferences from the omission of any provision addressing the application of such a pleading-and-proof requirement to individuals who have already been sentenced, as we did in *Conley*. But our conclusion is strongly reinforced by other indicia of legislative intent. In enacting Proposition 47, voters declared their purpose to '[r]equire a thorough review of criminal history and risk assessment of *any individuals* before resentencing to ensure that they do not pose a risk to public safety.' (Voter Information Guide, *supra*, text of Prop. 47, § 3(5), p. 70, italics added.) The breadth of this statement of purpose indicates an intent to apply the provisions of section 1170.18, including its risk assessment provision, to all previously sentenced defendants who had not yet completed their sentences, and not just to those whose judgments had become final on direct review. (See *People v. Canty* (2004) 32 Cal.4th 1266, 1280, 14 Cal.Rptr.3d 1, 90 P.3d 1168 [courts may consider 'statements of the intent of the enacting body contained in a preamble' as an 'aid in construing a statute'].)"

Nothing in SB 1437 suggests the issue of its retroactive application would be decided any differently than for Propositions 36 and 47. It is clear that SB 1437 has considerable similarity to Propositions 36 and 47. Like the propositions, it is a statute that changes the level of criminal responsibility for a given act – indeed, certain conduct previously constituting the crime of murder may no longer serve as a basis for a murder conviction. Like Propositions 36 and 47, SB 1437 contains a detailed resentencing provision applicable to persons previously convicted of murder under designated theories. And, like the propositions, SB 1437 contains no "savings clause" which prescribes a particular effective date. Of course, there also are some clear differences between the statute and the propositions. Unlike the propositions which reduce the punishment for designated crimes, SB 1437 actually eliminates a conviction of murder based on particular circumstances. Also, unlike the propositions, the resentencing provisions of SB 1437 do not require the court to consider the question of the defendant's dangerousness before granting relief. However, it does not appear these differences are material. Resentencing under section 1170.95 is not automatic. The petitioner first must establish a prima facie basis for relief under the statute. (§ 1170.95, subd. (c).) Even if the prima facie basis for relief is established, the prosecution must be given an opportunity at a hearing to establish the legitimacy of the conviction irrespective of the statutory changes. (§ 1170.95, subds. (d)(1), (3).) These requirements strongly suggest the Legislature did not intend to retroactively apply the new provisions of sections 188 and 189 such that a previously convicted person is automatically entitled to resentencing. Accordingly, based on the Supreme Court's analysis of retroactivity in *DeHoyos* and *Conley*, it does not appear that *Estrada* applies to persons convicted of murder under the law prior to January 1, 2019, but whose cases are not final as of that date. Such persons likely must petition for relief under section 1170.95.

People v. Frandsen (2019) 33 Cal.App.5th 1126, 1142, in footnote 3, addressed the retroactive application of Senate Bill 1437: "Senate Bill 1437 (2017-2018 Reg. Sess.), effective January 1, 2019, amends section 188, subdivision (a)(3) to read: '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.' This statutory amendment brings into question the ongoing viability of second degree felony murder in California. The parties have not raised this issue, however, and we need not address it because it does not appear the Legislature intended for this amendment to apply retroactively. (§ 3 ['"No part of [the Penal Code] is retroactive, unless expressly so declared." ']; *People v. Brown* (2012) 54 Cal.4th 314, 319, 142 Cal.Rptr.3d 824, 278 P.3d 1182.) "

IV. AMENDMENT OF FELONY-MURDER RULE

SB 1437 amends Section 189 in the following material respects:

(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, 287[5], 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 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.

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

A. The 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).

(§ 189, subd. (e).)

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 in the course of

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 in the course of 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*).

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.' (*People v. Banks* (2015) 61 Cal.4th 788, 794, 189 Cal.Rptr.3d 208, 351 P.3d 330 (*Banks*).) 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]' (*Id.* at p. 803, 189 Cal.Rptr.3d 208, 351 P.3d 330.) 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?' (*Ibid.*)" (*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' (*Tison v. Arizona, supra,* 481 U.S. at p. 157, 107 S.Ct. 1676) was sufficiently significant to be considered 'major' (*id.* at p. 152, 107 S.Ct. 1676; see *Kennedy v. Louisiana, supra,* 554 U.S. at p. 421, 128 S.Ct. 2641.)"

- "A major participant need not be the ringleader (*People v. Proby* (1998) 60 Cal.App.4th 922, 931, 70 Cal.Rptr.2d 706), but a ringleader is a major participant (see *People v. Marshall* (1990) 50 Cal.3d 907, 938, 269 Cal.Rptr. 269, 790 P.2d 676)." (*People v. 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.]' (*Clark, supra*, 63 Cal.4th

at pp. 614-615, 203 Cal.Rptr.3d 407, 372 P.3d 811.) '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.]' (*Clark, supra*, 63 Cal.4th at p. 615, 203 Cal.Rptr.3d 407, 372 P.3d 811.)" (*In re Bennett* (2018) 26 Cal.App.5th 1002, 1015-1016 (*Bennett*).)

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.' (*People v. Estrada* (1995) 11 Cal.4th 568, 577, 46 Cal.Rptr.2d 586, 904 P.2d 1197.) 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]....' (Ibid.) ¶ '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.' (*Banks*, *supra*, 61 Cal.4th at p. 801, 189 Cal.Rptr.3d 208, 351 P.3d 330.) '[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.' (*Clark*, *supra*, 63 Cal.4th at pp. 616-617, 203 Cal.Rptr.3d 407, 372 P.3d 811.)" (*Bennett*, *supra*, 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.)

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 in the course of 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. (See *Dillon* and *Chavez*, *supra*.) 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.

V. ELIMINATION OF THE NATURAL AND PROBABLE CONSEQUENCE DOCTRINE

SB 1437 eliminates the natural and probable consequence (NPC) doctrine at least 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.

(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) <u>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.</u>

(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 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 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. *People v. Chiu* (2014) 59 Cal.4th 155, 164 (*Chiu*), 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. (*People v. Garrison* (1989) 47 Cal.3d 746, 778, 254 Cal.Rptr. 257, 765 P.2d 419 [accomplice liability is vicarious]; *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, 221 Cal.Rptr. 592, 710 P.2d 392 ['The requirement that the jury determine the intent with which a person tried as an aider and abettor has acted is not designed to ensure that his conduct constitutes the offense with which he is charged. His liability is vicarious.']; *People v. Brigham, supra,* 216 Cal.App.3d at p. 1054, 265 Cal.Rptr. 486 [aider and abettor is derivatively liable for reasonably foreseeable consequence of principal's criminal act knowingly aided and abetted].) '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.' (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852, 128 Cal.Rptr.3d 565, italics added.)" (Italics added.) The highlighted 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."

People v. Gentile (2019) ___ Cal.App.5th ___ [E069088](*Gentile*), however, holds SB 1437 does not eliminate the application of NPC to second degree murder. The holding is based on the court's application of *Chiu*.

> In his supplemental letter brief, defendant argues that the amendment to section 189, "has now eliminated all murder liability, including second degree murder liability, based on the natural and probable consequences doctrine." We disagree. This argument proposes a construction of section 189, subdivision (e), which is contrary to the plain language of the statute, misconstrues the holding in *Chiu*, and would lead to absurd results.
>
> As indicated, *Chiu* made clear that second degree murder liability is proportional to the culpability of an aider and abettor under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at p. 166.) Additionally, the plain language of section 189, subdivision (e), expressly provides for murder liability in situations in which the defendant is the actual killer, or where the defendant was a "major participant" within the meaning of section 190.2, subdivision (d). That subdivision authorizes imposition of the death penalty or imprisonment for life without possibility of parole for "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."
>
> Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances. Defendant's construction would therefore conflict not only with the plain language of the statute, but also with the holding of *Chiu*, which also held that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles." (*Chiu*, *supra*, 59 Cal.4th at pp. 166-167, citing *People McCoy* (2001) 25 Cal.4th 1111, 1117–1118.) Considering the statement in *Chiu*, holding that under the natural and probable consequences theory, punishment for second degree murder is commensurate with a defendant's culpability, neither the Supreme Court nor the Legislature intended to relieve an aider-abettor entirely of liability for murder. (*Gentile*, at p. ___.)

It is important to observe that SB 1437 makes no change to the application of NPC to crimes other than murder.

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....' (*Robertson, supra,* 34 Cal.4th at p. 164, 17 Cal.Rptr.3d 604, 95 P.3d 872.)" In its preamble, SB 1437 states that "[t]he power to define crimes and fix penalties is vested exclusively in the Legislative branch."[6] (Section 1, subd. (a), SB 1437.) 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 "[T]he [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*, 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 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.

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

[6] 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.

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*, 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 called into question the relationship 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) – that now there is no legal difference between the two.

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 in the course of 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, aides 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." (*People v. Milan* (1973) 9 Cal.3d 185, 195[107 Cal.Rptr. 68, 507 P.2d 956].)' (*People v. Guerra* (1985) 40 Cal.3d 377, 386, 220 Cal.Rptr. 374, 708 P.2d 1252; accord, *People v. Moore* (2011) 51 Cal.4th 386, 413, 121 Cal.Rptr.3d 280, 247 P.3d 515; *People v. Millwee* (1998) 18 Cal.4th 96, 160, 74 Cal.Rptr.2d 418, 954 P.2d 990.)" (*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)[7]

SB 1437 enacts section 1170.95 to create a procedure for the resentencing of cases where a defendant could not be convicted of murder after the enactment of the other changes made by the legislation. If the petition for relief is granted, the murder 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

Persons "convicted of felony murder or murder under a natural and probable consequences theory may file a petition" for resentencing under section 1170.95. (§ 1170.95, subd. (a).) Clearly persons who are currently serving a term for murder may petition for relief if they have been convicted under the circumstances specified in section 1170.95. Likely eligible for relief are persons who have completed the custody portion of their sentence and are now under parole supervision.

The right to file such a petition is not available to persons convicted of attempted murder.

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 competed 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 1437[8], regardless of the age of the crime or conviction.

[7] For a procedural check-list for a petition filed under section 1170.95, see Appendix II, *infra*.
[8] For a full discussion of the effective date of SB 1437, see Section II, *supra*.

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 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."

Limited remand

Although *Martinez* 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. "We add a final note, albeit on a point not raised by defendant. 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. (*People v. Awad* (2015) 238 Cal.App.4th 215, 220, 189 Cal.Rptr.3d 404 (*Awad*); see also *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 923, 193 Cal.Rptr.3d 125.) 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. (See, e.g., *Awad*, *supra*, at p. 222, 189 Cal.Rptr.3d 404.) 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*, at pp. 729-730.)

Anthony 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. (See *Scarbrough*, *supra*, 240 Cal.App.4th at p. 928, 193 Cal.Rptr.3d 125 [concluding nothing in Proposition 47 contemplates immediate retroactive relief in rejecting a similar argument].) Also, the *Scarbrough* 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])." ' (*Scarbrough*, at p. 925, 193 Cal.Rptr.3d 125, quoting *People v. Yearwood* (2013) 213 Cal.App.4th 161, 177, 151 Cal.Rptr.3d 901 [regarding section 1170.126].) 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. (*Scarbrough*, at p. 925, 193 Cal.Rptr.3d 125.) 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.' (*Scarbrough*, *supra*, 240 Cal.App.4th at p. 928, 193 Cal.Rptr.3d 125.) 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.' (*Scarbrough*, at p. 928, 193 Cal.Rptr.3d 125.)" (*Anthony*, at p. 1156.)

Based on *Awad, Scarbrough* and *Martinez*, it seems likely a defendant 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, but 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 defendant's criminal responsibility prior to the extensive work necessary to resolve an appeal.

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

The granting of resentencing is predicated on 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 or 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 defendant with murder. Since the prosecution is not required to specify in the pleadings the theory under which the defendant is being prosecuted for murder, the prosecution is allowed to merely charge a generic violation of section 187. Simply making the allegation of murder "allows" the prosecution to pursue a conviction based on any theory, including felony murder and/or the doctrine of natural and probable consequences (NPC).
>
> (2) "The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder." (§ 1170.95, subd. (a)(2).) This requirement has two parts: (1) the defendant was convicted of first or second degree murder following a trial; or (2) the defendant accepted a plea offer to the crime of murder in lieu of a trial where he could have been convicted of first or second degree murder. Under the first provision, it is sufficient to show the fact of the conviction of murder; it is not necessary under this requirement to establish the theory under which the murder conviction was obtained. The scope of the second provision is less clear. It seems to suggest that a petitioner could meet this requirement if he shows that he accepted a plea offer to a lesser crime in a case where he could have been convicted of first or second degree murder. In other words, it may be argued that a petitioner, charged with murder, who accepts a plea to manslaughter, may have met this requirement. However, the conditions specified in section 1170.95, subdivision (a), must be squared with the opening language of the statute: "A person *convicted of felony murder or murder under a natural and probable consequences* theory may file a petition . . . ." [Emphasis added.]

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The more likely interpretation of subdivision (a)(2) is that it offers relief both to persons who are convicted of first or second degree murder after a trial and who are convicted based on a plea.

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(3) "The petitioner 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)(3).) In other words, for resentencing to be granted, it must be established that the defendant could not have been convicted of 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 defendant of 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, subdivisions (a)(1)-(3), implicit is the requirement that to be entitled to relief, the defendant must have been convicted based on the felony-murder rule and/or NPC: "*A person convicted of felony murder or murder under a natural and probable consequences theory* may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced . . ." (§ 1170.95, subd. (a); italics added.) At least for the purposes of determining whether petitioner has established a prima facie basis, likely 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 for a prima facie showing, absent a response from the prosecution to the contrary. If there is a legitimate factual dispute over whether these theories were or could have been used, the petitioner has made a sufficient showing for the purpose of the prima facie basis for relief.

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).) 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 defendant to declare the specific facts under which he contends entitles him to relief.

(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).)

"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).)

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.

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

The court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) "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." (*Ibid*.)

1. Right of court to conduct preliminary review of eligibility; scope of evidence

The court should conduct a preliminary review of the petition to determine whether petitioner has met his burden to make a prima facie showing for relief: The court must "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 makes a prima facie showing* that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c); italics added.) While the court must determine whether a prima facie basis has been shown, the statute does not specify the process

for making that determination, other than the court is to consider any response or reply filed by the parties. Nothing in the statute, however, limits the court's consideration to the response and reply, and nothing precludes the court from conducting its own review of other readily available information such as the court's file. It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations which would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or NPC, or just the target non-homicide crime, it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing.

The concept of a preliminary review of eligibility is well established as part of the process of resentencing under Propositions 36 and 47. *People v. Page* (2017) 3 Cal.5th 1175, 1188-1189 [Proposition 47], *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448-450 [Proposition 47], *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [Proposition 47], and *People v. Bradford* (2014) 227 Cal.App.4th 1332, 1341 [Proposition 36], discuss the petitioner's burden to establish a prima facie basis for eligibility in the court's preliminary review of the petition.

The correct process for a preliminary review under Proposition 47 was discussed in *People v. Simms* (2018) 23 Cal.App.5th 987, 993-994: "In many cases, the threshold issue of eligibility for relief under section 1170.18, subdivision (a) may be determined as a matter of law from the uncontested allegations of the petition or from the record of conviction. (*Page*, *supra*, 3 Cal.5th at p. 1189; *People v. Romanowski* (2017) 2 Cal.5th 903, 916, 215 Cal.Rptr.3d 758, 391 P.3d 633 (*Romanowski*).) While the court has no obligation to hold an evidentiary hearing where the petitioner's eligibility or ineligibility for relief is evident as a matter of law, ' "[a]n evidentiary hearing is required if ... there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact." ' (*Sledge*, *supra*, 7 Cal.App.5th at p. 1095.) The test is whether ' "after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact." ' (*Romanowski, supra,* 2 Cal.5th at p. 916.)"

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 defendant 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, subd. (c)(1), provides: "The court must issue an order to show cause if the petition 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 factual allegations are 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.)[9]

2. Consideration of a 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 should not be interpreted as requiring a response to every petition – certainly the prosecution is entitled to simply concede the merits of the petition and not file any response. Rather, the phrase simply means that 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

[9] It may be noted that the sponsors of SB 1437 take the position that the court has no discretion to summarily deny a facially deficient petition for resentencing, and that the prosecution must file a response in every instance. The sponsors find support for such an interpretation in the bill's legislative history. The Judicial Council, for example, had requested an amendment to specifically permit summary denial when a prima facie basis was not shown – the Legislature, however, did not make the amendment. Merely because the Legislature did not include the requested language does not mean the courts lack the authority to conduct a preliminary screening. As noted above, preliminary screening has been used in petitions brought pursuant to Propositions 36 and 47, even though there is no express provision granting the court such authority. While express authorization to conduct a preliminary screening would have been clearer with the requested amendment, it does not alter the fact that the legislation does not prohibit it. The only directory language to the court in section 1170.95, subdivision (c), in sequence, is that (1) "the court shall review the petition and determine if the petitioner has made a prima facie showing" for relief; (2) the court shall appoint counsel for petitioner if requested; and (3) the court shall issue an order to show cause if a prima facie basis is shown. Nothing in subdivision (c) requires the court to take any particular action prior to reviewing the petition for its prima facie showing. The statute does provide that "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." But as observed below, such language is merely consistent with the establishment of a filing deadline should the prosecution choose to respond.

prosecution. Guidance for such a procedure may be found in Rule 4.551, subdivision (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."

3. Entitlement to counsel (§ 1170.95, subd. (c).)

Nothing in section 1170.95 requires the court to provide counsel to petitioner in the preparation of the petition for resentencing. Although the statute is vague as to timing, petitioner likely is entitled to counsel at some point during the process where the court is considering whether the petitioner has stated a prima facie basis for relief. (§ 1170.95, subd. (c).) Likely the court may conduct a preliminary review of the circumstances of the petition prior to appointing counsel. For example, if the petition summarily alleges all of the statutory elements for making a prima facie showing, but a review of the court file shows the petitioner was convicted only of ~~attempted murder~~manslaughter, there is no reason justifying the appointment of counsel and preventing the court from summarily denying the petition.

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On the other hand, if it appears the petitioner has even a colorable claim for relief, counsel probably should be appointed if requested by petitioner. Unless the petition can be summarily denied, likely the right to counsel arises at the stage when the court is determining whether petitioner has stated a prima facie basis of relief and, in the course of that determination, is considering the response by the prosecution and the reply by the petitioner. The crafting of a technical and proper reply to the response prepared by the prosecution likely is beyond the petitioner's capabilities.

Although most prison inmates are indigent, not all are without any assets. Prior to appointment of counsel at public expense, the court may wish to conduct at least a cursory review of a petitioner's financial status.

4. 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.

5. Prior finding of allegation under section 190.2, subdivision (d), not true

Section 1170.95, subdivision (d)(2), also 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 defendant 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. Furthermore, relief should be denied if the jury found *true* a special circumstance allegation under section 190.2, subdivision (d).

6. 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. The prosecution has 60 days to file a response and petitioner an additional 30 days for filing a reply. (§ 1170.95, subd. (c).) There is nothing in section 1170.95 such as in Rule 4.551, subdivision (a)(3)(A), which requires a ruling on the 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.

7. Ruling by the court

If the court determines the petitioner has made a prima facie showing for relief, the court must issue an order to show cause and set the matter for hearing. (§ 1170.95, subd. (c); see discussion, *infra*.) If petitioner has failed to make the prima facie showing for relief, the petition should be summarily denied. 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 Rule 4.551, subdivision (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." (See Appendix III for a form of order summarily denying a petition for resentencing; see Appendix IV for a form of order issuing an order to show cause.)

I. Setting of hearing (§ 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 is issued. The setting may be later on a showing of good cause. (§ 1170.95, subd. (d)(1).)

J. Hearing on the grounds for relief

1. 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 ineligible for resentencing." (§ 1170.95, subd. (d)(3).)

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

"The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) What constitutes the "record of conviction" is well established. The "record of conviction" constitutes "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 and Bigelow, "California Three Strikes Sentencing," The Rutter Group, § 4:5, pp. 4-19 - 4-42 (2018).)

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. 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. (*People v. Arbuckle* (1978) 22 Cal.3d 749, 754, 150 Cal.Rptr. 778, 587 P.2d 220 (*Arbuckle*); *People v. Lamb* (1999) 76 Cal.App.4th 664, 683, 90 Cal.Rptr.2d 565 (*Lamb*); see also § 1170, subd. (b) [sentencing court can consider probation report].)" (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095.)

It may also be appropriate to distinguish between the issues at the resentencing hearing. To the extent the hearing is addressing whether the petitioner is guilty of murder, the traditional rules of evidence should be applied. To the extent the court is determining the sentence to impose after striking the murder conviction, the traditional latitude for sentencing hearings should be allowed.

3. Presence of the petitioner

Likely the hearing on the merits of the petition, and certainly the actual resentencing of 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 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 defendant 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 if a petitioner under section 1170.95 waives his appearance through counsel with the use of a form in substantial compliance with the specifications of section 977, subdivision (b)(2).

4. The issues at the hearing

Determining whether 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 based on the felony-murder rule or by the doctrine of natural and probable consequences. It is not clear how the defendant 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 defendant 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 defendant is convicted by plea. As to persons convicted after a trial, the most the defendant 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 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 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 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 be convicted of first or second degree murder because of the 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 is guilty of first or second degree murder under 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 defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

Petitioner 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, likely instructions and argument of counsel will 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 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, that the petitioner is guilty of murder under the law effective January 1, 2019.

K. Relief granted by the court (§ 1170.95, subd. (d)(3).)

1. 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 . . ." (§ 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.

2. 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 been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1), (3).) If the target offense was identified in the murder count of the complaint, that offense will then form the basis of the resentencing. (§ 1170.95, subd. (e).)

Because section 1170.95, subdivision (d)(1), provides that resentencing is to occur "as if petitioner had not been previously been [sic] 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.

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 include any relevant count-specific conduct enhancements or other allegations previously charged against the petitioner.

Determining target offense

If the defendant 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).) Although the language 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 defendant is convicted of first degree murder based on a generic allegation of murder[10], and the prosecution relied on a felony-murder theory because of a robbery, the target offense can be taken from the fact petitioner was convicted of the robbery in a separate count, or from the reference to robbery as the underlying felony

[10] 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.

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]."

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.

The court should insure that all proper notification of the new sentencing proceeding be given to the victims as required by California Constitution, Article 1, section 28, subdivisions (b)(7) and (8).

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

"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 three years following the completion of the sentence." (§ 1170.95, subd. (g).) The addition of the second sentence suggests the court may order the supervision period even though petitioner's credits exceed the new sentence and the three-year period of parole.

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 in 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.

L. 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.

In the course of 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 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 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. (*Burks v. United States* (1978) 437 U.S. 1, 18 [98 S.Ct. 2141, 2150, 57 L.Ed.2d 1].) Thus, an appellate ruling of legal insufficiency is functionally equivalent to an acquittal and precludes a retrial. (See *id*. at pp. 16-17 [98 S.Ct. at pp. 2149-2150].) An analogous trial court finding is also an acquittal for double jeopardy purposes. (*Hudson*, *supra*, 450 U.S. at p. 42 [101 S.Ct. at p. 971]; *Martin Linen Co.*, *supra*, 430 U.S. at p. 575 [97 S.Ct. at p. 1356].)"

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.

M. Right to appeal

The appellate process following a ruling on a motion under section 1170.95 is unclear.

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.' (*People v. Johnson*, *supra*, 26 Cal.3d 557, 578.) 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.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 2789, 61 L.Ed.2d 560].)" (*Hatch*, *supra*, at p. 272; italics in original.)

Ruling granting relief

To the extent the granting of a motion under section 1170.95 is considered an acquittal of the murder charge, the People would not be entitled to appeal. (*People v. Cartwright* (1979) 98 Cal.App.3d 369, 380.) To the extent the ruling is equivalent to a sufficiency of evidence determination under section 1118.1, the ruling is subject to a de novo review by the appellate court. In *People v. Stevens* (2007) 41 Cal.4th 182, our Supreme Court held the trial court's determination of a judgment of acquittal under section 1118.1 was a question of law subject to independent review. (*Id*., at p. 200.) Accordingly, whether a ruling granting relief is subject to

review ultimately will depend on whether the trial court's decision is made as a matter of law or of fact.

APPENDIX I: TEXT OF SB 1437

SECTION 1.
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 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, 287[11], 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 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

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

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.
(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder 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 or murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder.

(3) The petitioner could not be convicted of first or second degree 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 he or she 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.

(c) 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.

(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 conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been 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 his or her murder conviction vacated and for resentencing. 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 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. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

(e) 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.

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

(g) 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 three years following the completion of the sentence.

SECTION 5.

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

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 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 or murder under the natural and probable consequences doctrine." (§ 1170.95, subd. (a)(1).)

C. "The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder." (§ 1170.95, subd. (a)(2).)

D. "The petitioner 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)(3).)

III. CONTENT OF PETITION

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. PRELIMINARY REVIEW AND DETERMINATION OF PRIMA FACIE BASIS FOR RELIEF (§ 1170.95, subd. (c).)

A. Preliminary review of petition and court file – summarily deny if ineligible.

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

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

D. Await filing of response by prosecution (60 days) and reply by petitioner (30 days). (§ 1170.95, subd. (c).)

E. Determine if prima facie basis for relief established. (§ 1170.95, subd. (c).)

1. Consider petition, court file, 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 (S 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 ineligible for resentencing." (§ 1170.95, subd. (d)(3).)

B. **Evidence**: "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).)

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 defendant 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).)

   a. From the complaint if alleged in the murder count.

   b. From conviction of separate count in complaint.

   c. From jury instructions.

   d. 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 been 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. (g).)
6. Determine whether to impose up to three years of post-sentence parole. (§ 1170.95, subd. (g).)
7. Send copy of order and amended abstract of conviction to CDCR.
8. Send disposition report to DOJ.

APPENDIX III: ORDER SUMARILY DENYING PETITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF [COUNTY]

[COURTHOUSE]

[DEPARTMENT #]

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **[PETITIONER'S NAME]** Defendant and Petitioner.	Case No.: [number] **MEMORANDUM OF DECISION** [Petition for Recall and Resentencing, Pen. Code, § 1170.95]

IN CHAMBERS

The court has received and reviewed a petition for recall and resentencing pursuant to Penal Code section 1170.95. The petition is summarily denied because the petitioner is not entitled to relief as a matter of law, for the following reason:

[ ] The petitioner was not convicted of murder.

[ ] The petitioner was convicted of murder but the court file reflects that the petitioner was the actual killer and was not convicted under a theory of felony-murder of any degree, or a theory of natural and probable consequences. There are no jury instructions for aiding and abetting, felony murder, or natural and probable consequences.

[ ] The appellate opinion affirming the petitioner's conviction and sentence reflects that the petitioner was the actual killer and was convicted of murder on a theory of being the direct perpetrator and not on a theory of felony murder of any degree, or a theory of natural and probable consequences.

DISPOSITION

For the foregoing reasons, the petition for recall and resentencing is DENIED.

The Clerk is ordered to serve a copy of this order upon Petitioner, and upon the Office of the District Attorney, as counsel for the People of the State of California.

Dated: _____ _____

[JUDGE'S NAME]

Judge of the Superior Court

Send copy of order to:

[Petitioner's address]

[Address for Office of the District Attorney]

APPENDIX IV: ORDER ISSUING ORDER TO SHOW CAUSE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF [COUNTY]

[COURTHOUSE]

[DEPARTMENT #]

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **[PETITIONER'S NAME]** Defendant and Petitioner.	Case No.: [number] **ORDER TO SHOW CAUSE** [Petition for Recall and Resentencing, Pen. Code, § 1170.95]

IN CHAMBERS

The court has received and reviewed a petition for recall and resentencing pursuant to Penal Code section 1170.95.

[ ] The District Attorney has filed a response to the petition. OR

[ ] The District Attorney has not filed a response to the petition, and the time to file a response has expired.

[ ] The petitioner has filed a reply to the response. OR

[ ] The time to file a reply has expired.

After reviewing the petition and the submissions of the parties, the People of the State of California are ORDERED TO SHOW CAUSE, if any they have, why the relief requested in the petition should not be granted. A hearing will be held on the petition in this court at _____[a.m./p.m.] on _____[no later than 60 days from date order issued]. The initial hearing will be conducted as a chambers conference to determine whether the matter may be resolved informally.

[ ] The Public Defender is appointed to represent petitioner.

The Clerk is ordered to serve a copy of this order upon Petitioner, and upon the Office of the

District Attorney, as counsel for the People of the State of California.

Dated: _____ _____

[JUDGE'S NAME]
Judge of the Superior Court

Send copy of order to:

[Petitioner's address]

[Address for Office of the District Attorney]