ACCOMPLICE LIABILITY FOR MURDER
Penal Code §§ 188, 189, and 1172.6

(SB 1437 and SB 775)

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May 2024

TABLE OF CONTENTS

ACKNOWLEDGMENTS

Substantial contributions were made to this memorandum by the Los Angeles Superior Court, particularly by Hon. William C. Ryan.

I. INTRODUCTION

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), enacted by the Legislature and effective January 1, 2019, made substantial changes to the law relating to the liability of an accomplice under California's felony-murder rule and doctrine of natural and probable consequences. The legislation has three primary components: (1) a restriction on the ability to prosecute a person for murder when the person is not the actual killer; (2) elimination of the "natural and probable consequences" doctrine applicable to murder, and, possible elimination of second degree felony murder; and (3) the establishment of a resentencing procedure in Penal Code, section 1170.95[2] for certain persons convicted of murder under the law prior to January 1, 2019.

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

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

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

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

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

Section 1170.95 renumbered as section 1172.6

Section 10 of Assembly Bill No. 200 (Stats 2022, ch 58)(AB 200) renumbered section 1170.95 without substantive change to section 1172.6, effective June 30, 2022. Appendix I, *infra*, contains the full text of SB 1437, as amended by SB 775, and renumbered by AB 200. These materials will reference section 1172.6 unless section 1170.95 is being used in a quotation.

II. LAW PRIOR TO JANUARY 2019

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

A. First degree felony murder

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

The reference in section 189 to the designated crimes comprises the California first degree felony-murder rule. If the killing occurs while committing one of the designated crimes, a showing of actual malice 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

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

proved is the specific intent to commit the particular underlying felony." (*People v. Chavez* (2004) 118 Cal.App.4th 379, 385 (*Chavez*).)

B. Second degree felony murder

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

C. Doctrine of natural and probable consequences

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

"We have described the mental state required of an aider and abettor as 'different from the mental state necessary for conviction as the actual perpetrator.' [Citation.] The difference, however, does not mean that the mental state of an aider and abettor is less culpable than that of the actual perpetrator. On the contrary, outside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct

perpetrator. 'To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]' [Citation.]" (*McCoy*, *supra*, 25 Cal.4th at pp. 1117–1118, italics original.)

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

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

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

III. EFFECTIVE DATES OF SB 1437 AND SB 775

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

A. Effective date of resentencing provisions created by SB 1437

Section 1172.6, which establishes the right of a defendant convicted under a theory of felony murder or natural and probable consequences to petition for resentencing, became effective on January 1, 2019. The right is granted to "a person convicted" of such crimes without any restriction based on when the crime occurred. Accordingly, the right to request resentencing is

available to any person whose conviction is final, regardless of when the crime or conviction occurred.

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

There remains the question of the proper application of SB 1437 to persons who have been found guilty by plea or jury and sentenced prior to January 1, 2019, but whose cases are not final as of that date. The issue is whether the defendant will be entitled to an automatic dismissal of the homicide conviction and resentencing, or whether the defendant must first apply for resentencing through the provisions of section 1172.6. Whether the amendments made by SB 1437 are applied retroactively to crimes committed prior to January 1, 2019, depends on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

People v. Gentile (2020) 10 Cal.5th 830, holds that a petition pursuant to section 1170.95 is the exclusive means for a defendant to obtain vacatur of a conviction of murder based on the theory of NPC. Because the Legislature created section 1170.95, that section, not *Estrada*, applies. The conviction may not be challenged by direct appeal even though the case was not final at the time AB 1437 was enacted. (*Gentile*, *supra*, 10 Cal.5th at pp. 851-854.) Likely *Gentile* has been abrogated by the amendment of section 1172.6 adding subdivision (g): "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)."

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

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

In anticipation of litigation over the application of *Estrada* to cases not final as of January 1, 2022, the effective date of SB 775, section 1172.6, subdivision (g), provides: "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." Thus, the change to section 1172.6 clearly will be applicable to any sentence imposed after January 1, 2022, and to any case not final as of January 1, 2022.

Without reference to subdivision (g), *People v. Montes* (2021) 71 Cal.App.5th 1001 (*Montes*], applied the provisions of SB 775 to a case pending appeal. "The first question before us is whether the new legislation—Senate Bill No. 775—applies to appellant's pending appeal. New legislation generally applies to all judgments which are not final as of the effective date of the new statute. [Citations.] Where it is unlikely that a judgment will be final by the effective date of new legislation, courts have remanded matters to the trial courts so that the new statute can

be applied after its effective date. [Citation.] [¶] Both parties acknowledge in their supplemental briefs that the order here will not be final until after the effective date of Senate Bill No. 775. To promote judicial economy and efficiency, we opt to apply the revised provisions set forth in Senate Bill No. 775 to appellant's case now. Doing so means that appellant is eligible for resentencing relief under section 1170.95 by virtue of his attempted murder conviction so long as appellant was convicted under a natural and probable consequences theory." (*Montes*, *supra*, 71 Cal.App.5th at pp. 1006-1007.)

People v. Porter (2022) 73 Cal.App.5th 644, holds the amendment made by SB 775 to section 1172.6 to add attempted murder as an eligible offense applies to cases not final as of January 1, 2022.

IV. AMENDMENT OF FELONY-MURDER RULE

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

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287[8], 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.

[7] Underscored text indicates language added by SB 1437.

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

(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.

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

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

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

A. New felony-murder rule

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

(1) The defendant is the actual killer;

(2) The defendant is not the actual killer, but with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree; or

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

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

(§ 189, subds. (e), (f).)

It is important to understand that SB 1437 only changes first degree felony murder with respect to accomplices when the target offense is a felony designated in section 189, subdivision (a). The new provisions make no change to the law when the defendant is being prosecuted as a direct accomplice to the crime of murder. As an example, if defendants A and B plan and participate in the crime of robbery and the victim is killed by defendant A, SB 1437 will define the circumstances under which defendant B may be convicted of first degree felony murder. SB 1437, however, makes no change to the liability of defendant B if both defendants A and B planned to murder the victim and it happens that defendant A pulled the trigger – under these circumstances, defendant B may be convicted of murder as a principal in the commission of the crime.

B. Exceptions to new rule

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

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

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

People v. Saavedra (2023) 96 Cal.App.5th 444, holds the trial court properly denied the petition for relief based on the factual statement given at the time of petitioner's plea that he was the actual shooter. "The plea form conclusively establishes as a matter of law that Saavedra is ineligible for resentencing under section 1172.6. As the factual basis for the plea, Saavedra admitted he 'attempted to murder' the three victims 'by personally discharging a firearm at the vehicle' in which the victims were riding. This factual basis establishes Saavedra was the actual shooter; that is, he actually attempted to murder the victims by shooting at their vehicle. As the trial court pointed out, in the factual basis for the plea Saavedra admitted he attempted to murder the victims *by means* of discharging a firearm into the car in which they were in." (Italics original.)

Actual killer defined

People v. Lopez (2022) 78 Cal.App.5th 1, 4-5 (*Lopez*), discussed the meaning of "actual killer" in section 189, subdivision (e)(1): "We conclude the term 'actual killer' as used in the revised felony-murder rule of section 189, subdivision (e)(1) refers to someone who personally killed the victim and is not necessarily the same as a person who 'caused' the victim's death." " The jury instructions created the possibility the jury convicted defendant of felony murder and found to be true the robbery-murder special-circumstance allegation without finding him to have been the actual killer. The jury was not instructed it had to find defendant personally killed the victim to convict him; the jury was instructed it only had to find defendant committed an act that caused the victim's death. The jury might have found defendant, though not the actual killer, participated somehow in the home invasion robbery, and the victim's death was the direct, natural, and probable consequence of an act committed in the course of his participation. As defendant posits, 'the jury could have taken a realistic view of the prosecution's circumstantial evidence and determined beyond a reasonable doubt that [defendant] was involved in the robbery that resulted in the death, but that [defendant] may or may not have been the actual killer.'" (*Lopez*, *supra*, 78 Cal.App.5th at p. 20.)

People v. Harden (2022) 81 Cal.App.5th 45 (*Harden*), also holds the actual killer is ineligible for relief as a matter of law. "[Petitioner's] record of conviction conclusively establishes, with no factfinding, weighing of evidence, or credibility determinations, that she was the actual killer. Harden complains that because the jury was not asked to 'expressly' find that she was the actual killer, the record of conviction does not refute her petition as a matter of law. But given the 'kills' language in CALJIC No. 8.10, along with 'actually killed' in CALJIC No. 8.80.1, and 'personally inflicted great bodily injury on Alfred [P.]' in CALJIC No. 17.20, in returning guilty verdicts and true findings, the jury necessarily found she actually killed Alfred P. The trial court, therefore, correctly denied her petition at the prima facie stage." (*Harden*, *supra*, 81 Cal.App.5th at p. __; footnote omitted.)

People v. Vang (2022) 82 Cal.App.5th 64 (*Vang*), held petitioner was not the actual killer. "In short, defendant, who has a long history of domestic violence, had an argument with

his wife. After she fled in her car, defendant followed, eventually forced her to stop, and coerced her (through force or fear) into his vehicle. As defendant was driving away, his wife opened the door and jumped from the moving vehicle, resulting in her death." (*Vang*, *supra*, 82 Cal.App.5th at p. 69.) "In light of Senate Bill No. 1437's intent to impose punishment commensurate with the person's culpability, we conclude that the term 'actual killer' was intended to limit liability for felony murder—in cases where section 189, subdivision (e)(2) or (e)(3) do not apply—to the actual perpetrator of the killing, i.e., the person (or persons) who personally committed the homicidal act. In other words, the intent was to conform California law to the 'agency theory' of felony murder liability, under which criminal culpability is restricted to deaths directly caused by the defendant or an accomplice, as distinguished from the 'proximate cause' theory of felony murder, under which a defendant is responsible for any death that proximately results from the unlawful activity. [Citations.]" (*Vang*, *supra*, 82 Cal.App.5th at p. 88.)

In *People v. Garcia* (2022) 82 Cal.App.5th 956 (*Garcia*), the petitioner physically assaulted and stole money from an 82-year-old man. The victim died about an hour later from an existing heart condition. The petitioner was convicted of murder under a felony-murder theory. The court rejected petitioner's contention that there was no "actual killer" where death resulted from a pre-existing medical condition aggravated by the stress of the underlying crime. "A cause of death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death and without which the death would not occur. [Citations.] When there is more than one contributing cause of death in a murder case, the law is clear: '[A]s long as the jury finds that without the criminal act the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death. Rather, it is required [only] that the cause was a substantial factor contributing to the result.' [Citation.]) The 'substantial factor' standard addresses situations in which there are independent concurrent causes of a death. [Citation.]" (*Garcia*, *supra*, 82 Cal.App.5th at p. 964.)

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

The defendant, as a participant in one of the designated crimes, may be convicted of first degree felony murder if, with the intent to kill, the defendant aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. (§ 189, subd. (e)(2).) To apply the felony-murder rule under these circumstances, it need be shown only that in assisting the actual killer, the defendant had the specific intent to kill the victim. As noted in *Dillon* and *Chavez*, a showing of actual malice and premeditation is not required.
The prosecution also must establish that the actual killer committed first degree murder. Presumably this element may be established by proof of the killing with malice and premeditation, or by the fact the actual killer committed the homicide while committing one of the felonies designated in section 189, subdivision (a).

The theory of direct aiding and abetting was discussed by the Supreme Court in *People v. Reyes* (2023) 14 Cal.5th 981 (*Reyes*). " The Court of Appeal in *Powell* explained the elements as follows: '[D]irect aiding and abetting is based on the combined actus reus of the participants and the aider and abettor's own mens rea. ([People v. McCoy (2001) 25 Cal.4th 1111, 1122, 108 Cal.Rptr.2d 188, 24 P.3d 1210.]) In the context of implied malice, the actus reus required of the perpetrator is the commission of a life endangering act. For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life-endangering act. Thus, to be liable for an implied malice murder, the direct aider and abettor must, by words or conduct, aid the commission of the life-endangering act, not the result of that act. The mens rea, which must be personally harbored by the direct aider and abettor, is knowledge that the perpetrator intended to commit the act, intent to aid the perpetrator in the commission of the act, knowledge that the act is dangerous to human life, and acting in conscious disregard for human life.' (*Powell*, *supra*, 63 Cal.App.5th at pp. 712–713, 278 Cal.Rptr.3d 150, fn. omitted; see id. at p. 713, fn. 27, 278 Cal.Rptr.3d 150 ['The relevant act is the act that proximately causes death.'], citing *People v. Cravens*, *supra*, 53 Cal.4th at p. 507, 136 Cal.Rptr.3d 40, 267 P.3d 1113, and Knoller, supra, 41 Cal.4th at p. 143, 59 Cal.Rptr.3d 157, 158 P.3d 731.) [¶] *Powell* further explained: 'The reason why there is a dearth of decisional law on aiding and abetting implied malice murder may be the heretofore availability of the natural and probable consequences doctrine for second degree murder, which was easier to prove. ... [T]he natural and probable consequences doctrine did not require that the aider and abettor intend to aid the perpetrator in committing a life-endangering act .... What was natural and probable was judged by an objective standard and it was enough that murder was a reasonably foreseeable consequence of the crime aided and abetted.' (Powell, supra, 63 Cal.App.5th at p. 711, fn. 26, 278 Cal.Rptr.3d 150.)" (*Reyes*, *supra*, 14 Cal.5th at pp. 990-991.)

Reyes further observed: "The trial court's factual findings illustrate the nature of its error. The court found that 'the defendant, along with several other gang members, one of which [was] armed, traveled to rival gang territory' and then considered whether that act was done with the mental state required for implied malice. In particular, after finding the natural and probable consequence of the act to be 'dangerous to human life,' the trial court asked whether Reyes 'at the time he acted, ... knew that the act was dangerous to human life,' and whether 'he deliberately acted with conscious disregard for human life.' But implied malice murder requires attention to the aider and abettor's mental state concerning the life endangering act committed by the direct perpetrator, such as shooting at the victim. (See *Powell*, *supra*, 63 Cal.App.5th at p. 713, fn. 27, 278 Cal.Rptr.3d 150 ['The relevant act is the act that proximately causes death.'].) Here, assuming the life-endangering act was the shooting, the trial court should have asked whether Reyes knew that Lopez intended to shoot at the victim, intended to aid him in the shooting, knew that the shooting was dangerous to life, and acted in conscious disregard for life. (See *id.* at pp. 712–713, 278 Cal.Rptr.3d 150.) Because the court did not do so, its decision was based on an error of law insofar as the court sustained

Reyes's murder conviction on a direct aiding and abetting theory." (*Reyes*, *supra*, 14 Cal.5th at pp. 991-992.)

In *People v. Hollywood* (2024) 100 Cal.App.5th 66, ___, the court affirmed the summary denial of a petition based on aiding and abetting. " 'Defendants who aid a qualifying felony with an *intentional plan* to kill (i.e., an intent to kill) are the exact type of offender" who remain liable for murder under Senate Bill 1437. [Citation.] We emphasize that appellant provided the machine gun to his cohorts and ordered them to kill the decedent. [Citation.] The trial judge heard this evidence at the trial and there is no showing that this did not occur. The Legislature did not intend to provide sentencing relief or meaningless evidentiary hearings for someone who directs his cohorts to murder an innocent child. [¶] Checking a box on a printed form saying the petitioner could not presently be convicted of murder, given the record of conviction, is ridiculous. Appellant is a 'direct aider and abettor' as a matter of law. Reversal for an evidentiary hearing would be a futile act. [Citation.]" (Italics in original.)

People v. Morris (2024) ___ Cal.App.5th ___, ___ [G061916], addresses the actus reus necessary for felony murder: "The statute speaks of aiding 'the actual killer in the commission of murder in the first degree.' (§ 189, subd. (e)(2).) This phrase is a legal term of art which, contrary to defendant's assertion, is not limited to assisting the killing itself. Although 'murder in the first degree' may still be committed by an actual killer through a willful, deliberate and premeditated act, that is not the only way. Someone who personally commits what turns out to be the homicidal act while acting in furtherance of the common design of an enumerated felony, would also be guilty of first degree murder as an actual killer under the amended statutes. (See § 189, subds. (a) & (e)(1); *People v. Pulido* (1997) 15 Cal.4th 713, 716, 63 Cal.Rptr.2d 625, 936 P.2d 1235 [felony-murder homicidal act involves killing while acting in furtherance of common design]; *People v. Washington* (1965) 62 Cal.2d 777, 782-783, 44 Cal.Rptr. 442, 402 P.2d 130 [to constitute felony murder, killing must be committed by person jointly engaged in underlying felony and done in furtherance of common design]; *People v. Bodely* (2023) 95 Cal.App.5th 1193, 1199, 313 Cal.Rptr.3d 547 [no mens rea requirement for actual killer under amended felony-murder statute]; *People v. Vang* (2022) 82 Cal.App.5th 64, 88, 297 Cal.Rptr.3d 806 [person who personally commits homicidal act is actual killer under amended felony-murder statute].) With such an act occurring in furtherance of the underlying common design, all others who are engaged in the commission of the felony—i.e., acting in furtherance of the common design—would necessarily be aiding the killer in the commission of murder in the first degree. Thus, the actus reus required for those possessing an intent to kill is simply aiding the underlying felony in which a qualifying death occurs. (*People v. Hollywood* (Feb. 28, 2024, B323018) —— Cal.App.5th ——, ——, —— Cal.Rptr.3d ——, 2024 WL 8323201; *Lopez*, *supra*, 88 Cal.App.5th at pp. 577-578, 305 Cal.Rptr.3d 93.)"

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*).

People v. Strong (2022) 13 Cal.5th 698 (*Strong*), holds that persons found to be a "major participant" who acted "with reckless indifference to human life" prior to the court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), are not precluded from making a prima facie showing for relief under section 1172.6. "In 2015, *Banks* substantially clarified the law surrounding major participant findings. [Citation.] A year later, *Clark* recited the teachings of *Banks* on the major participant question and then substantially clarified the relevant considerations for determining whether a defendant has acted with reckless indifference to human life. [Citation.] For reasons we have explained, unless a defendant was tried after *Banks* was decided, a major participant finding will not defeat an otherwise valid prima facie case. And unless a defendant was tried after *Clark* was decided, a reckless indifference to human life finding will not defeat an otherwise valid prima facie case." (*Strong*, *supra*, 13 Cal.5th at p. 721.) Substantially in accord with *Strong* is *People v. Arrequin* (2023) ___ Cal.App.5th ___ [B304838].

Standard of review

The trial court's finding that petitioner was a major participant or acted with reckless indifference to life is subject to "substantial evidence" review. (*People v. Reyes* (2023) 14 Cal.5th 981, 988; *People v. Sifuentes* (2022) 83 Cal.App.5th 217, 232–233; *People v.*

Oliver (2023) 90 Cal.App.5th 466, 479; *People v. Montanez* (2023) 91 Cal.App.5th 245, 270; *People v. Njoku* (2023) 95 Cal.App.5th 27, 41.)

a. Major participant

"Major participant" has been variously defined by the appellate courts:

- "We have recently examined the issue of 'under what circumstances an accomplice who lacks the intent to kill may qualify as a major participant so as to be statutorily eligible for the death penalty.' [Citation.] The ultimate question pertaining to being a major participant is 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major" [Citation]' [Citation.] Among the relevant factors in determining this question, we set forth the following: 'What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inactions play a particular role in the death? What did the defendant do after lethal force was used?' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 611 (*Clark*).)

- Of the foregoing factors, *People v. Banks* (2015) 61 Cal.4th 788, 803, observed: "No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major' [citations.]"

- "A major participant need not be the ringleader [citation], but a ringleader is a major participant [citation]." *Williams* (2015) 61 Cal.4th 1244, 1281.)

- "[I]t is significant to note there is significant overlap 'between the two elements, being a major participant, and having reckless indifference to human life, . . . "for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life." [Citation.]' [Citation.] 'The high court [in *Tison*] also stated: "Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." [Citation.] In *Banks*, we observed that *Tison* did not specify "those few felonies for which any

major participation would 'necessarily exhibit[ ] reckless indifference to the value of human life.' " ' [Citation.] We surmised a possible example would be "the manufacture and planting of a live bomb." [Citation.] Yet we also concluded that armed robbery, by itself, did not qualify. [Citation.]' [Citation.]" (*In re Bennett* (2018) 26 Cal.App.5th 1002, 1015–1016 (*Bennett*).)

- "[W]ith respect to the major participant finding, it is true that there was no evidence that Oliver planned the crime, supplied a weapon, or carried a weapon. However, as our high court has counseled,'[n]o one' of the factors it has identified as relevant in this context 'is necessary.' [Citation.] Oliver was present during the planning of the crime. And he downplays the importance of his physical presence as backup throughout the crimes, a status which was confirmed by his receipt of the second largest portion of the stolen cocaine. It was established at trial that Oliver is six feet, four inches tall and, at the time of the crimes, weighed 225 pounds. Thus, his presence no doubt helped facilitate the completion of the planned robbery/burglary. [¶] Moreover, Oliver knew it was likely Adger would use lethal force during the underlying crimes and there is no evidence he ever took any action to dissuade Adger from committing murder or warn Jimenez, either before or during the crimes. Indeed, Adger reportedly looked at Oliver immediately before pulling out his gun and shooting Jimenez. A reasonable inference from this fact is that Adger was looking for confirmation that Oliver was on board with the plan and ready to back him up. Yet Oliver took no action at this crucial time, and this inaction clearly played a role in Jimenez's death. Finally, after the shooting, Oliver did not act surprised or upset. Instead, he and Adger simply removed the cocaine from the residence and drove away. Later, Oliver assisted in cooking a portion of the cocaine; secreted the gun in his mother's home; and assisted in disposing of the car and the gun. In sum, substantial evidence supports the trial court's conclusion that Oliver's participation in the underlying crimes was sufficiently significant to be considered 'major.'" (*People v. Oliver* (2023) 90 Cal.App.5th 466, 483 [*Oliver*].)

- "In sum, the trial evidence overwhelmingly supports the conclusion Eddie knew Steve was an armed, explosively violent person who had previously committed violent offenses and who had talked about shooting someone earlier that very day. As the crimes unfolded, Eddie could observe additional warning signs of danger to the victims. Eddie could hardly have been any more "aware[ ] ... of [the] particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of [Steve]." (*Banks*, *supra*, 61 Cal.4th at p. 803, 189 Cal.Rptr.3d 208, 351 P.3d 330.) As a result, this factor weighs heavily against him." (*People v. Montanez* (2023) 91 Cal.App.5th 245, 274.)

b. Reckless indifference to human life

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

- 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.)

- " ' "[R]eckless indifference to human life" is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.' [Citation.] Thus, 'the culpable mental state of "reckless indifference to life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death" [citation] . . . ' [Citation.] [¶] 'The defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create.' [Citation.] '[I]t encompasses a willingness to kill (or to assist in another killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.' [Citation.]" (*Bennett*, *supra*, 26 Cal.App.5th at p. 1021.)

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

- "As for the reckless indifference finding, we agree, as stated above, that knowing participation in an armed robbery is not sufficient, on its own, to demonstrate reckless indifference. Here, the evidence supports the inference that Oliver was aware Adger likely intended to use a firearm during the robbery/burglary to kill Jimenez and did nothing to minimize this grave risk of death. [Citation.] Again, Oliver's status as Adger's second in command cannot be ignored. Oliver had multiple opportunities to object to the planned murder, but he did not do so. After the shooting, he did not go to the aid of the victim. Instead, he was seen by

one witness 'strutting' back to the car. And another witness saw all three of the vehicle's passengers laughing as they drove away. Nor does it seem that, after the event, Oliver expressed any outrage. Rather he helped process the cocaine and cover up the crimes. A reasonable inference from his behavior is that he simply did not care whether Jimenez ended up dead because the crime was his 'chance for everything.' Substantial evidence thus supports the trial court's conclusion that Oliver acted with reckless indifference to human life." (*Oliver*, *supra*, 90 Cal.App.5th at pp. 483-484.)

- Defendant's age is a relevant factor in determining whether the defendant acted with reckless indifference to human life under section 190.2, subdivision (d). (*In re Moore* (2021) 68 Cal.App.5th 434 (*Moore*). 439.) In 1991, Moore, age 16, and Russell stole a car from a mall parking lot. After driving around the lot, the two spotted three persons getting out of a parked car. Russell got out of the stolen car and robbed the trio at gunpoint. After the victims handed over their property, Russell, without provocation, fired two shots at one of them, killing the victim. "Considering the totality of the circumstances, including the fact that Moore was only 16 at the time of his offenses, in light of *Banks*, *Clark*, and their progeny, we find insufficient evidence to establish Moore acted with the requisite reckless indifference to human life. We therefore vacate the robbery-murder special-circumstance finding and remand this case for resentencing." (*Moore*, *supra*, 68 Cal.App.5th at p. 439; see also *People v. Ramirez* (2021) 71 Cal.App.5th 970, 987 [youth is an appropriate consideration]; *In re Harper* (2022) 76 Cal.App.5th 450, 466 [assuming without deciding that youth is a factor that must be considered]; *People v. Jones* (2022) 86 Cal.App.5th 1076, 1091-1093 [youth a relevant factor to consider].) Generally in accord with *Moore* that age is a relevant factor is *People v. Oliver*, *supra*, 90 Cal.App.5th at pages 485-488; and *People v. Pittman* (2023) 96 Cal.App.5th 400, 416-418.

People v. Keel (2022) 84 Cal.App.5th 546 (*Keel*), for insufficient evidence to support the trial court's finding that petitioner acted with reckless indifference to human life. "In sum, the evidence showed 15-year-old Davion Keel participated in a crime of opportunity in which a death occurred. The crime was unplanned, spontaneous, and short in duration. There was no direct evidence that Keel carried a loaded weapon during the crime. There was no evidence that he knew his confederate's weapon was loaded. There also was no evidence that Keel supplied his confederate with a weapon or instructed him to use one. There was no evidence that his confederate had a propensity or reputation for violence, let alone that Keel was aware of such violent tendencies. Further, when these tragic events unfurled, Keel was a 15-year-old minor—a member of a class of persons who, in general, ' "have a ' "lack of maturity and an underdeveloped

sense of responsibility," ' leading to recklessness, impulsivity, and heedless risk-taking."' [Citation.] " (*Keel*, *supra*, 84 Cal.App.5th at p. 562.)

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

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

People v. Sifuentes (2022) 83 Cal.App.5th 217 (*Sifuentes*), discusses the establishment of the peace officer exception. "Petitioner is correct that the Legislature did not create a strict liability offense with the peace officer exception. 'Consistent with this policy [of supporting and protecting peace officers engaged in the performance of their duties] and the applicable principles of statutory interpretation, section 189, subdivision (f), excuses the prosecution from proving ... the defendant acted with malice when the victim of a murder committed in the course of a felony listed in section 189, subdivision (a), is a peace officer engaged in the performance of the officer's duties *and the defendant has the requisite knowledge*.' [Citation, italics added by *Sifuentes*.] The 'requisite knowledge' referred to in Hernandez and at issue here is that 'the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties.' [Citation.] [¶] While the meaning of 'knew or reasonably should have known' in section 189, subdivision (f) has not been subject to interpretation, courts have interpreted similar statutory language. Where a provision of the Penal Code requires 'knowledge' of a fact, 'a subjective appreciation of that fact is an element of the offense.' [Citation.] ['the word "knowingly" imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code'].) 'Knowledge' has been defined as '[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact.' [Citation.] [¶] The term 'reasonably should have known,' on the other hand, implicates an objective criminal negligence standard. [Citations.] If a reasonable person in the defendant's position would have been aware of the facts at issue, the defendant is presumed to have such knowledge. [Citation.] As one court has observed, knowledge is a higher standard than criminal negligence, but both standards

may be proven in much the same way: 'Circumstantial evidence tending to show that a reasonable person would have known an officer was engaged in the performance of duty will likewise tend to show that a particular defendant was aware of that fact. The only difference when actual knowledge is required is that if a defendant denies knowing the relevant facts, the trier of fact must judge the credibility of that statement.' [Citation.] [¶] Before turning to the merits, we briefly emphasize that the parties here agree, as do we, that the legal standard to be applied in this appeal is whether the requisite knowledge was acquired before or concurrently with the acts that caused the peace officer-victim's death. Petitioner argued below that the court had to find he had the requisite knowledge 'at or before the time of the killing.'" (*Sifuentes*, *supra*, 82 Cal.App.5th at pp. 229-230, footnote omitted.)

The "substantial evidence" standard will be applied to a review of the trial court's decision on the peace officer exception. (*Sifuentes*, *supra*, 83 Cal.App.5th at pp 232-233.)

After the court determines the petitioner has shown a prima facie basis for relief, the People are entitled to an evidentiary hearing to determine whether the peace officer exception applies to the case. (*Sifuentes*, *supra*, 83 Cal.App.5th at pp. 236-237; *People v. Flint* (2022) 75 Cal.App.5th 607, 616-617.)

V. ELIMINATION OF THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

A. First degree murder

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

(a) For purposes of Section 187, malice may be express or implied.[9]

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

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

(3) <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>

[9] Underscored text indicates language added by SB 1437.

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

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

(f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.

(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

SB 1437 in its amendment of section 188, coupled with the declaration of intent in section 1, clearly indicates an intent to eliminate NPC and permit a conviction of first degree murder only if there is something more than a person's participation in a non-homicide target offense. The elimination occurs as a result of two changes to section 188: (1) the addition of the requirement that to be convicted of any murder (except for felony murder according to section 189, subdivision (e)), the defendant must act with malice aforethought; and (2) the inability to use mere participation in a target offense as a basis to impute malice to the non-killer.

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

The elimination of the NPC doctrine was discussed in *People v. Curiel* (2023) 15 Cal.5th 433, 462: "[A]fter the enactment of Senate Bill 1437, a defendant cannot be convicted of murder based on the doctrine of natural and probable consequences, even with a showing of malice aforethought. [Citation.] It is an invalid theory. Murder liability requires a different, valid theory, such as direct aiding and abetting. [Citation.] And it requires a different, valid theory because of the changes to section 188 in Senate Bill 1437. It was those changes that persuaded this court that the doctrine of natural and probable consequences could no longer support murder liability, with or without malice. [Citation.] Consequently, a petitioner who alleges that he or she could not currently be convicted of a homicide offense 'because of changes to Section 188 or 189 made effective January 1, 2019' (§ 1172.6, subd. (a)(3)) puts at issue all elements of the offense under a valid theory."

B. Second degree murder

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

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

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

Because the crime of attempted murder necessarily requires the proof of a defendant's intent to kill, why does the use of the doctrine of natural and probable consequences in an attempted murder case force a resentencing? The issue has been addressed in *People v. Montes* (2021) 71 Cal.App.5th 1001 (*Montes*).

> "[T]he trial court found appellant ineligible for resentencing relief because appellant 'possessed the intent to kill or the jury could not have convicted him of attempted murder.' The trial court inferred from the jury's finding of guilt that the jury must have found appellant possessed the intent to kill, qualifying him for criminal liability with the requisite malice aforethought. The trial court's reasoning here is flawed.
>
> When appellant was found guilty of attempted murder under a natural and probable consequence theory of liability, the 'intent to kill' was imputed onto appellant from the actual killer or perpetrator. (*People v. Sanchez* (2020) 46 Cal.App.5th 637, 642, 259 Cal.Rptr.3d 829 [The natural and probable consequences doctrine therefore imputes specific intent to kill in attempted murder convictions; the actions of the perpetrator are imputed to the accomplice].) Vicarious liability is imposed '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.' (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852, 128 Cal.Rptr.3d 565.) Here, the jury found appellant guilty of attempted murder because the perpetrator (not appellant) intended to kill and the perpetrator's attempted murder was a natural and probable consequence of appellant's intent to participate in the target offense of assault. In other words, the jury here did not consider appellant's own intent to kill for purposes of the attempted murder crimes, as appellant's intent to commit the non-target offense is irrelevant.
>
> Additionally, as already mentioned, Senate Bill No. 1437 prohibited imputing malice to persons based solely on their participation in a crime. (*People v. Sanchez*, *supra*, 46 Cal.App.5th at p. 642, 259 Cal.Rptr.3d 829.) The enactment of Senate Bill Nos. 1437 and 775 shows the Legislature's recognition of the need for statutory changes to more equitably sentence offenders in relation to their involvement in the criminal activity. (See, e.g., *People v. Rodriguez* (2020) 58 Cal.App.5th 227, 240, fn. 7, 272 Cal.Rptr.3d 342.) That legislative goal is best effectuated by resentencing individuals convicted of attempted murder under the natural and probable consequences doctrine if the evidence, whether from the record of conviction alone or with new and additional evidence introduced at the section 1170.95, subdivision (d)(3) hearing, fails to establish beyond a reasonable doubt they, in fact, acted during the crime with the now-required mental state. (*Id*. at pp. 240-241, 272 Cal.Rptr.3d 342.) 'To deny resentencing simply because a jury could have found that they may have acted with express malice would frustrate the legislation's purpose.' (*Id*. at p. 241, 272 Cal.Rptr.3d 342.) That is exactly what happened here when the trial court found appellant ineligible for relief because

he 'possessed the intent to kill or the jury could not have convicted him of attempted murder.'" (*Montes*, *supra*, 71 Cal.App.5th at pp. 1007-1008.)

Applying *Montes* to the new procedures under section 1172.6, the petitioner convicted of attempted murder under an NPC theory of liability will be entitled to resentencing unless the prosecution proves beyond a reasonable doubt that the petitioner is guilty of attempted murder either because they were the person actually attempting the killing or were an aider and abettor acting with the intent to kill.

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

A. Whether SB 1437 eliminates second degree felony murder

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

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

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

Chun also observed that "the [second degree] felony-murder rule imputes the requisite malice for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to life. [Citation.]" (*Chun*, *supra*, 45 Cal.4th at p. 1184.) The imputing of malice based on the defendant's simple participation in a target felony is now prohibited by section 188, subdivision (a)(3). Mere participation in a felony "inherently dangerous to human life" without any of the additional factors specified in section 189, subdivision (e), is insufficient to show the defendant acted with the requisite reckless indifference to human life.
felony is now prohibited by section 188, subdivision (a)(3).
SB 1437 retained, but severely limited, the use of the first degree felony-murder rule (defined in section 189, subdivisions (a) and (e)), as the only exception to the requirement that a

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

principal act with malice aforethought in committing the crime of murder. There is no similar exception for the crime of second degree felony murder. Indeed, the legislation expressly provides that the requisite malice may not be imputed to a person based solely on participation in the target felony. (§ 188, subd. (a)(3).) And, of course, if the prosecution can prove the defendant acted with malice, there is no need to use the felony-murder rule.

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

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

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

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

As noted above, SB 1437 changed the felony-murder rule by limiting its application to when: (1) the defendant is the actual killer; (2) the defendant is not the actual killer, but with the intent to kill, 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." [Citation.]' [Citations.]" (*People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024-1025.)

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

D. Aiding and abetting implied malice murder as a permissible theory of murder liability

People v. Curiel (2023) 15 Cal.54th 433, discusses the elements of direct aiding and abetting: "In general, to establish liability for murder under the theory of direct aiding and abetting, 'the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission.' [Citation.] In addition, as noted, an aider and abettor may be liable for murder under a theory of implied malice where the aider and abettor aids in the commission of a life-endangering act, with ' "knowledge that the perpetrator intended to commit the act, intent to aid the perpetrator in the commission of the act, knowledge that the act is dangerous to human life, and acting in conscious disregard for human life." ' [Citation.] 'Thus, proof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus — a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea' — which here includes knowledge that the direct perpetrator intends to commit the crime or life-endangering act, 'and (c) the aider and abettor's actus reus — conduct by the aider and abettor that in fact assists the achievement of the crime.' [Citation.]" (*Curiel*, *supra*, 15 Cal.5th at pp. 466-467.) "We have generally described the requisite mens rea for direct aiding and abetting as 'knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends.' [Citation.] In other words, the aider and abettor must have 'knowledge of the unlawful purpose of the perpetrator' and 'the intent or purpose of committing, encouraging, or facilitating' the commission of the offense. [Citation.] Alternatively, in the context of implied malice murder, the aider and abettor must know the perpetrator intends to commit a life-endangering act, intend to aid the perpetrator in the commission of that act, know the act is dangerous to human life, and act in conscious disregard for human life. [Citation.]" (*Curiel*, *supra*, 15 Cal.5th at p. 468.)

A number of courts have addressed the issue of whether aiding and abetting implied malice murder remains a viable theory for murder after the changes made by SB 1437 and SB 775. *People v. Vizcarra* (2022) 84 Cal.App.5th 377, 391-392 (*Vizcarra*), observed: "We join the chorus of appellate authorities—from the Supreme Court, our own court, and other Courts of Appeal—which have uniformly upheld aiding and abetting implied malice murder as a viable form of murder liability, notwithstanding the legislative changes effectuated by Senate Bill 1437 and Senate Bill 775. ([*People v. Gentile* (2020) 10 Cal.5th 830,] at p. 850, 272 Cal.Rptr.3d 814, 477 P.3d 539; [*People v. Glukhoy* (2022) 77 Cal.App.5th 576,] at pp. 589–591, 292 Cal.Rptr.3d 623 [granted review]; [*People v. Superior Court (Valenzuela)*(2021) 73 Cal.App.5th 485,] at p. 499, 288 Cal.Rptr.3d 627; [*People v.* Powell (2021) 63 Cal.App.5th 689,] at pp. 706–714, 278 Cal.Rptr.3d 150; see also People v. Langi (2022) 73 Cal.App.5th 972, 983, 288 Cal.Rptr.3d 809 [citing approvingly to the

mens rea standard articulated in Powell]; People v. Cortes (2022) 75 Cal.App.5th 198, 205, 290 Cal.Rptr.3d 547 [‘the evidence presented and arguments made might support that [the defendant] aided and abetted a shooting and acted with *implied* malice —a theory of murder that is still valid’].) (Italics original.)

As further observed in *Vizcarra*: “The district attorney prosecuted Vizcarra as an aider and abettor of Holcomb's murder. ‘All persons concerned in the commission of a crime ... whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so committed.’ [Citations.] [‘ “A person who aids and abets the commission of a crime is culpable as a principal in that crime.” ‘].) ‘When a person directly perpetrates a killing, it is the perpetrator who must possess ... malice. [Citations.] Similarly, when a person directly aids and abets a murder, the aider and abettor must possess malice aforethought.’ [Citation.] Therefore, ‘[g]uilt as an aider and abettor is guilt “based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state.” ‘ [Citations.] [‘ “[T]he aider/abettor's guilt is based on the combined acts of all the principals and on the aider/abettor's own knowledge and intent.” ‘].)” (*Vizcarra*, *supra*, 84 Cal.App.5th at p. 389, italics original; *People v. Silva* (2023) 87 Cal.App.5th 632, 649-651 [liability of aider and abetter].)

People v. Schell (2022) 84 Cal.App.5th 437 (*Schell*), found sufficient evidence to affirm the denial of a petition for resentencing, the denial being based on the trial court’s finding that petitioner was liable for the death of the victim based on the theory of second degree implied malice murder. “[Petitioner] was one of at least eight gang members or gang associates who participated in a vicious assault upon the victim. The trial court could reasonably infer that appellant knew Zara was repeatedly being hit in the head with a shovel and bat and that he intended to aid those acts by participating in the assault. The blows to Zara's head were loud enough to be heard by several neighbors, some of whom heard someone yell ‘[s]top it’ and ‘[y]ou're killing him.’ Another witness described the group as behaving ‘like a bunch of rats going for cheese.’ While appellant was participating in the attack, his pants, underwear, and jacket were stained with Zara's blood. [¶] Appellant's presence at the scene, his participation in the attack on the victim, his companionship with other perpetrators, his conduct before and after the crimes, and his motive of retaliation for disrespect all support the finding that he aided and abetted an implied malice murder. [Citation], [recognizing that circumstances relevant to the determination whether a defendant is guilty of aiding and abetting a crime include presence at the crime scene, his or her companionship and conduct before and after the crime, and motive].) As the People note, ‘[a]ppellant did not need to specifically know that someone would strike Zara with [a shovel and bat] in that particular manner to be liable under an implied malice theory. It suffices that he knew he was aiding in a violent attack, knew dangerous weapons were being used against Zara, and intended to stop Zara from escaping or defending himself by helping the perpetrators to surround and hit him.’” (*Schell*, *supra*, 84 Cal.App.5th at p 443.)

E. Doctrine of transferred intent

People v. Lopez (2024) 99 Cal.App.5th 1242, holds the doctrine of transferred intent was not eliminated by SB 1437. "Senate Bill 1437 amended section 188, which defines malice. It also amended section 189, which defines the degrees of murder. Finally, this bill added former section 1170.95, now renumbered as section 1172.6.3 (Stats. 2018, ch. 1015, §§ 2, 3.) Nothing in the language of this bill demonstrates or even reasonably suggests that, when eliminating the natural and probable consequences doctrine, the Legislature also intended to abolish the doctrine of transferred intent. There is no ambiguity in the statutory language. Accordingly, we presume the Legislature meant what it said and the statute's plain meaning governs. [Citation.]" (*Lopez*, *supra*, 99 Cal.App.5th at p. ___.)

VII. PETITION FOR RESENTENCING (§ 1172.6)[11]

SB 1437 as amended by SB 775 enacted section 1170.95, now section 1172.6, to create a procedure for the resentencing of cases where a defendant could not be convicted of murder, attempted murder and manslaughter after the enactment of the changes made to sections 188 and 189 by the legislation. If the petition for relief is granted, the conviction and any related enhancements are vacated and any remaining counts are resentenced.

A. Eligibility for resentencing (§ 1172.6, subd. (a))

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

As originally enacted by SB 1437, section 1172.6 provided that persons "convicted of felony murder or murder under a natural and probable consequences theory may file a petition" for resentencing if their conviction was based on the old law of accomplice liability. Whether the provision was sufficiently broad to include attempted murder was a matter of disagreement between the appellate courts. (See, e.g., *People v. Harris* (2021) 60 Cal.App.5th 557, 565-566 [granted review][§ 1172.6 is not available to persons convicted only of attempted murder]; *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008 [granted review] [persons convicted of attempted murder may petition for relief].) Appellate courts, however, agreed resentencing was not available to persons convicted of voluntary manslaughter, even if the conviction resulted from a plea after reduction of a murder charge. (See, *e.g.*, *People v. Cervantes* (2020) 44 Cal.App.5th 884.)

SB 775 amends section 1172.6, subdivision (a), to expressly provide relief for persons convicted of attempted murder and manslaughter: "A person convicted of felony murder or murder under the natural and probable consequences doctrine or other

[11] For a procedural check-list for a petition filed under section 1172.6, see Appendix II, *infra*.

theory under which malice is imputed to a person based solely on that person's participation in a crime, *attempted murder under the natural and probable consequences doctrine, or manslaughter* may file a petition with the court that sentenced the petitioner to have the petitioner's *murder, attempted murder, or manslaughter conviction* vacated and to be resentenced on any remaining counts. . . ." (Italics added.)

Note the requirement that to be entitled to relief, a person convicted of attempted murder must show the conviction was obtained under the doctrine of "natural and probable consequences" (NPC). Whether SB 1437 eliminated the NPC doctrine as to attempted murder has been a matter of some disagreement in the appellate courts. As observed in *People v. Love* (2020) 55 Cal.App.5th 273 (*Love*) [granted review], appellate courts are divided on the issue. "So far, the Courts of Appeal have split three ways on the question. The first group has held that Senate Bill 1437 did not eliminate the natural and probable consequences theory for attempted murder at all—either prospectively or retroactively. [Citations.] The second group has held that Senate Bill 1437 eliminated the natural and probable consequences theory for attempted murder prospectively, but not retroactively. [Citations.] The last group has held that Senate Bill 1437 eliminated the natural and probable consequences theory for attempted murder prospectively and retroactively as to nonfinal convictions, but not retroactively as to final convictions. [Citation.]" (*Love*, *supra*, 55 Cal.App.5th at pp. 278-279.) *Love* holds SB 1437 does not eliminate the natural and probable consequences theory for attempted murder on *any* basis—either prospectively or retroactively. (*Ibid.*) *Love* has been granted review. How the amendment to section 1172.6, subdivision (a), relates to the continued viability of the NPC doctrine for attempted murder will be a matter for further appellate determination.

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

People v. Whitson (2022) 79 Cal.App.5th 22 (*Whitson*), also holds section 1172.6 [1170.95] offers no relief to persons convicted of conspiracy to commit murder. "The plain language of section 1170.95 does not indicate that it applies to convictions for conspiracy to murder. Conspiracy to murder is not mentioned in the statute. This is particularly significant because the Legislature promulgated Senate Bill 775 in part to amend section 1170.95 to expressly include convictions for attempted murder and manslaughter in the list of crimes subject to petition. Those crimes had not been identified in the original statute. [Citation; ['The Legislature finds and declares that this legislation ... [¶] ... [c]larifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories'].] At the time it added this language, the Legislature had the opportunity

to extend section 1170.95 relief to conspiracy to murder convictions alongside attempted murder and manslaughter convictions, but did not. The language of section 1170.95 is unambiguous. The statute does not permit a challenge to a conviction for conspiracy to murder." (*Whitson*, *supra*, 79 Cal.App.5th at pp. 34-35.)

People v. Lezama (2024) 101 Cal.App.5th 583 (*Lezama*), holds relief under section 1172.6 is not available as a matter of law to a person who pleads guilty to manslaughter after statutory amendments eliminated imputed malice theories of murder liability. *Lezama* states the relevant statutory language in section 1172.6, subdivision (a): "The amended statute specifies, in relevant part, that a person convicted of manslaughter may file a resentencing petition to have their 'conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) [a] complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, or attempted murder under the natural and probable consequences doctrine[;] [¶] (2) [t]he petitioner was convicted of ... manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder[;] [¶] (3) [t]he petitioner could not presently be convicted of murder or attempted murder because of changes to [s]ection 188 or 189 made effective January 1, 2019.' " (*Lezama*, supra, 101 Cal.App.5th at p. ___.) Focusing on the third element, Lezama observes: "[T]he Legislature's aim in the manslaughter context was to make relief available to defendants who were convicted by plea or trial at a time when the prosecution could have pursued a murder charge, but the only way of doing so would have been a now invalid theory of imputed malice. Thus, in the manslaughter plea context, the most reasonable reading of the third criterion for establishing resentencing eligibility is that at the time of conviction — i.e., the time the plea was entered — the only way to a murder conviction was through an imputed malice theory. As a matter of law, this cannot be true for a person, like defendant, who pled guilty to voluntary manslaughter at a time when imputed malice theories had already been statutorily eliminated." (*Lezama*, *supra*, 101 Cal.App.5th at p. ___, footnote omitted.)

Murder based on provocative act

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

defendant or his accomplice committed with conscious disregard for life." ' [Citation.]" (*Johnson*, *supra*, 57 Cal.App.5th at p. 266, italics original.)

People v. Mancilla (2021) 67 Cal.App.5th 854 (*Mancilla*), holds section 1172.6 relief is not available to a person convicted of murder under the provocative act doctrine. "Supreme Court case law . . . makes clear a murder conviction under the provocative act doctrine requires proof the defendant 'personally harbored the mental state of malice.' [Citations [the malice requirement for provocative act murder 'stands in marked contrast to the mens rea contemplated by the natural and probable consequences doctrine']; [citation] ['[p]rovocative act murder requires proof of malice, which distinguishes it from felony murder and natural and probable consequences murder'].) That is, the defendant (or his or her accomplice) must have acted with implied malice—the defendant knew his or her conduct endangered the life of another and acted with conscious disregard for life. [Citations.] Thus, section 188, subdivision (a)(3), which provides malice shall not be imputed to a person based solely on his or her participation in a crime, does not affect the theory of provocative act murder. Unlike natural and probable consequences liability for murder, which contained no requirement of proof of malice [citation] (['when a person aided and abetted a nonhomicide crime that then resulted in a murder, the natural and probable consequences doctrine allowed him or her to be convicted of murder without personally possessing malice aforethought']), malice aforethought—conscious disregard for life—is a necessary element of a conviction for provocative act murder, as Mancilla's jury was instructed." (*Mancilla*, *supra*, 67 Cal.App.5th at pp. 867-868.)

People v. Lee (2023) 95 Cal.App.5th 1164, 1183, found under the circumstances of that case that the petitioner could have been found liable for murder based on imputed liability of a coparticipant based on the provocative act doctrine; a prima facie showing for relief was made. "It is . . . conceivable that the jury found Lee guilty of murder not based on his own malicious conduct, but on that of a surviving co-perpetrator. In so doing, the jury would have imputed malice to Lee solely based on his participation in the underlying robbery. Although permissible in 1994, Lee 'could not presently be convicted of murder' on this basis in light of Senate Bill No. 1437. (§ 1172.6, subd. (a)(3); § 188, subd. (a)(3) ['Malice shall not be imputed to a person based solely on his or her participation in a crime.'].) Thus, Lee has made a prima facie showing of eligibility for resentencing. The resentencing court must hold an evidentiary hearing to determine if, beyond a reasonable doubt, Lee is guilty of murder under the law as amended by Senate Bill No. 1457. (§ 1172.6, subd. (d)(3).)"

People v. Cunningham (2024) ___ Cal.App.5th ___ [B323640](*Cunningham*), holds the provocative act doctrine survives the statutory enactments excluding imputed malice. "We cannot add the phrase 'provocative act murder' to [section 1172.6]. This species of murder liability has been the law in California since the 1960s (see, e.g., People v. Gilbert (1965) 63 Cal.2d 690, 704-705, 47 Cal.Rptr. 909, 408 P.2d 365). Surely the Legislature was aware of this murder theory when it made two changes to the statutory murder

definitions. It's failure to mention 'provocative murder' is significant and leads to only one logical conclusion: the Legislature did not intend to jettison this theory." (*Cunningham*, *supra*, ___ Cal.App.5th at p. ___.)

Petitioner is sole killer

People v. Gallo (57 Cal.App.5th 594, holds petitioner, the sole killer, is not entitled to relief under section 1172.6 even though the conviction was based on the doctrine of natural and probable consequences.

2. Persons who have completed their sentence

The eligibility to file a petition for resentencing is less clear for persons who have completed their sentence and any period of post-sentencing supervision. Unlike Propositions 36 and 47, SB 1437 does not include a separate resentencing procedure for persons who have 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.

3. Filing period; date of conviction

Section 1172.6 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[12], regardless of the age of the crime or conviction.

B. 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 1172.6. 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

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

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

People v. Burhop (2021) 65 Cal.App.5th 808, 814, concluded the trial court lacked subject matter jurisdiction to hear petitioner's motion under section 1172.6 because the remittitur had not issued in the direct appeal of the underlying conviction.

Direct appeal of cases not final

Martinez and *Cervantes* likely are no longer valid. SB 775 added subdivision (g) to allow a challenge on direct appeal if the case is not final as of January 1, 2022: "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." (§ 1172.6, subd. (g).)

Limited remand

Although *Martinez, supra,* 31 Cal.App.5th 719*,* did not permit the defendant to raise SB 1437 on direct appeal, it observed that a limited remand to the trial court might be appropriate. "Although we hold the section 1170.95 petition procedure is the avenue by which defendants with nonfinal sentences of the type specified in section 1170.95, subdivision (a) must pursue relief, we are cognizant of the possibility that some defendants may believe themselves able to present a particularly strong case for relief under the changes worked by Senate Bill 1437 and

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

Anthony, supra, 32 Cal.App.5th 1102, was less enthusiastic about the potential of a limited remand to the trial court: "There is nothing in the petition procedure enacted by Senate Bill 1437, which is outlined in section 1170.95, that indicates the Legislature intended that convicted defendants were entitled to immediate retroactive relief. [Citation.] Also, the [*People v.*] *Scarbrough* [(2015) 240 Cal.App.4th 916] court concluded regarding Proposition 47, ' "[i]t is reasonable for the voters to have designed a statutory process where the trial court considers a petition for a recall of sentence after final resolution of legal issues related to the conviction and original sentence (which may have components that are unaffected by [the Three Strikes Reform Act of 2012])." ' [Citation.] The same is true here. The *Scarbrough* court also deemed Proposition 47 voters to have been aware of this previous interpretation in *Yearwood* when they approved Proposition 47, further evidence of their intentions to design a petition process that was only available after the resolution of a pending appeal. [Citation.] This can be equally said about the Legislature's awareness of *Scarbrough* and *Yearwood* when it adopted Senate Bill 1437. [¶] That defendants must wait until the resolution of their appeal before pursuing their petition does not deprive them of a remedy. As the *Scarbrough* court said about the same argument, '[b]y concluding there is no concurrent jurisdiction to resentence a defendant . . . , we merely delay the resentencing; we do not preclude its application.' [Citation.] Defendants also do not establish that concurrent jurisdiction would result in judicial economy. The *Scarbrough* court's rejection of a similar argument applies with equal force here: '[C]oncurrent jurisdiction would not support judicial economy. Our efforts to review the initial judgment may be rendered futile; we may be asked to review conflicting judgments, each with different errors to be corrected; and the trial court may be asked to effectuate a remittitur against a judgment that has since been modified. These scenarios would lead to chaos, confusion, and waste—not judicial economy.' [Citation.]" (*Anthony*, *supra*, 32 Cal.App.5th at p. 1156.)

Based on *Awad, Scarbrough* and *Martinez*, it seems likely a petitioner who is potentially eligible for relief under section 1172.6 could request a limited remand for resentencing or a stay of the sentence imposed on the murder conviction pending the motion for resentencing. While Proposition 47 motions for resentencing only involve the *reduction* of a felony charge, whereas motions brought under section 1172.6 potentially involve the *dismissal* of a felony charge, there does not appear to be a material difference in the two resentencing motions, at least for

the purpose of obtaining permission of the appellate court for a limited remand of the case or a stay of the sentence. Certainly it may be of value to all parties and the court to determine the proper level of a petitioner's criminal responsibility prior to the extensive work necessary to resolve an appeal.

Relief by writ of habeas corpus

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

C. Conditions for granting relief (§ 1172.6, subd. (a).)

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

> **"A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, or attempted murder under the natural and probable consequences doctrine."** (§ 1172.6, subd. (a)(1).) Proof of this requirement is made simply by showing a pleading was filed charging the petitioner with murder, attempted murder, or manslaughter. Since the prosecution is not required to specify in the pleadings the theory under which the petitioner is being prosecuted for murder, the prosecution is allowed to merely charge a generic violation of section 187. Simply making the allegation of murder, for example, "allows" the prosecution to pursue a conviction based on any theory, including felony murder and/or the NPC doctrine.
>
> The resentencing provisions of section 1172.6 do not apply to convictions obtained under the *current* law. *People v. Reyes* (2023) 97 Cal.App.5th 292, 298, observed: "In this matter, appellant is ineligible for resentencing for two reasons. First, in order to be

resentenced, the charging document filed against appellant must have allowed the prosecution to proceed under a theory of murder liability that is now invalid. (§ 1172.6, subd. (a)(1).) This requirement is not met here. The prosecution filed the information against appellant in 2020. Thus, when this criminal proceeding was initiated, the prosecution was precluded from proving the murder charge under a theory of imputed malice. This deficiency amply demonstrates that the trial court did not err when it denied appellant's petition for resentencing. [¶] Appellant's claim fails for a second reason. In order to be resentenced, a petitioner must allege that he could not presently be convicted of murder (or its attempt) 'because of changes' brought by Senate Bill No. 1437. (§ 1172.6, subd. (a)(3).) This language demonstrates that appellant's petition was properly denied. Appellant was not convicted under the prior law, which permitted a theory of murder based on imputed malice. Instead, he entered his change of plea in 2021 with the advice and consent of legal counsel. When appellant entered his change of plea, the now invalid theories of murder liability had already been eliminated. Consequently, appellant has already received the benefits of Senate Bill No. 1437."

"The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder." (§ 1172.6, subd. (a)(2).) This requirement has two options: (1) the petitioner was convicted of murder, attempted murder, or manslaughter following a trial; or (2) the petitioner accepted a plea offer to the crime of murder, attempted murder, manslaughter in lieu of a trial where he could have been convicted of murder or manslaughter. Under the first option, it is sufficient to show simply the fact of the conviction of murder, attempted murder, or manslaughter; it is not necessary to establish the theory under which the conviction was obtained.

The scope of the second option is less clear. It suggests a petitioner may be entitled to relief if he accepted a plea offer to a lesser crime in a case where he could have been convicted of murder or attempted murder. In other words, a petitioner, charged with murder, who accepts a plea to manslaughter, may have met this requirement. *People v. Cervantes* (2020) 44 Cal.App.5th 884, 887, held section 1172.6 did not apply to a conviction for voluntary manslaughter, even when the conviction resulted from a plea down from the charge of murder. *Cervantes* likely is no longer valid after the passage of SB 775 which expands relief to persons convicted of manslaughter.

"**The petitioner could not be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019."** (§ 1172.6, subd. (a)(3).) In other words, for resentencing to be granted, it must be established that the petitioner could not have been convicted of murder or attempted murder under the law as it reads after January 1, 2019. As discussed above, the only changes made by SB 1437 to sections 188 and 189 regard the liability of certain accomplices under first degree felony murder, the application of NPC, and, likely, conviction of second degree felony murder. Accordingly, relief must be granted if the only way to have convicted the

petitioner of murder or attempted murder was through first degree felony murder, NPC, and, likely, second degree felony murder as they existed prior to January 1, 2019.

Although not one of the three conditions necessary for granting relief specified in section 1172.6, subdivision (a)(1)-(3), implicit is the requirement that to be entitled to relief, the petitioner must have been convicted based on the felony-murder rule and/or NPC: "A person convicted of felony murder or murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, attempted murder under the natural and probable consequences doctrine, or manslaughter may file a petition with the court that sentenced the petitioner to have the petitioner's murder, attempted murder, or manslaughter conviction vacated and to be resentenced. . . ." (§ 1172.6, subd. (a), italics added.) At least for the purposes of determining whether the petitioner has filed a facially sufficient petition, likely the petitioner's simple allegation that he was convicted (or could have been convicted by his plea) under the prior felony-murder rule or NPC is sufficient.

D. Form and content of the petition (§ 1172.6, subd. (b)(1))

Section 1172.6 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)." (§ 1172.6, subd. (b)(1)(A).)

(2) "The superior court case number and year of the petitioner's conviction." (§ 1172.6, subd. (b)(1)(B).)

(3) "Whether the petitioner requests the appointment of counsel." (§ 1172.6, subd. (b)(1)(C).) *People v. Lewis* (2021) 11 Cal.5th 952 (*Lewis*), in interpreting section 1172.6, subdivision (b)(1)(C), held: "Notably, whether a petitioner 'requests the appointment of counsel' is part of the information that must be included in a petition for it to satisfy the court's subdivision (b)(2) review. [Citation.] Subdivision (c)'s language regarding the appointment of counsel is mandatory: 'If the petitioner has requested counsel, the court *shall* appoint counsel to represent the petitioner.' [Citation.] The combined meaning is clear: petitioners who file a complying petition requesting counsel are to receive counsel upon the filing of a compliant petition." (*Lewis*, *supra*, 11 Cal.5th at pp. 962-963, italics original.)

SB 775 codifies *Lewis* by adding section 1172.6, subdivision (b)(3): "Upon receiving a petition in which the information required by this subdivision is set forth or a petition where any missing information can readily be ascertained by the court, if the petitioner

has requested counsel, the court shall appoint counsel to represent the petitioner." The amendment makes the court's obligation clear: if the petition is facially sufficient as delineated in subdivision (b)(1), the court must appoint counsel if requested by the petitioner. "[W]e conclude that the statutory language and legislative intent of section 1170.95 make clear that petitioners are entitled to the appointment of counsel upon the filing of a facially sufficient petition. . . ." (*Lewis*, *supra*, 11 Cal.5th at p. 957.)

E. Filing and service of the petition (§ 1172.6, 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." (§ 1172.6, subd. (b)(1).)

F. Assigned judicial officer (§ 1172.6, 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. (§ 1172.6, subd. (b)(1).) Undoubtedly the parties may stipulate to a different or central judge to rule on the petition.

Section 1172.6, subdivision (b)(1), means the judge that originally sentenced the petitioner, not the court or tribunal that sentenced the petitioner. (*People v. Santos* (2020) 53 Cal.App.5th 467 (*Santos*). "[T]he People also argue that the phrase 'not available' must be broadly interpreted to give a presiding judge latitude in assigning specific cases to specific trial judges. We are skeptical that the mere fact that a different bench officer is sitting in the original sentencing judge's prior courtroom when the petition is filed satisfies the statutory requirement of unavailability. (See, e.g., "[citation]['a showing of more than mere inconvenience is necessary before a judge can be deemed unavailable']; [citation]['We recognize that in multi-judge courts, a judge hearing criminal cases one month may be assigned to other departments in subsequent months. However a defendant's reasonable expectation of having his sentence imposed, pursuant to bargain and guilty plea, by the judge who took his plea and ordered sentence reports should not be thwarted for mere administrative convenience'].)" (*Santos*, *supra*, 53 Cal.App.5th at pp. 474-475.)

Use of a challenge under Code of Civil Procedure, section 170.6

The remand of a petition under section 1172.6 for further proceedings following appeal is not for the purpose of a "new trial" as contemplated by Code of Civil Procedure, section 170.6, subdivision (a)(2). (*Torres v. Superior Court* (2023) 94 Cal.App.5th 497, 503.) The attempted challenge of the judge who heard the original petition should be denied as untimely. Generally

in accord with *Torres* are *Sandoval v. Superior Court* (2023) 95 Cal.App.5th 1274; and *Estrada v. Superior Court* (2023) 93 Cal.App.5th 915.

G. Procedure for the review of the petition and issuance of order to show cause (§ 1172.6, subd. (c))

As established by legislation and case law, there are four potential stages in the review of a petition and granting of relief under section 1172.6:

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

1. Facial sufficiency of the petition

The first step in the review process is to determine the facial sufficiency of the petition. Section 1172.6, subdivision (b)(1), specifies the petition is to contain three items:

(a) "A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)." (§ 1172.6, 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 1172.6, subdivision (a)." Nothing in section 1172.6 requires the petitioner to declare the specific facts under which he contends he is entitled to relief.

(b) "The superior court case number and year of the petitioner's conviction." (§ 1172.6, subd. (b)(1)(B).)

(c) "Whether the petitioner requests the appointment of counsel." (§ 1172.6, subd. (b)(1)(C).)

If there is missing information, the court may deny the petition and invite the filing of a corrected pleading. "If any of the information required by [§ 1172.6, 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." (§ 1172.6, subd. (b)(2).)

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

a. Right to counsel

Torres must now be considered in light of the right to counsel in section 1172.6, subdivision (b)(3), and *People v. Lewis* (2021) 11 Cal.5th 952 (*Lewis*). Section 1172.6, subdivision (b)(3), provides: "Upon receiving a petition in which the information required by this subdivision is set forth or a petition where any missing information can readily be ascertained by the court, if the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner." *Lewis* holds "only *after* the appointment of counsel and the opportunity for briefing may the superior court consider the record of conviction to determine whether 'the petitioner makes a prima facie showing that he or she is entitled to relief.' [Citation.]" (*Lewis*, *supra*, 11 Cal.5th at p. 957, italics original.) The direction is clear: if the petition is facially sufficient, the court *must* appoint counsel.

People v. Foley (2023) 97 Cal.App.5th 653 (*Foley*), holds a petitioner has a state and federal constitutional right to conflict-free appointed counsel in proceedings under section 1172.6. "The parties assume this constitutional right applies in the context of a resentencing petition under section 1172.6. We conclude it does, at least where the trial court issues an order to show cause and holds an evidentiary hearing. While a defendant generally 'has no constitutional right to counsel with respect to statutory postconviction motions seeking a reduction in sentence' [citation], the trial court does not issue an order to show cause and hold an evidentiary hearing under section 1172.6 unless the defendant has made a prima facie showing of entitlement to relief. The situation is therefore similar to a postconviction habeas corpus proceeding where the appointment of counsel is demanded by due process concerns if the petition attacking a

judgment's validity states a prima facie case leading to an order to show cause. [Citation.]" (*Foley*, *supra*, 97 Cal.App.5th at pp. 659-66.)

b. Scope of facial review

The proper scope of the facial review is very limited. The court should examine the petition to determine whether it contains the three elements specified in section 1172.6, subdivision (b)(1), no matter how in artfully they may be phrased. Particularly if counsel has been requested, the court should refrain from any review of the sufficiency of the factual allegations or review of the record of conviction until after counsel has been appointed and both parties have an opportunity to submit briefing.

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

2. **Determining the prima facie basis for relief**

Section 1172.6, subdivision (c), as originally enacted, provided: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is

served. These deadlines shall be extended for good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause."

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

SB 775 amended section 1172.6, subdivision (c), to conform the statutory language to *Lewis*. Subdivision (c) now provides: "Within 60 days after service of a petition that meets the requirements set forth in subdivision (b), the prosecutor shall file and serve a response. The petitioner may file and serve a reply within 30 days after the prosecutor's response is served. These deadlines shall be extended for good cause. After the parties have had an opportunity to submit briefings, the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief. If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause. If the court declines to make an order to show cause, it shall provide a statement fully setting forth its reasons for doing so." The amendment of subdivision (c) clarifies a number of points:

- The amendment eliminated the two references to establishing a prima facie basis for relief. Now there is only one required showing – to be made after briefing by the parties and a hearing conducted by the court.

- The prosecutor "shall" file a response within 60 days of service of the petition if the petitioner has filed a petition in facial compliance with subdivision (b). The petitioner thereafter "may" file a reply within 30 days after the prosecution's response is served. The use of "shall" when addressing the prosecution's duty to respond appears mandatory. Failure to file the required response should be considered by the court at least as a concession petitioner has stated a prima facie basis for relief, necessitating the court issuing an order to show cause.

- If the petition complies with subdivision (b), the court may not summarily deny the petition without an opportunity for briefing by the parties and a hearing conducted by the court.[13]

- If the petitioner makes the prima facie showing for relief, the court must issue an order to show cause. Although the court is not required to give its reasons for issuing an order to show cause, such a statement may nevertheless provide guidance for the parties and the court in conducting the hearing on the merits and may assist in any appellate review. If the court declines to issue the order to show cause, "it shall provide a statement fully setting forth its reasons for doing so." The statement may be given orally or in writing.

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

To the extent they suggest more than one prima facie review, the following cases are likely abrogated by *Lewis* and SB 775: *People v. Drayton* (2020) 47 Cal.App.5th 965; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 897 (granted review); *People v. Verdugo* (2020) 44 Cal.App.5th 320 (granted review).

Actual killer ineligible for relief

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

If the petitioner is the actual killer, they are not entitled to resentencing as a matter of law. *People v. Garrison* (2021) 73 Cal.App.5th 735, held petitioner was ineligible for relief under section 1172.6 as a matter of law because the record established he was the actual killer. Petitioner pled to the charge of murder and admitted he personally used a firearm; the evidence submitted at the preliminary hearing supported the conclusion there was only one shooter.

In *People v. Hurtado* (2023) ___ Cal.App.5th ___ [B319381], the petition satisfied the facial review, but the trial court denied the petition without appointing counsel, setting a briefing schedule and holding a hearing. The errors by the trial court were not of constitutional dimension. The error was found harmless because as a matter of law, the petitioner was the sole person who attempted the murder.

a. **Evidence considered in review of prima facie basis**

Section 1172.6 is silent on the question of what evidence the court may consider in determining whether the petitioner has presented a prima facie basis for relief. *Lewis*, however, observed that the court may consider the record of conviction. "Having concluded that a petitioner is statutorily entitled to counsel, if requested, upon the filing of a facially sufficient petition, and that subdivision (c) describes only one prima facie showing, we now turn to the question of whether a trial court can rely on the record of conviction in determining whether that single prima facie showing is made. The answer is yes. In fact, Lewis agrees that 'the court may — with the benefit of advocacy for both sides — consider the record of conviction at [the prima facie] stage.' In Lewis's view, appointed counsel and the prosecutor 'can and should make use of the record of conviction.' Notably, there is no disagreement amongst the Courts of Appeal regarding the propriety of the parties and the trial court looking at the record of conviction *after* the appointment of counsel. [Citations.] [¶] The record of conviction will necessarily inform the trial court's prima facie inquiry under section 1170.95, allowing the court to distinguish petitions with potential merit from those that are clearly meritless. This is consistent with the statute's overall purpose: to ensure that murder culpability is commensurate with a person's actions, while also ensuring that clearly meritless petitions can be efficiently addressed as part of a single-step prima facie review process. [Citation.]" (*Lewis*, *supra*, 11 Cal.5th at pp. 970-971, italics original.)

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

In considering the petition, all factual inferences should be made in favor of the petition. Certainly if the court has any questions regarding its responsibility, it should appoint counsel for the petitioner and receive briefing from the parties. If there is any need to resolve factual issues to determine whether the petitioner is entitled to relief, or petitioner has stated even a potential or colorable claim for relief, the order to show cause should be issued. Guidance may be found in California Rules of Court, rule 4.551 regarding habeas corpus proceedings. Rule 4.551(c)(1), provides: "The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." (See also *People v. Duvall* (1995) 9 Cal.4th 464, 474–475; People *v. Sledge* (2017) 7 Cal.App.5th 1089.)

"Although at [the facial review] stage a court presented with a section 1172.6 petition may not engage in factfinding that requires weighing evidence or exercising discretion, the court may consider jury instructions, jury verdicts, and other documents that are part of the record of conviction to determine whether the petitioner satisfies the conditions for relief. (§ 1172.6, subd. (c); *People v. Lewis* (2021) 11 Cal.5th 952, 970–972, 281 Cal.Rptr.3d 521, 491 P.3d 309 (*Lewis*); [*People v. Coley* (2022) 77 Cal.App.5th 539,] 545–548, 292 Cal.Rptr.3d 257.)" (*People v. Flores* (2023) 96 Cal.App.5th 1164, 1170.)

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

People v. Verdugo (2020) 44 Cal.App.5th 320 (*Verdugo*), upheld the trial court's use of the record of conviction, including the appellate opinion, in summarily denying a petition under section 1172.6: "Although subdivision (c) does not define the process by which the court is to make this threshold determination, subdivisions (a) and (b) of section 1170.95 provide a clear indication of the Legislature's intent. As discussed, subdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the

court in connection with the first prima facie determination required by subdivision (c). In particular, because a petitioner is not eligible for relief under section 1170.95 unless he or she was convicted of first or second degree murder based on a charging document that permitted the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine (§ 1170.95, subd. (a)(1), (2)), the court must at least examine the complaint, information or indictment filed against the petitioner; the verdict form or factual basis documentation for a negotiated plea; and the abstract of judgment. Based on a threshold review of these documents, the court can dismiss any petition filed by an individual who was not actually convicted of first or second degree murder. The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding SB 1437's amendments to sections 188 and 189 (see § 1170.95, subd. (a)(3))—for example, a petitioner who admitted being the actual killer as part of a guilty plea or who was found to have personally and intentionally discharged a firearm causing great bodily injury or death in a single victim homicide within the meaning of section 12022.53, subdivision (d)." (*Verdugo*, at pp. 329–330.) *Verdugo* has been granted review by the Supreme Court. In accord with *Verdugo* on this issue is *People v. Harris* (2021) 60 Cal.App.5th 939.

People v. Clements (2022) 75 Cal.App.5th 276, 292, held the court may consider an appellate court opinion as part of the record of conviction in the case. Use of the appellate opinion, however, is limited. The court may consider the procedural history as cited by the appellate court but may not rely on its factual summary. (*Ibid*.)

People v. Njoku (2023) 95 Cal.App.5th 27, 43-47, holds the prosecution is not required to present any live testimony but may rely entirely on the cold testimony of a trial transcript.

People v. Coley (2022) 77 Cal.App.5th 539 (*Coley*), in accordance with *Lewis*, upheld the trial court's use of the record of conviction in finding petitioner failed to establish a prima facie basis for relief. "As a review of the record on conviction reveals, appellant was convicted of murder based on his aiding and abetting of the same shooting that gave rise to the attempted murder conviction. The jury was instructed by CALCRIM No. 600 that attempted murder requires a determination that 'the defendants intended to kill that person.' [Citations; [defendant who is guilty of attempted murder under a direct aiding and abetting theory must have the specific intent to kill].] An intent to kill is the equivalent of express malice, at least when there is no question of justification or excuse, and by finding appellant guilty of attempted murder, the jury necessarily found he had personally harbored intent to kill or express malice when he aided and abetted the second-degree murder. [Citations.]" (*Coley*, *supra*, 77 Cal.App.5th at pp 547-548.)

Coley also rejected petitioner's request for resentencing his attempted murder conviction. "Section 1170.95 applies by its terms only to attempted murders based on the natural and probable consequences doctrine. (§ 1170.95, subd. (a) ["A person

convicted of ... attempted murder under the natural and probable consequences doctrine ... may file a petition"].) The jurors in this case were not instructed on that doctrine. They were given CALCRIM Nos. 400 and 401, on the theory of direct aiding and abetting, as well as CALCRIM No. 600, which advised them that an attempted murder conviction required a finding that 'the defendants intended to kill [the victim].' Direct aiding and abetting remains a valid theory of attempted murder after the enactment of Senate Bill No. 775. [Citation.] The court was not required to grant resentencing on this count." (*Coley*, *supra*, 77 Cal.App.5th at p. 548.)

Similarly, in *People v. Estrada* (2022) 77 Cal.App.5th 941 (*Estrada*), the petitioner was convicted of murder as an aider and abettor, thus was ineligible for relief as a matter of law. "Estrada argues that the trial court erred because the record establishes that he may have been convicted of first degree murder under a natural and probable consequences theory. We disagree. The record establishes that Estrada was convicted of first degree murder as an aider and abettor with intent to kill, and he is therefore ineligible for resentencing under section 1170.95. [Citation; ['Senate Bill No. 1437 does not eliminate direct aiding and abetting liability for murder because a direct aider and abettor to murder must possess malice aforethought'].] (*Estrada*, *supra*, 77 Cal.App.5h at p. 945.)

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

People v. Soto (2020) 51 Cal.App.5th 1043 (*Soto*), held in determining the prima facie entitlement to relief under section 1172.6, subdivision (c), the trial court properly considered the instructions given to the jury in petitioner's original trial. (*Soto*, *supra*, 51 Cal.App.5th at p. 1055.) Denial of the petition was proper because the jury was never instructed on the doctrine of natural and probable consequences with respect to petitioner's second degree murder conviction. (*Id*.) *Soto* has been granted review.

The record of conviction in a co-defendant's case is not a part of the record of conviction of petitioner's case; it may not be used to establish as a matter of law that petitioner was the actual killer. (*People v. Flores* (2022) 76 Cal.App.5th 974, 987-988 (*Flores*).)

Flores also held in determining whether the petitioner has made a prima facie showing, the court assumes the facts as alleged by petitioner are true. It is"[o]nly where the record of conviction contains facts *conclusively* refuting the allegations in the petition may the court make credibility determinations adverse to the petitioner. [Citation.]" (*Flores*, *supra*, 76 Cal.App.5th at p. 991, italics original.)

With respect to the use of the facts stated by a court of appeal in its opinion, *People v. Arnold* (2023) 93 Cal.App.5th 376, 392, observes: "Overall, the record demonstrates that the trial court probably relied on its independent review of the trial record, but quoted from our prior opinions to quickly summarize the broader factual history of defendant's case. In the interest of avoiding future confusion on this issue, we note that when issuing orders from a section 1172.6 evidentiary hearing, the trial court should make clear that it is relying on facts taken from the evidence before it and not from prior appellate opinions. (*Clements*, *supra*, 75 Cal.App.5th at p. 292, 290 Cal.Rptr.3d 395.)"

b. Improper summary denial of petition

People v. Offley (2020) 48 Cal.App.5th 588 (*Offley*), discusses the circumstances where the petitioner is found guilty of committing a murder with the use of a firearm under section 12022,53, subdivision (d). The court found the proof of the gun enhancement alone does not make petitioner ineligible for relief. "The trial court erred by denying Offley's petition because the existence of an enhancement under section 12022.53, subdivision (d) does not show that a defendant acted with malice aforethought. It therefore does not establish as a matter of law that Offley could still be convicted of murder under the new law and is ineligible for relief under section 1170.95. [¶] Both express and implied malice require proof of the defendant's mental state. In the case of express malice, the defendant must have intended to kill. [Citation.] Implied malice also involves a mental component, namely a ' "conscious disregard for the danger to life that the [defendant's] act poses." ' [Citation.] This requires ' "examining the defendant's subjective mental state to see if he or she actually appreciated the risk of his or her actions." [Citation.] "It is not enough that a reasonable person would have been aware of the risk." ' [Citation.] [¶] Section 12022.53, subdivision (d) provides that the defendant must have intended to discharge a firearm, but does not refer to an "intent to achieve any additional consequence.' [Citation.] It is thus a general intent enhancement, and does not require the prosecution to prove that the defendant harbored a particular mental state as to the victim's injury or death. [Citations.] The jury in this case was instructed accordingly. The trial court told the jury that it would need to decide 'whether the defendant intentionally and personally discharged a firearm and proximately caused great bodily injury or death,' but not whether he intended to kill or was aware of the danger to life that his act posed. [¶] Because an enhancement under section 12022.53, subdivision (d) does not require that the defendant acted either with the intent to kill or with conscious disregard to life, it does

not establish that the defendant acted with malice aforethought." (*Offley*, *supra*, 48 Cal.App.5th at pp.598-599, footnotes omitted.)

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

People v. Strong (2022) 13 Cal.5th 698 (*Strong*), holds that persons found to be a "major participant" who acted "with reckless indifference to human life" prior to the court's decisions in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), are not precluded from making a prima facie showing for relief under section 1172.6. "In 2015, *Banks* substantially clarified the law surrounding major participant findings. [Citation.] A year later, *Clark* recited the teachings of *Banks* on the major participant question and then substantially clarified the relevant considerations for determining whether a defendant has acted with reckless indifference to human life. [Citation.] For reasons we have explained, unless a defendant was tried after *Banks* was decided, a major participant finding will not defeat an otherwise valid prima facie case. And unless a defendant was tried after *Clark* was decided, a reckless indifference to human life finding will not defeat an otherwise valid prima facie case." (*Strong*, *supra*, 13 Cal.5th at p. 721.)

The following cases, although granted review, are consistent with *Strong*:

- *People v. Smith* (2020) 49 Cal.app.5th 85 (*Smith*), holds a jury's finding that the petitioner was a "major participant" in an underlying robbery and acted with "reckless indifference to human life" did not preclude the petitioner from making a prima facie showing for relief. The jury's findings were based on the law prior to the Supreme Court's decisions in *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522, which substantially revised the definition of these phrases. (*Smith*, at pp. 93-94.) Since the facts of petitioner's conduct could not be determined as a matter of law, the trial court errored in not providing the petitioner with counsel and a postbriefing determination of his entitlement to an O.S.C hearing. "Here, without appointing counsel to Smith or permitting counsel to make a filing, the trial court reviewed our 1996 appellate opinion and considered the facts as described in our discussion of the sufficiency of the evidence supporting the special circumstance. The trial court made a determination that those facts were sufficient to establish that Smith was a major participant in the underlying felony and acted with reckless indifference to human life. But that factual record is not the only consideration that the trial court must take into account for purposes of section 1170.95. Where the record of conviction does not preclude a petitioner from making a prima facie showing that he falls within the statute's provisions as a matter of law, the petitioner is

not confined to presenting evidence contained in the record of conviction in seeking relief. Section 1170.95 provides 'the petitioner may rely on the record of conviction or offer new or additional evidence to meet [his] burden[ ].' (§ 1170, subd. (d)(3).) It is conceivable that Smith may be able to provide evidence not presented at trial that would demonstrate either that he was not a major participant in the robbery or did not act with reckless indifference to human life. By ruling prior to the appointment of counsel, the trial court deprived Smith of the opportunity to develop, with the aid of counsel, a factual record beyond the record of conviction. Only after giving a petitioner the opportunity to file a reply, in which he may develop a factual record beyond the record of conviction, is a trial court in a position to evaluate whether there has been a prima facie showing of entitlement to relief." (*Smith*, *supra*, 49 Cal.App.5th at p. 95; footnote omitted.) *Smith* has been granted review.

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

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

People v. Rivera (2021) 62 Cal.App.5th 217, holds "a defendant who entered a plea to murder 'with malice aforethought' is not categorically incapable of making a prima facie showing of eligibility for relief under section 1170.95, subdivision (c) (section 1170.95(c)), because such a plea is not necessarily an admission that the crime was committed with

actual malice. We also hold that a defendant who stipulated to a grand jury transcript as the factual basis of the plea may make a prima facie showing of eligibility for relief by identifying a scenario under which he or she was guilty of murder only under a now-invalid theory, even if the record of conviction does not demonstrate that the indictment rested on that scenario." (*Rivera*, *supra*, 62 Cal.App.5th at p. 224.) *Rivera* has been granted review.

People v. Duchine (2021) 60 Cal.App.5th 798, states the prima facie showing: (1) "[T]he prima facie showing the [petitioner] must make is that he [or she] did not, in fact, act [as required] or harbor the mental state required ... for a murder conviction under current law" and (2) "the time for weighing and balancing and making findings on the ultimate issues arises at the evidentiary hearing stage rather than at the prima facie stage, at least where the record is not dispositive on the factual issues. Thus, absent a record of conviction that conclusively establishes that the petitioner engaged in the requisite acts and had the requisite intent, the trial court should not question [the petitioner's] evidence." (*Id*. at p. 815.)

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

In *People v. Barboza* (2021) 68 Cal.App.5th 955 (*Barboza*), petitioner was convicted of first degree murder with a gang special circumstance. The trial court reduced the conviction to second degree murder and struck the special circumstance finding. Thereafter petitioner requested resentencing pursuant to section 1172.6. The trial court summarily denied the petition based on the special circumstance finding by the

jury. The appellate court reversed, holding the trial court improperly considered the first degree murder and special circumstance findings by the jury. "[T]he jury's decision to convict on first degree murder and the special circumstance finding are nullities and cannot foreclose the possibility of relief under section 1170.95. The defendant was convicted of second degree murder, sentenced for second degree murder, and he is serving time for second degree murder. What the jury found prior to the court's decision to set aside the first degree verdict and the special circumstance finding simply has no legal effect." (*Barboza*, *supra*, 68 Cal.App.5th at p. 965.) Generally in accord with *Barboza* on this issue is *People v. Jenkins* (2021) 70 Cal.App.5th 924, 935.) *People v. Eynon* (2021) 68 Cal.App.5th 967 (*Eynon*), held the trial court improperly relied on the transcript of the preliminary hearing in summarily denying a petition under section 1172.6. "[W]hen conducting a prima facie review, the trial court must assume the truth of the petition's allegations and must not engage in factfinding, weigh the evidence, or reject the petition's allegations on the basis of adverse credibility determinations. [Citation.] If the record of conviction ' " 'contain[s] facts refuting the allegations made in the petition' " ' [citation], however, then the trial court is justified in rejecting them. Eynon alleged that he was not a major participant or did not act with reckless indifference to human life. The special circumstance allegation was to the contrary, and Eynon was held to answer on that allegation, but neither the allegation nor Eynon's being held to answer on it constitutes a ' " 'fact[ ] refuting' " ' Eynon's allegation in his petition. [Citation.] Being held to answer on an allegation does not constitute a factual finding that the allegation is true (and the allegation itself does not establish its own truth). Being held to answer does not even constitute a determination that the allegation is supported by substantial evidence. [Citation.] The trial court therefore erred." (*Eynon*, *supra*, 68 Cal.App.5th at pp. 975-976, footnote omitted.)

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

a robbery consequently did not include any factual admissions that refute his allegation that he is eligible for relief under section 1170.95. Although he admitted that he was liable for a murder committed with malice, deliberation, and premeditation, he did not admit that *he acted with* malice, deliberation, or premeditation. And although he admitted that he was liable for a murder committed in the course of a robbery, he did not admit that he was the actual killer, acted with intent to kill, or was a major participant in the robbery and acted with reckless indifference to human life." (*Eynon*, *supra*, 68 Cal.App.5th at p. 979, italics original.)

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

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

People v. Langi (2022) 73 Cal.App.5th 972 (*Langi*), held the trial court improperly relied on the appellate opinion in summarily denying the petition. "Current law thus provides that the actual killer, or a direct aider and abettor of the killing who knew that his (or her) conduct endangered the life of another and acted with conscious disregard for life, may be guilty of second degree murder. In this case, the trial court treated this court's opinion in *Langi I* as conclusively establishing that the jury found appellant guilty as the actual killer. Although understandable in view of explicit statements in this court's prior opinion, the trial court erred in treating those statements as conclusive. The Supreme Court's subsequent decision in Lewis, supra, 11 Cal.5th 952, 281 Cal.Rptr.3d 521, 491 P.3d 309, held that although an appellate opinion affirming a conviction may be considered in determining whether a prima facie showing has been made under section 1170.95, on prima facie review such an opinion may not be conclusive. 'While the trial court may look at the record of conviction ... to determine whether a petitioner has made a prima facie case for section 1170.95 relief, the prima facie inquiry ... is limited. Like the analogous prima facie inquiry in habeas corpus proceedings, " 'the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.' " [Citations.] [A] court

should not reject the petitioner's factual allegations on credibility grounds without first conducting an evidentiary hearing." [Citations.] "However, if the record, including the court's own documents, 'contain[s] facts refuting the allegations made in the petition,' then 'the court is justified in making a credibility determination adverse to the petitioner.' " [Citations.] [¶] Appellate opinions ... are generally considered to be part of the record of conviction. [Citation.] However, as we cautioned in Woodell, the probative value of an appellate opinion is case-specific, and "it is certainly correct that an appellate opinion might not supply all answers." [Citation.] In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in "factfinding involving the weighing of evidence or the exercise of discretion." [Citation.] ... [T]he 'prima facie bar was ... set very low." ' [Citation.]" (*Langi*, *supra*, 73 Cal.App.5th at pp. 979-980.)

People v. Flores (2022) 76 Cal.App.5th 974, 986-987, observed that merely because the petitioner did nothing more than "print out and fill out a form" is insufficient to deny a petition if the form contains an adequate prima facie showing.

People v. Gaillard (2024) 99 Cal.App.5th 1206, ___ (Gaillard), applied section 1172.6 to a manslaughter plea. "In its current form, section 1172.6 applies to those who pled guilty to manslaughter after being charged with murder and who would have been subject to prosecution for murder under a felony murder theory, the natural and probable consequences doctrine, or any other theory of imputed malice. (§ 1172.6, subd. (a).) To be eligible for relief, the petitioner must make a prima facie showing that he could not presently be convicted of murder under changes to these theories of murder liability made effective January 1, 2019 by Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Sen. Bill No. 1437). (§ 1172.6, subd. (a)(3).) If the petitioner makes a prima showing, the trial court must conduct an evidentiary hearing on the petition for resentencing. (§ 1172.6, subds. (c), (d).)"

c. Prima facie basis not shown

In *People v. Cornelius* (2020) 44 Cal.App.5th 54 (*Cornelius*), the court affirmed summary denial of a section 1172.6 petition where the jury convicted the petitioner of second degree murder and found true that he personally and intentionally discharged a firearm causing death—*i.e*., he was the actual killer. *Cornelius* has been granted review by the Supreme Court.

In *Verdugo, supra*, 44 Cal.App.5th at p. 333, the court affirmed summary denial of a section 1172.6 petition because the underlying appellate opinion found the petitioner acted with express malice. *Verdugo* has been granted review by the Supreme Court.

In *People v. Edwards* (2020) 48 Cal.App.5th 666, the court upheld the trial court's summary denial of the petition under section 1172.6 that was based on a review of the record of conviction. Such a review showed as a matter of law petitioner was not

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

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

People v. Allison (2020) 55 Cal.App.5th 449 (*Allison*), holds petitioner was not eligible for relief under section 1172.6 after he admitted a special circumstance allegation. "[We] believe that *People v. Verdugo* (2020) 44 Cal.App.5th 320, 257 Cal.Rptr.3d 510, review granted March 18, 2020, S260493, correctly describes the role of prior factual findings in the analysis of a petition under section 1170.95. According to *Verdugo*, relief under section 1170.95 is barred if a prior finding shows the petitioner "was convicted on a ground that remains valid notwithstanding Senate Bill No. 1437's amendments to sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330, 257 Cal.Rptr.3d 510.) *Verdugo*'s interpretation is faithful to the language of subdivision (a)(3) of section 1170.95: If the prior finding shows the petitioner meets the requirements for murder liability under amended sections 188 and 189, then it is not true that the petitioner could not be convicted of murder *because of the changes to sections 188 and 189*, and the petition must be denied." (*Allison*, *supra*, 55 Cal.App.5th at pp. 461-462, italics original.) To the extent inconsistent with *People v. Strong* (2022) 13 Cal.5th 698, *Allison* has been disapproved. (*Strong*, at p. 718, fn. 3.)

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

People v. Farfan (2021) 71 Cal.App.5th 942 (*Farfan*), holds the jury's true finding on the robbery-murder special circumstance makes the petitioner ineligible for relief under section 1172.6 as a matter of law. "In order to obtain relief from his or her felony murder conviction under section 1170.95, a petitioner must make a prima facie showing that he or she '*could not* be convicted of first or second degree murder *because of* changes to Section 188 or 189' made by Senate Bill No. 1437. [Citations.] But the jury's special circumstance finding in this case means it necessarily found beyond a reasonable doubt that appellant either had the intent to kill *or* he was a major participant in the robbery who acted with reckless disregard for human life. Accordingly, the jury's true

finding on the special circumstance establishes appellant is ineligible for section 1170.95 relief as a matter of law. [Citations.]" (*Farfan*, *supra*, 71 Cal.App.5th at p. 954, italics original.)

People v. Cortes (2022) 75 Cal.App.5th 198 (*Cortes*), held petitioner failed to establish a prima facie basis for relief under section 1172.6 because the jury was never instructed on the NPC doctrine. "We conclude that Cortes failed to make a prima facie showing that he was entitled to relief because the record of conviction demonstrates that he was convicted of murder and attempted murder either as a perpetrator or a direct aider and abettor, and not under the natural and probable consequences doctrine, or indeed any theory under which malice is imputed to a person based solely on that person's participation in a crime. In so doing, we decline to address the trial court's reasons for denying the petition, as we may affirm a ruling that is correct in law on any ground. [Citation.]" (*Cortes*, *supra*, 75 Cal.App.5th at p. 204, footnote omitted.)

People v. Romero (2022) 80 Cal.App.5th 145 (*Romero*), held petitioner was ineligible for relief as a matter of law because at the time of his plea to the charge of murder, petitioner expressly admitted he acted intentionally, deliberately and with premeditation." "His admission to intentional, deliberate, and premeditated murder establishes that he acted with actual malice sufficient to sustain the murder conviction under the law as amended by Senate Bill No. 1437 (2017-2018 Reg. Sess.). (Citations; ['[W]hen malice is *express* because the defendant possessed a specific intent to kill, first degree murder liability may be proper if the charged defendant personally acted willfully, deliberately, and with premeditation.']; ['Absent some circumstance negating malice one cannot knowingly and intentionally help another commit an unlawful killing without acting with malice.']; [to prove a defendant premeditated and deliberated the consequences of his action, there must be 'substantially more reflection than may be involved in the mere formation of a specific intent to kill'].]" (*Romero*, *supra*, 80 Cal.App.th at p. 153; italics original.)

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

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

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

People v. Vargas (2022) 84 Cal.App.5th 943 (*Vargas*), upheld the denial of a petition under section 1172.6 because there was substantial evidence the petitioner aided and abetted the commission of the murder. "The trial court denied the petition for resentencing because it found appellant aided and abetted a first degree premeditated murder. The court explained that the evidence presented at trial left no reasonable doubt that appellant's command to 'Shoot. Shoot the motherfucker,' and Alcantar yelling, 'Hurry up. Shoot this motherfucker,' directly led 'Luna to pull out his gun and fatally shoot John Barbosa.' [¶] Both parties read the court's ruling to mean that the trial court held appellant ineligible for relief under section 1172.6 because it found *her* guilty of first degree premeditated murder. Appellant does not dispute that *Luna's* killing of John constituted a willful, deliberate and premeditated murder, but argues that substantial evidence does not support a finding that she had the requisite intent to kill John. Respondent counters that substantial evidence supports the finding that appellant directly aided and abetted the murder *with the intent to kill*. [¶] Both parties misconstrue the basis for the trial court's ruling: To find appellant ineligible for relief under section 1172.6, the court needed only find appellant acted with implied malice in directly aiding and abetting the killing. Contrary to the parties' arguments, the trial court did not find appellant guilty of first degree premeditated or express malice murder, but denied relief because she directly aided and abetted one." (*Vargas*, *supra*, 84 Cal.App.5th at pp. 951-952.)

People v. Williams (2022) 86 Cal.App.5th 1244 (*Williams*), correctly found petitioner failed to establish a prima facie basis for relief. The petitioner was properly convicted as a direct adder and abettor. "It is well settled that SB 1437 'does not eliminate direct aiding and abetting liability for murder because a direct aider and abettor to murder must possess malice aforethought.' [Citation.] 'Under a direct aider and abettor liability

theory, the prosecution must prove the person who is not the actual killer "engaged in the requisite acts [actus reus] and had the requisite intent [mens rea]" to aid and abet the target crime of murder.' [Citation.] A direct aider and abettor's 'guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state.' [Citation.] ([I]talics in original.) ' "The aider and abettor doctrine merely makes aiders and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who [was] the direct perpetrator or to what extent each played which role." ' [Citation.] ([I]talics in original.) '[A]s long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder as that offense is defined by statute, it need not decide unanimously by which theory he is guilty. [Citations.] More specifically, the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator.' [Citation.]" (*Williams*, *supra*, 86 Cal.App.5th at p. 1252, italics added by *Williams*, footnotes omitted.)

People v. Lopez (2023) 88 Cal.App.5th 566 (*Lopez*), found petitioner failed to establish a prima facie basis for relief. "Though he was tried under both a natural and probable consequences theory and a felony-murder theory, on this record the theories were identical because robbery—a qualifying felony under section 189—was the target crime for both. Thus, regardless of the underlying theory of liability, by finding Lopez guilty of first degree murder, the jury necessarily found one of three things was true beyond a reasonable doubt: (i) he was the actual killer, (ii) he was an accomplice to first degree murder, or, at the very least, (iii) he was engaged in the commission or attempted commission of a qualifying felony in which a death occurred. [¶] That last finding, coupled with the intent to kill finding from the special circumstance, establishes Lopez's guilt under the current felony-murder rule. This is because, under section 189, subdivision (a), all murder that is 'committed in the perpetration of, or attempt to perpetrate [a qualifying felony] ... is murder of the first degree.' And here, the jury found Sabatka's murder was committed while Lopez and his confederate were robbing or attempting to rob him. That finding, plus the intent to kill finding from phase two of the trial, establishes the jury found that 'with the intent to kill, [Lopez] aided, abetted, ... or assisted the actual killer in the commission of murder in the first degree" within the meaning of section 189, subdivision (e)(2)." (*Lopez*, *supra*, 88 Cal.App.5th at pp. 576-577, footnotes omitted.)

People v. Carr (2023) ___ Cal.App.5th ___ [E079368](*Carr*), held the provisions of section 1172.6 do not apply to a Watson murder based on implied malice. "[Petitioner] contends that the theory under which he was convicted — causing death unintentionally but with implied malice while driving drunk (People v. Watson (1981) 30 Cal.3d 290 (*Watson*)) — is an 'other theory under which malice is imputed to a person based solely on that person's participation in a crime' within the meaning of section 1172.6. [¶] Not so. Implied malice is not imputed malice. It requires the that perpetrator actually and personally harbor malice. *Watson* stands for the proposition that implied malice may be inferred from a defendant's conduct before, during, and

after driving drunk — not imputed from the bare fact of driving drunk. Petitioner's contrary argument is an artificial concoction that takes the words "natural consequences" and/or "natural and probable consequences" out of their proper legal contexts and dumps them all together into a confused semantic stew." (*Carr*, *supra*, ___ Cal.App.5th at p. ___.) The court observed: "Petitioner asserts that 'A *Watson* murder rests upon and is a specific application of the natural and probable consequences doctrine. [Citation.]' No. The natural and probable consequences doctrine is a theory of liability for aiding and abetting. It made an aider and abettor guilty of a murder committed by the perpetrator, even if the aider and abettor lacked malice, as long as (1) the aider and abettor intended to commit the target crime, and (2) murder was a natural and probable consequence of the target crime. A *Watson* murder, by contrast, does not normally involve aiding and abetting. In fact, it is hard to imagine how it could. Rather, *Watson* requires that the defendant — the person who kills unintentionally while driving drunk — act with implied malice." (*Carr*, *supra*, ___ Cal.App.5th at p. ___.)

People v. Estrada (2024) ___ Cal.App.5th ___ [B324576] (*Estrada*), holds that the mere fact petitioner was charged alone in the accusatory pleading does not establish that petitioner could not have been subject to imputed malice. "The amended information does establish that Estrada was charged alone, but a charging decision does not establish any facts as a matter of law. [Citation.] Moreover, we are aware of no authority requiring prosecutors to try all codefendants together, so this single charging document does not foreclose the possibility of other people having been charged for related crimes. Even further, the information did not foreclose the prosecution from presenting imputed malice before a jury regardless of whether it charged others. Thus, the charging document here does not establish ineligibility as a matter of law, where Estrada's ' "prima facie bar was intentionally and correctly set very low" ' [Citation.]" (*Estrada*, *supra*, ___ Cal.App.5th at p. ___.)

People v. Lovejoy (2024) ___ Cal.App.5th ___ [D080941] (*Lovejoy*), holds the petitioner failed to establish a prima facie basis for relief from an attempted murder conviction. The court found the conviction was not based on the doctrine of natural and probable consequences. "Petitioner], along with [her codefendant], were convicted of conspiracy to commit *murder*, which necessarily required an intent to kill. (CALCRIM No. 563 [requiring agreement 'to intentionally and unlawfully kill'].) And a finding that the defendant intended to kill eliminates any need or reason to rely on the natural and probable consequence doctrine." (*Lovejoy*, *supra*, ___ Cal.App.5th at p. ___, italics in original.) The court also concluded section 1172.6 has no application to the crime of conspiracy to commit murder. (*Id*. at p. ___.) Furthermore, "because the jury necessarily found that Lovejoy personally possessed an intent to kill as part of a conspiracy to commit murder, she is ineligible for relief under section 1172.6. [Citation.]" (*Lovejoy*, *supra*, ___ Cal.App.5th at p. ___.)

People v. Palacios (2024) ___ Cal.App.5th ___ [B324572] (*Palacios*), holds that a proceeding under section 1172.6 may not be used to bar the admissibility of a

confession not challenged in the original trial. "A resentencing hearing under section 1172.6 is not a new trial. Nor does it provide the petitioner a new opportunity to raise claims of trial error. Instead, it is a limited proceeding at which the superior court must decide one issue: could the petitioner 'not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.' [Citation.] To decide that issue, the statute expressly allows the court to consider 'evidence previously admitted at any prior hearing or trial that is admissible under current law.' [Citation.] Palacios's confession falls within that category, as it was admitted at his trial and remains admissible under current law. The time to litigate whether the confession should have been admitted at trial has long passed, and the superior court properly refused to consider the issue for the first time." (*Palacios*, *supra*, ___ Cal.App.5th at p. ___.)

d. **Consideration of the response by the prosecution and reply by petitioner (§ 1172.6, 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 1172.6, subdivision (c), provides, in part: "The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served." The direction to the prosecution may be interpreted as requiring a response to every petition – but the prosecution could simply concede the merits of the petition and not file any response. If the prosecution wants to file a response, it must do so within 60 days of service of the petition. The petitioner must file a reply, if any, within 30 days after service of the prosecution response. The deadlines are to be extended on a showing of good cause. (§ 1172.6, 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 1172.6 precludes the court from requesting further information or an informal response from the prosecution. Guidance for such a procedure may be found in California Rules of Court, rule 4.551(b). There, the court may request an informal response from either the respondent or real party in interest. The rule further provides: "(2) A copy of the request must be sent to the petitioner. The informal response, if any, must be served on the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response on the petitioner. If the informal response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner. (3) After receiving an informal response, the court may not deny the petition until the petitioner

has filed a timely reply to the informal response or the 15-day period provided for a reply under (b)(2) has expired."

e. Issuance of order to show cause

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

f. Informal handling of petition by stipulation

SB 1437 expressly provides for the potential of informal handling of the petition: "The parties may waive a resentencing hearing and stipulate that the petitioner is eligible to have his or her murder conviction vacated and for resentencing. (§ 1172.6, subd. (d)(2).) Accordingly, prior to determining whether the petition states a prima facie basis for relief, the court should consider conducting an informal chambers conference with counsel to assess the possibility of a stipulated resolution. If petitioner has requested the appointment of counsel, the court should provisionally appoint an attorney for the purpose of the informal inquiry.

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

Section 1172.6, subdivision (d)(2), provides: "If there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, the court shall vacate the petitioner's conviction and resentence the petitioner." Likely the only time this situation will arise is when the petitioner had been charged with a special circumstance allegation under section 190.2, subdivision (d), and the jury or court found the allegation *not true*. Presumably relief must be denied, however, if the prosecution is able to show the petitioner was the actual killer, or was not the actual killer but, with the intent to kill, aided in the commission of the murder.

The application of section 1172.6, subdivision (d)(2), was addressed in *People v. Guillory* (2022) 82 Cal.App.5th 326 (*Guillory*). Petitioner was convicted of first degree murder, first degree robbery, kidnapping for purposes of robbery, kidnapping for purposes of carjacking, simple kidnapping, carjacking, and child endangerment. The jury also returned a not true finding on a special circumstance allegation that Guillory committed the murder during the course of a kidnapping. It failed to reach a verdict on two other special circumstance allegations: murder during a robbery, and murder during a carjacking. The appellate court rejected petitioner's contention that the "not true" finding on the special circumstance mandate vacatur and resentencing relief under section 1172.6, subdivision (d)(2). "[W]e cannot construe subdivision (d)(2) of section

1172.6 to mean, as Guillory argues, that the negative finding on the kidnapping allegation entitles her to resentencing even though she could be convicted under other, still valid theories of murder. First, as the court found, Guillory remains directly liable as an aider and abettor under the amended law because she intended Curtis's death. [Citations.] Second, neither the jury's rejection of the kidnapping allegation nor its deadlock on the remaining special circumstance allegations would preclude a subsequent court or jury from finding her guilty of felony murder based on her participation in the robbery and carjacking. [Citations.] In short, Guillory could be convicted of murder under current law, and she therefore falls outside the class of defendants that may benefit from the Legislature's decision to narrow liability for murder in other circumstances. [Citation.]" (*Guillory*, *supra*, 82 Cal.App.5th at p. 333.)

As for the proper interpretation of subdivision (d)(2), *Guillory* observed: "Section 1172.6, subdivision (d)(2) is more reasonably understood to require automatic vacatur and resentencing where a special circumstances allegation found to be not true (or the legal equivalent, see [citation]) provides the only viable ground for a murder conviction. This construction serves the legislative purpose behind Senate Bill 1437. It is also consistent with section 1172.6, subdivision (d)(2)'s reference to '*the* felony' (italics added [by *Guillory*]), which suggests the Legislature only contemplated felony murder convictions predicated on a single felony. Finally, it will not, as Guillory claims, deprive section 1172.6, subdivision (d)(2) 'almost completely, if not completely' of effect. Rather, consistent with legislative intent, the subdivision affords relief to offenders who could not currently be convicted of murder under any still-valid theory that could have been proven at their trial." (*Guillory*, *supra*, 82 Cal.App.5th at p. 334.)

People v. Garcia (2023) 93 Cal.App.5th 416, 419, observes: "Section 1172.6, subdivision (d)(2) does not mandate vacatur of a murder conviction and resentencing when there are viable bases for murder liability independent of a rejected special circumstances allegation. Section 1172.6, subdivision (d)(2) provides a mechanism to streamline the process of resentencing only if it is clear the petitioner is otherwise eligible for resentencing under section 1172.6."

In *People v. Nieber* (2022) 82 Cal.App.5th 458 (*Nieber*), the petitioner claimed a magistrate's finding of insufficient evidence of a special circumstances allegation entitled petitioner to immediate resentencing under subdivision (d)(2) because it was a "prior finding by a court" that he was not a major participant in the crime. The argument was rejected. *Nieber* observed: "[A] defendant is eligible for resentencing under section 1172.6, subdivision (d)(2) if the defendant is acquitted of special circumstance allegations. The acquittal can be the result of an appellate court's factual findings in response to a habeas corpus petition [citation], a court or jury's not-true finding of a special circumstances allegation [citations], or the dismissal of a special allegation after the evidence is submitted to the jury when there is not sufficient evidence to support the charge [citation]. Thus, the type of 'prior finding by a court' must, like a ' "prior finding by a ... jury" ' be the type of finding that challenges whether

the People have demonstrated guilt beyond a reasonable doubt. Accordingly, we ask if the magistrate's finding at the preliminary hearing in this case was comparable to an acquittal that juries commonly render. [Citation.]" (*Nieber*, *supra*, 82 Cal.App.5th at p. 473.)

The appellate court concluded it was not comparable. "We agree with the trial court's assessment of its role at the preliminary hearing: its findings at the preliminary exam were not the type of findings that automatically result in vacating the convictions under section 1172.6, subdivision (d)(2). At the preliminary hearing, the magistrate found there was sufficient evidence to lead to a finding that Nieber acted with reckless indifference to human life but did not hold Nieber over on the special circumstances charge because it also found there was no evidence to show if he was aware of the violence or whether he planned for the violence. The court did not resolve evidentiary disputes or assess witness credibility in reaching this conclusion. [Citation.] And its determination that there was insufficient evidence to proceed to trial on the special circumstances allegation was based on the information before it at the time. [¶] These findings did not constitute a determination regarding the truth of the special circumstance allegation, i.e., whether Nieber had in fact assisted his co-defendants while engaged in the commission and attempted commission of robbery. [Citations.] Just like the court's finding that there was probable cause that Nieber acted with a reckless indifference to human life is not sufficient to establish guilt beyond a reasonable doubt, its finding that there was a lack of probable cause that Nieber was a major participant is not sufficient to acquit Nieber of those charges." (*Nieber*, *supra*, 82 Cal.App.5th at pp. 473-474.)

Special circumstance findings by the jury were addressed in *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411 (*Gutierrez-Salazar*). In that case, the "jury was provided instructions allowing it to convict defendant of first degree murder . . . pursuant to a felony-murder theory and the natural and probable consequences doctrine, as both were defined prior to the effective date of Senate Bill 1437." (*Id*. at p. 419.) The jury also found true a special circumstance that (1) the petitioner's participation in the crime began before or during the killing, (2) the petitioner was a major participant in the crime and (3) the petitioner acted with reckless indifference to human life. (*Ibid*.) The court explained that "because the jury found true the special circumstance allegation, any potential post-Senate Bill 1437 instructional error related to the felony-murder rule and the natural and probable consequences doctrine would be harmless beyond a reasonable doubt because the jury made the requisite findings necessary to sustain a felony-murder conviction under the amended law. Consequently, since defendant cannot benefit from a retroactive application of Senate Bill 1437, we need not resolve that issue, and instead we simply deny relief on this appeal." (*Gutierrez-Salazar*, supra, 38 Cal.App.5th at p. 419.)

Where there is a finding on appeal that the petitioner was not a major participant in the underlying felony and did not act with reckless indifference to human life, the trial court

must consider a subsequent petition under section 1172.6 to vacate the murder conviction and "proceed directly to resentencing" pursuant to section 1172.6, subdivision (d)(2). (*People v. Ramirez* (2019) 41 Cal.App.5th 923, 932.)

People v. Allison (2020) 55 Cal.App.5th 449 (*Allison*), holds petitioner was not eligible for relief under section 1172.6 after he admitted a special circumstance allegation. "[We] believe that People v. Verdugo (2020) 44 Cal.App.5th 320, 257 Cal.Rptr.3d 510, review granted March 18, 2020, S260493, correctly describes the role of prior factual findings in the analysis of a petition under section 1170.95. According to Verdugo, relief under section 1170.95 is barred if a prior finding shows the petitioner "was convicted on a ground that remains valid notwithstanding Senate Bill No. 1437's amendments to sections 188 and 189." [Citation.] Verdugo*'s* interpretation is faithful to the language of subdivision (a)(3) of section 1170.95: If the prior finding shows the petitioner meets the requirements for murder liability under amended sections 188 and 189, then it is not true that the petitioner could not be convicted of murder *because of the changes to sections 188 and 189*, and the petition must be denied." (*Allison*, *supra*, 55 Cal.App.5th at pp. 461-462, italics original.) To the extent inconsistent with *People v. Strong* (2022) 13 Cal.5th 698, *Allison* has been disapproved. (*Strong*, at p. 718, fn. 3.)

In *People v. Clayton* (2021) 66 Cal.App.5th 145 (*Clayton*), the petitioner was convicted of murder and two counts of robbery, and that he was armed in the commission of the crimes. However, the jury found the special circumstance allegation that the murder was committed while the petitioner was engaged in a robbery "not true." The trial court summarily denied the subsequent petition for relief under section 1172.6. The appellate court reversed, holding the trial court should proceed directly to resentencing as a matter of law. "[A] jury's acquittal on the special-circumstance allegation means the jury found the evidence insufficient to prove beyond a reasonable doubt that the petitioner was an aider and abettor with the intent to kill or a major participant in the robbery who acted with reckless indifference to human life. In that case, the prosecution cannot sustain its burden of proving ineligibility under subdivision (d)(3) without invalidating the jury's finding. [¶] Section 1170.95, subdivision (d)(2) addresses this situation by requiring the trial court to accept a jury's prior finding that 'the petitioner did not act with reckless indifference to human life or was not a major participant in the felony' and grant the resentencing petition. [Citation.] The court is not authorized to reverse the prior finding or substitute its own factual findings for the specific findings the jury already made." (*Clayton*, *supra*, 66 Cal.App.5th 155, footnote omitted.) Generally in accord with *Clayton* on this issue are *People v. Harrison* (2021) 73 Cal.App.5th 429, 441-442, and *People v. Flint* (2022) 75 Cal.App.5th 607, 613.
People v. Bradley (2021) 65 Cal.App.5th 1022 (*Bradley*), found sufficient evidence to uphold a finding the petitioner acted with reckless indifference to human life in committing a robbery where the petitioner was personally armed. "Defendants fail to identify a single case in which a defendant actively participated in a robbery, wielded a firearm during that robbery, and was present for the shooting, but an appellate court found insufficient evidence to support a finding that the defendant acted with reckless

indifference for human life. Nor are we aware of any. In considering the *Clark* factors, defendants' culpability is greater than that set forth in those cases on which they rely, namely *Banks*, *Clark*, *Scoggins*, *Taylor*, *In re Bennett*, and *Ramirez*. We conclude the evidence relevant to the *Clark* factors, when considered in total, sufficiently supports the judgment." (*Bradley*, *supra*, 65 Cal.App.5th at p. 1036.)

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

People v. Flint (2022) 75 Cal.App.5th 607 (*Flint*), holds a jury's finding of a special circumstance "not true" does not automatically entitle the petitioner to resentencing under section 1172.6, subdivision (d)(2), where the prosecution contends the victim was a peace officer, an exception to the new felony-murder rule. *Flint* observed that although the petitioner may technically qualify for resentencing under the language of the statute, to do so in this case would produce an absurd result. "The Legislature's purpose in enacting section 1170.95 as the retroactive component of Senate Bill No. 1437 is also clear, and is stated in the preamble to the bill itself: to 'provide a means of vacating the conviction and resentencing a defendant' convicted of murder where 'the defendant could not be charged with murder after the enactment of this bill.' Indeed, one of the criteria for resentencing is that the petitioner 'could not presently be

convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019.' [Citation.] Under section 189, subdivision (f), a defendant convicted of felony murder who knew or should have known that the victim was a peace officer engaged in the performance of her duties fails to meet this requirement regardless of whether or not he was a major participant in the felony who acted with reckless indifference to human life. [Citation.] Flint's interpretation of the statute would make subdivision (d)(2) into a backdoor to guarantee resentencing for certain defendants who are not eligible, rather than a mechanism to 'streamline the process' of resentencing [citation] in cases where it is clear that the defendant is eligible. This is an absurd result, which we will not infer the Legislature intended." (*Flint*, *supra*, 75 Cal.App.5th at p. 618.)

People v. Pacheco (2022) 76 Cal.App.5th 118 (*Pacheco*), held the jury's "true" finding on a gang special circumstance allegation did not automatically disqualify petitioner from relief under section 1172.6. "Here, the jury's true finding on the gang special circumstance certainly establishes Pacheco intended to kill Abraham Sanchez at the time of his killing (the mens rea). But the gang circumstance instruction does not establish—as a matter of law—that Pacheco *directly aided and abetted* the killing of Sanchez (the actus reus). In other words, without weighing the evidence, it is possible Pacheco intended to kill, but he did nothing to directly "aid, facilitate, promote, encourage, or instigate" the target crime of murder. [Citation.]" (*Pacheco*, *supra*, 76 Cal.pp.5th at p. 128, italics original.)

h. Deadline for determining prima facie basis

Section 1172.6 does not specify a deadline for the court's determination of the prima facie basis for relief. "There is no time limit by which the trial court must make a ruling [on the prima facie showing]. This means that courts can rule, and have ruled, on the so-called first-step prima facie review after 60 days have passed." (*People v. Lewis* (2021) 11 Cal.5th 952, 965.) The prosecution has 60 days to file a response and petitioner an additional 30 days to file a reply. (§ 1172.6, subd. (c).) There is nothing in section 1172.6 that resembles California Rules of Court, rule 4.551(a)(3)(A), which requires a ruling on a habeas petition within 60 days. However, because the statute establishes a number of deadlines for filing of pleadings and setting of a hearing, it may be fairly inferred that the Legislature expects these petitions to be handled expeditiously, depending on the extent and availability of the information necessary to determine whether the petitioner has shown a prima facie basis for relief.

i. Ruling by the court

If the court determines the petitioner has made a prima facie showing for relief, it must issue an order to show cause and set the matter for hearing. (§ 1172.6, subd. (c); see

discussion, *infra*.) If the petitioner has failed to make the prima facie showing for relief, the court should summarily deny the petition.

If the petition is *denied* for failure to establish a prima facie basis for relief, the court must "provide a statement fully setting forth its reasons for doing so." (§ 1172.6, subd. (c).) There is no requirement specifying the form of the statement – it may be written or oral. The court is not required to provide any formal or on-the-record statement of reasons why a petition is *granted*. The better practice, however, is to give some indication why the petition is either granted or denied. Section 1172.6, subdivision (b)(2), encourages such an explanation: "If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." Furthermore, such a practice is consistent with the requirements of California Rules of Court, rule 4.551(g), for habeas proceedings: "Any order denying a petition for writ of habeas corpus must contain brief statement of the reasons for the denial. An order only declaring the petition to be 'denied' is insufficient."

3. Hearing on the merits of the petition (§ 1172.6, subd. (d)(1))

If the court finds the petitioner has shown a prima facie basis for relief, the court must set a hearing on the merits of the petition. "Within 60 days after the order to show cause has issued, the court shall hold a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. This deadline may be extended for good cause." (§ 1172.6, subd. (d)(1).)

a. Burden of proof

Prior to its amendment by SB 775, section 1172.6, subdivision (d)(3), provided, in relevant part: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for relief." Appellate courts disagreed over what had to be proved beyond a reasonable doubt. (See, *e.g.*, *People v. Duke* (2020) 55 Cal.App.5th 113 [granted review] [The prosecution must prove beyond a reasonable doubt that the petitioner *could* be convicted under the new law of accomplice liability]; *People v. Lopez* (2020) 56 Cal.App.5th 936 [granted review] [Each element of the murder conviction must be proved beyond a reasonable doubt under the new law].)

As amended by SB 775, subdivision (d)(3), now provides, in relevant part: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is

guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019. . . . A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." As made clear by the amendment, to prevail at the hearing on the merits of the petition the prosecution must convince the court, beyond a reasonable doubt, that the petitioner, in fact, is guilty of the crime of conviction.

People v. Garrison (2021) 73 Cal.App.5th 735 (Garrison), held petitioner was ineligible for relief under section 1172.6 as a matter of law because the record established he was the actual killer. Petitioner pled to the charge of murder and admitted he personally used a firearm; the evidence submitted at the preliminary hearing supported the conclusion there was only one shooter. Petitioner was not prejudiced by the fact the trial court may have used the wrong burden of proof. (*Garrison*, *supra*, 73 Cal.App.5th at p. 745-747.)

People v. Basler (2022) 80 Cal.App.5th 46 (*Basler*), discusses the role of the court in assessing whether the People have met their burden of proof. "We reject [petitioner's] argument that the trial court is not to act as an independent factfinder when deciding whether the People have met their burden of proof at a section 1170.95 evidentiary hearing. The structure of section 1170.95 compels this conclusion: the Legislature expressly permits presentation of new and additional evidence, and places the burden on the People to show Basler 'is ineligible for resentencing'—i.e., to present evidence of the elements of murder rendering Basler guilty of murder under current law—such that factfinding is necessary. Restricting the lower court's review of what the *jury in his original trial* did amounts to an appellate standard. As Basler concedes, the Legislature has expressly repudiated use of a substantial evidence standard to ascertain whether the People meet their burden of proof at the section 1170.95 evidentiary hearing, so the trial court may not rely on this court's sufficiency of the evidence finding to reach its conclusion. [Citation; ['A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing'].] (*Basler*, *supra*, 80 at Cal.App.5th at p. 61; italics original.)

People v. Wilson (2023) 90 Cal.App.5th 903 (*Wilson*), discusses the prosecution's burden and the standard of review. "In ruling on a resentencing petition, the trial court determines whether the prosecution proved beyond a reasonable doubt that the defendant is liable for murder as defined after amendments to the relevant statutes. (Former § 1170.95, subd. (d)(3) [prosecution must prove beyond a reasonable doubt that the petitioner is ineligible for sentencing]; § 1172.6, subd. (d)(3) [same].) We review the trial court's factual findings for substantial evidence and the court's application of those facts de novo. (*People v. Cooper* (2022) 77 Cal.App.5th 393, 412, 292 Cal.Rptr.3d 513 (*Cooper*).)" (*Wilson*, *supra*, 90 Cal.App.5th at p. 916.) The trial court may find beyond a reasonable doubt that the petitioner was the actual killer even though the

original trial jury was unable to reach a verdict on the allegation the petitioner was the actual shooter. (*Id*, at pp. 916-918.)

b. Evidence at the hearing (§ 1172.6, subd. (d)(3))

As originally enacted, section 1172.6 did not fully address the evidence admissible at the hearing on the merits of the petition. Section 1172.6, subdivision (d)(3), provided: "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens."

SB 775 amended subdivision (d)(3): "The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case recited in any prior appellate opinion. However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens." Although a broader scope of evidence may be admissible at the actual resentencing of petitioner (see discussion, *infra*), it appears the amendment to section 1172.6, subdivision (d)(3), limits evidence at the hearing on the merits of the petition to what is admissible according to the traditional rules of evidence. Excepted from the general rule of admissibility is the following evidence:

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

The role of the record of conviction at the hearing on the merits is unclear. As observed by an analysis of SB 775 by the Assembly Committee on Public Safety: "[SB 775] would specify that the rules of evidence apply at the hearing on eligibility. It is not entirely clear whether this means a statement in the record of conviction that is offered to prove the truth of the matter stated would have to fall within an exception to the hearsay rule in order to be admissible at the hearing. This raises a concern that parties would be required to recall witnesses from the trial to testify again at the Evidence Code section 1172.6 evidentiary hearing, even where there is a prior transcript of the trial testimony

as part of the record of conviction; this may not be possible in older cases in which witnesses are no longer available." (Report of Assembly Committee on Public Safety, SB 775 (Becker), July 13, 2021, page 10.) Regardless of the ambiguity expressed in the Assembly analysis, what is clear is that SB 775 removed the reference to "record of conviction" originally contained in subdivision (d)(3). Subdivision (d)(3), as originally enacted by SB 1437 provided: "The prosecutor and the petitioner may *rely on the record of conviction* or offer new or additional evidence to meet their respective burdens." (Italics added.) Subdivision (d)(3), as amended by SB 775, now provides: "The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens." Likely the amendment is intended to preclude the use of the record of conviction unless otherwise allowed by section 1172.6, subdivision (d)(3), such as under other established exceptions to the hearsay rule.

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

People v. Cody (2023) 92 Cal.App.5th 87 (*Cody*), holds the unavailability requirement of the Evidence Code for the admission of prior testimony is inapplicable to proceedings under section 1172.6. " 'The admission of evidence in the hearing shall be governed by the Evidence Code ....' (§ 1172.6, subd. (d)(3).) If the Legislature had stopped there, then we would likely agree with Cody's interpretation of the statute. That is, we would find the prosecution is required to make a showing of witness unavailability under Evidence Code section 1291, before the trial court could admit the former testimony of witnesses at the evidentiary hearing. However, the law has an explicit exception that provides for the admission of former testimony: 'The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony ....' (§ 1172.6, subd. (d)(3), italics added.)" (*Cody*, *supra*, 92 Cal.App.5th at p. 104.)

People v. Owens (2022) 78 Cal.App.5th 1015, 1026, observed: "As it may have application to this case, section 1170.95 subd. (d)(3) now says that the Evidence Code shall apply at such hearing. This may mean that, absent some exception, hearsay contained in probation, pre-sentence reports, appellate opinions/orders, and other documents, are not now admissible at a section 1170.95 hearing. There is no statement in S.B. 775 indicating that the procedural change is to be applied retroactively on appeal. The preclusion of hearsay is an ordinary rule of evidence. This aspect of the new law is a procedural change. Changes in criminal procedural rules, as declared by the courts, generally speaking, are not applied retroactively. [Citations.] The same is true for California statutory changes in criminal procedural rules. As the Legislature has said, since 1872, 'No part of it [the Penal code] is retroactive, unless expressly so declared.' [Citations; [procedural change in criminal rules by initiative not retroactive].]"

People v. Davenport (2023) 95 Cal.App.5th 1150 (*Davenport*), holds the preliminary hearing transcript is admissible at the hearing on the merits. "Although section 1172.6, subdivision (d)(3) does not contain express language stating that a preliminary hearing transcript is admissible at the evidentiary hearing, a plain reading of the statute compels this conclusion. First, the provision unambiguously provides that a trial court ruling on the merits of a resentencing petition 'may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony.' (§ 1172.6, subd. (d)(3).) Second, because of the proviso that the trial court may not consider hearsay testimony that was admitted into evidence at a preliminary hearing under subdivision (b) of section 872, unless some other hearsay exception applies, section 1172.6, subdivision (d)(3) expressly contemplates that preliminary hearing testimony in particular will be considered at an evidentiary hearing. [¶] In effect, what section 1172.6, subdivision (d)(3) does is create a new hearsay exception applicable specifically to merits hearings in section 1172.6 resentencing proceedings. 'Most hearsay exceptions are located in Evidence Code §§ 1220 to 1390. They exist, however, in other codes as well.' [Citation.] Section 872, subdivision (b), is an example. Section 1172.6, subdivision (d)(3), contains another, broader exception for former testimony given at a preliminary hearing, but carves out an exception for section 872, subdivision (b), testimony. Thus, as we read section 1172.6, subdivision (d)(3), the rules of evidence apply to hearings held under section 1172.6, subdivision (d); under those rules, hearsay is inadmissible in the absence of an exception; and the pertinent exception here is the clause in section 1172.6, subdivision (d)(3), stating that 'except that the court may consider evidence previously admitted at any prior hearing ....' " (*Davenport*, *supra*, 95 Cal.App.5th at p. 1158.)

Davenport further observes: "To be sure, section 1172.6, subdivision (d)(3) now makes clear that not all evidence that has traditionally been considered to be part of the 'record of conviction [citation] as codified and clarified by Senate Bill No. 775 [citation] is automatically admissible in section 1172.6 merits hearings. Detective Cook's preliminary hearing testimony as to the statement of Officer Goley is an example. Indeed, the exclusion of Detective Cook's testimony illustrates how the hearsay exception for former testimony given at a preliminary hearing works against the backdrop of the newly tightened rule that the record of conviction may generally be considered at a section 1172.6, subdivision (d)(3) hearing. Detective Cook's testimony is part of the record of conviction, but because it was admitted at the preliminary hearing under Evidence Code section 872, subdivision (b), the trial court correctly ruled it is inadmissible at a resentencing merits hearing under 'current law': Section 1172.6, subdivision (d)(3), by its express terms, now bars this specific form of hearsay, while permitting admission of all other forms of previously admitted former witness testimony." (*Davenport*, *supra*, 95 Cal.App.5th at pp. 1159-1160.)

Davenport also addresses the phrase "is admissible under current law" in section 1172.6, subdivision (d)(3): "To the extent the phrase 'is admissible under current law' creates ambiguity, we think the most natural reading of those words is that the basis for

admission of testimony *at the hearing or trial in which it was previously admitted must remain a valid basis for admitting the testimony* 'under current law.' The statute 'contemplate[s] that there may be some evidence that was admitted at a former trial that would not be admissible [in such a proceeding] under current law.' " (*Davenport*, *supra*, 95 Cal.App.5th at pp. 1158-1159, italics in original.) (See also *People* v. *Palacios* (2024) ___ Cal.App.5th ___, ___.)

People v. Das (2023) 96 Cal.App.5th 954 (*Das*), addresses the use of the factual basis as evidence in a hearing under section 1172.6. The factual basis is part of the record of conviction and, as such, may be used at the hearing. But the record must reflect that petitioner *accepted* the factual statement. As observed by *Das*: "We agree that the stated factual basis, *if true*, demonstrates defendant stabbed the attempted murder victim with the intent to kill, fatally undermining his prima facie case for relief. Defendant did not, however, stipulate to the stated factual basis or otherwise admit the truth of the facts recited by the prosecutor. (*Id*. at p. 961, italics original.) "[H]ere, defendant did not stipulate to a factual basis for his plea, either in writing on a plea form or verbally at the change of plea hearing. (The record in this case does not even contain a plea form.) Nor can defendant's silence following the prosecutor's recitation of the factual basis somehow be interpreted as an 'implied' stipulation or admission by defendant. Obviously, counsel's statement, without defendant's assent, is only a statement; it is not evidence. For all these reasons, we conclude defendant did not expressly or impliedly admit to having stabbed the victim with a knife in the head, neck, and chest, attempting to kill him." (*Das*, *supra*, 96 Cal.App.5th at p. 962.)

People v. Williams (2020) 57 Cal.App.5th 652 (*Williams*), holds a court may consider reliable hearsay in determining whether petitioner is entitled to relief under section 1172.6. "Accordingly, the superior court here was permitted to consider hearsay such as that found in our prior opinion in *Williams I* and the section 1203.01 statement, 'provided there is a substantial basis for believing the hearsay information is reliable.' (See *People v. Sledge* (2017) 7 Cal.App.5th 1089, 1094-1095, 213 Cal.Rptr.3d 265 (*Sledge*) [rejecting similar argument, concluding that reliable hearsay may be considered to resolve Proposition 47 (Safe Neighborhoods and Schools Act) petition to dismiss or resentence petitioner after reduction of felony conviction to misdemeanor]; *People v. Saelee* (2018) 28 Cal.App.5th 744, 756, 239 Cal.Rptr.3d 475 [rejecting similar argument, concluding reliable hearsay may be considered to resolve Proposition 64 (Control, Regulate and Tax Adult Use of Marijuana Act) petition to dismiss or resentence petitioner after reduction of felony marijuana conviction to misdemeanor]; see also *People v. Guilford* (2014) 228 Cal.App.4th 651, 660-661, 175 Cal.Rptr.3d 640 [prior appellate court opinion, although hearsay, was admissible to resolve Proposition 36 (Three Strikes Reform Act of 2012) petition to recall and reduce sentence imposed on third-strike conviction].)" (*Williams*, *supra*, 57 Cal.App.5th at p. 662.) The continued validity of *Williams* in light of the amendment of section 1172.6, subdivision (d)(3), likely depends on whether the current court is considering only the "procedural history" of the case.

People v. Myles (2021) 69 Cal.App.5th 688 (*Myles*), held the trial court did not error in considering a parole risk assessment and the transcript of petitioner's parole hearing in denying a petition under section 1172.6 on the merits. "[T]he plain language of the statute allows both the petitioner and the prosecutor to rely on 'the record of conviction or offer *new or additional evidence* to meet their respective burdens.' [Citation.] The term 'new or additional evidence' is not defined in the statute, but the ordinary meaning of the word 'new,' unbounded by further definition or restriction in the statutory text, suggests the Legislature intended to allow both the prosecution and defendant to rely on evidence that becomes available after a trial or plea, whether the evidence previously existed or not. ([Citation] ['In allowing for the section 1170.95 postconviction proceeding, the Legislature gave the superior court unfettered discretion to consider "evidence" without any restriction at the subdivision (d)(3) hearing to determine the petitioner's eligibility for resentencing.']; Couzens et al., Sentencing California Crimes (The Rutter Group 2021) § 23:51 ['[Senate Bill] 1437 does not specify the exact scope and nature of the "new evidence" the parties may offer. The statute appears to permit live testimony and admission of new physical evidence.'].)" (*Myles*, *supra*, 69 Cal.App.5th at p. 698, italics original.) Generally in accord with *Myles* in allowing the use of testimony from a parole hearing are *People v. Anderson* (2022) 78 Cal.App.5th 81 (*Anderson*), and *People v. Mitchell* (2022) 81 Cal.App.5th 575 (*Mitchell*). The continued validity of *Myles,* and *Anderson* in permitting the use of parole hearing testimony to be admitted at the petitioner's full evidentiary hearing will depend on the application of section 1172.6, subdivision (d)(3), added after the case decisions, which provides in relevant part: "The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. . . . . The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens."

Mitchell concluded the petitioner's testimony at the parole hearing was properly admitted in the resentencing proceeding as an admission of a party opponent. "The parole transcript is and was properly admitted evidence. The trial court diligently considered Mitchell's evidentiary objections to the parole transcript and to the police reports. To overcome hearsay objections, the court limited its consideration to the admissions of a party opponent. (See Evid. Code, § 1220 [hearsay exception for party admissions].)" (*Mitchell*, *supra*, 81 Cal.App.5th at p. 586.)

People v. Duran (2022) 84 Cal.App.5th 920 (*Duran*), also approved the trial court's admission of a statement made by the petitioner taken from the parole risk assessment report. It was petitioner's contention that the admission of the statement violated the "use immunity" granted the statement. *Duran* rejected the argument for two reasons. "First, and as Myles*,* Anderson, and Mitchell have all recognized, the use of a defendant's statements at a subsequent section 1172.6 evidentiary hearing does not implicate the

privilege against self-incrimination. By its plain text, the privilege applies only during a 'criminal case' or 'cause.' [Citations.] [privilege applies where person 'reasonably believes the answers might incriminate him or her *in a criminal case'*], italics added [by *Duran*].) Once a defendant's 'sentence has been fixed and the judgment of conviction has become final,' the 'general rule' is that 'there can be no further incrimination' and hence 'no basis for the assertion of the privilege.' [Citations.] ['a witness retains the privilege against self-incrimination during the pendency of an appeal,' and hence up until a judgment is 'final'].) Although the United States Supreme Court has suggested that the privilege ceases at the time a judgment of conviction becomes final, the Ninth Circuit Court of Appeals has carved out an exception to that rule: If a final judgment is overturned on collateral review, use immunity attaches to bar the use of statements the defendant made during that collateral review *at any subsequent retrial or sentencing* on the overturned convictions. [Citations.]" (*Duran*, *supra*, 84 Cal.App.5th at p. 930.)

"Second, and as Coleman made clear, the use immunity it acknowledged does not apply when a defendant's prior statements are to be introduced 'for purposes of impeachment' because the privilege against self-incrimination 'does not ... encompass a right of an accused to lie.' (Coleman, supra, 13 Cal.3d at pp. 889, 892, 120 Cal.Rptr. 384, 533 P.2d 1024.) Here, defendant's petition for relief under section 1172.6 was accompanied by his sworn declaration that he was 'qualif[ied] to be resentenced' under section 1172.6 because his conviction was invalid under the current murder statutes. In other words, defendant offered his own sworn testimony that he was *not* a direct aider and abettor to Torres's murder, and hence did not act with the intent to kill. Defendant's statements in the 2013 parole risk assessment report recounting how he yelled, '[N]ow let's kill these mother fuckers' is 'clearly inconsistent' with a disclaimer of an intent to kill [citation], and hence was admissible even if we assume that *Coleman* applies here." (*Duran*, *supra*, 84 Cal.App.5th at pp. 931-932, italics original.)

c. Presence of the petitioner

People v. Basler (2022) 80 Cal.App.5th 64, 57-58 (*Basler*), holds petitioner has a constitutional right to be personally present at the evidentiary hearing on the merits of a petition for resentencing, absent a proper waiver of that right. "[Petitioner's right to be personally present] attached here, where Basler's eligibility for relief under section 1170.95 required an evidentiary hearing. Basler had already made out a prima facie case under subdivision (c) of section 1170.95, entitling him to an evidentiary hearing at which the court was to 'determine whether to vacate the murder [or] attempted murder ... conviction and to recall the sentence and resentence the petition on any remaining counts *in the same manner as if the petitioner had not previously been sentenced*, provided that the new sentence, if any, is not greater than the initial sentence.' [Citation.] At that hearing the prosecution bore the burden to prove 'beyond a reasonable doubt' that Basler was ineligible for resentencing. [Citation.] The statute authorizes both parties to 'offer new or additional evidence to meet their respective

burdens.' [Citation.] This is 'akin to a plenary sentencing hearing' and thus a 'critical stage' in the criminal process even though it prevents imposition of a sentence greater than that originally imposed. [Citation; [resentencing hearing on a section 1170.18 petition is akin to plenary sentencing hearing and a critical stage in the criminal process to which Sixth Amendment right to counsel attached even though statutory scheme prevents imposition of a sentence greater than originally imposed].] None of the People's arguments—generally discussing chambers or bench discussions outside the jury's presence—meaningfully address or challenge these principles." (*Basler*, *supra*, 80 Cal.App.5th at p.58; italics in original.)

Generally in accord with *Basler* is *People v. Quan* (2023) 96 Cal.App.5th 524 (*Quan*). *Quan* further holds that presence of petitioner can be waived. " It is well-established that a defendant may waive his or her right to be present at a critical stage, 'provided the waiver is knowing, intelligent, and voluntary.' [Citations.] In certain circumstances, defense counsel may waive a defendant's presence but '[a]t a minimum, there must be some evidence that the defendant understood the right he was waiving and the consequences of doing so.' [Citation.] The statutory provision which permitted a court to proceed in the defendant's absence at the time of the hearing in this case required a written waiver executed by the defendant in open court. (Former § 977, subd. (b)(1).)" (*Quan*, *supra*, 96 Cal.App.5th at pp. 534-535.)

Notwithstanding petitioner's right to be personally present, the court should not order the production of the petitioner from prison without consultation with the petitioner's counsel. Because of housing and prison program considerations, the petitioner may choose to remain in prison during the proceedings. This may be particularly true if the petitioner will remain in prison custody even if the petition is successful. If the petitioner does choose to remain in prison, the court should obtain a proper waiver of personal appearance through counsel.

A proper waiver can be obtained under the provisions of section 977, subdivision (b). The difficulty with such a procedure, however, is that the waiver technically must be made in open court – a process that defeats the purpose of getting the waiver. In *People v. Price* (1991) 1 Cal.4th 324, 406, our Supreme Court upheld a waiver made by the petitioner in writing from his jail cell: "Defendant was absent from jury voir dire during the morning of July 31, 1985, and again on August 5, 1985. Each time, defendant sent a note to the court explaining his absence and signed a waiver form. On July 31, defendant said in the note that he preferred to use the morning for a doctor's appointment and for court-ordered recreation at the jail. On August 5, defendant said in the note he preferred to use the time for exercise. Although the waiver forms were not executed in open court and did not use the precise language of section 977, they substantially complied with that provision. Accordingly, the waiver was valid under sections 977 and 1043, subdivision (d)." It will be sufficient under section 1172.6 if the petitioner waives his appearance through counsel with the use of a form in substantial compliance with the specifications of section 977, subdivision (b)(2).

d. The issues at the hearing

The hearing under section 1172.6 is not a trial *de novo* on all the original charges; rather, it is "a hearing to determine whether to vacate the murder, attempted murder, or manslaughter conviction and to recall the sentence and resentence the petitioner on any remaining counts. . . ." (§ 1172.6, subd. (d)(1).) The hearing potentially will involve the following issues:

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

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

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

Likely most of the litigation under section 1172.6 will be to determine whether the petitioner could be convicted of murder, attempted murder, or manslaughter after the changes made by SB 1437. For the petitioner to be eligible for relief, it must be shown that "[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1172.6, subd. (a)(3).) Because the prosecution carries the burden of proof, however, the issue is more precisely whether the prosecution can establish beyond a reasonable doubt, that the petitioner could be found guilty of murder, attempted murder, or manslaughter under any one or more of the following theories:

(1) The petitioner was the actual killer, having killed the victim with malice aforethought.

(2) The petitioner was not the actual killer, but as a principal aided and abetted the commission of the murder.

(3) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was the actual killer.

(4) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

(5) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

(6) In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the victim was a peace officer who was killed while in the course of his or her duties, where the petitioner knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

People met burden of proof

People v. Bascomb (2020) 55 Cal.App.5th 1077, and *People v. Douglas* (2020) 56 Cal.App.5th 1, found sufficient evidence to support petitioner's conviction of murder based on the allegation he was a major participant in the underlying crime and acted with reckless indifference to human life. The underlying convictions met the standards of *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522. The trial court properly denied relief under section 1172.6.

People v. Richardson (2022) 79 Cal.App.5th 1085 (*Richardson*), upheld the trial court's finding petitioner was a major participant in the robbery/homicide. Initially petitioner acted only as the "wheelman" for the robbery committed by his co-participants. One of the participants killed the owner of the store during the active robbery. Petitioner was standing next to the driver's door as the participants left the store. A citizen started to follow them. Petitioner shouted, "Shoot him. Shoot him." A coparticipant fired one shot, missing the citizen, but stopping his advance. The participants got into the car and

left the scene. "As the trial court here ruled, petitioner's statement, 'Shoot him,' distinguishes this case from Banks. Up until that point, for all the evidence showed, petitioner was no more than a getaway driver. That statement, however, shows that he was aware that his coparticipants were armed. Even more important, it shows that he took on — or already had — a role in directing the robbery and the conduct of his coparticipants. He had the right to decide to use lethal force and to order his coparticipants to do so." (*Richardson*, *supra*, 79 Cal.App.5th at pp. 1091-1092.)

People v. Mitchell (2022) 81 Cal.App.5th 575 (*Mitchell*), held petitioner was a major participant in the crime. "Mitchell was a *major participant*. Mentally, Mitchell helped decide to rob, helped plan the robbery technique, and helped select the victim. Physically, Mitchell was on the scene from start to finish. Tangibly, he helped with the gun and split the proceeds equally with the shooter: his fellow gang member and brother. At every stage, Mitchell was a full partner in crime." (*Mitchell*, *supra*, 81 Cal.App.5th at p.591, italics original.) Applying each of the factors identified in *Banks*, *Clark* and *Scoggins*, *Mitchell* also found petitioner was recklessly indifferent to human life. (*Mitchell*, *supra*, 81 Cal.App.5th at p. 591.)

In re Harper (2022) 76 Cal.App.5th 450 (*Harper*), upheld the trial court's denial of a petition under section 1172.6 because he was a "major participant" in the commission of the crime and acted with "reckless indifference to human life." *Harper* summarized the non-exclusive elements of these two factors as identified by the California Supreme Court in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*), and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*).

- **Whether petitioner was a major participant**: "Determining whether a defendant was a major participant requires consideration of the totality of the circumstances. [Citation.] Banks identified five nonexclusive factors for evaluating the extent of a defendant's participation: '[(1)] What role did the defendant have in planning the criminal enterprise that led to one or more deaths? [(2)] What role did the defendant have in supplying or using lethal weapons? [(3)] 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? [(4)] 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 inaction play a particular role in the death? [and (5)] What did the defendant do after lethal force was used?' [Citation.] None of the factors the court expressly articulated is necessary or necessarily sufficient, and all must be weighed in determining the ultimate question of '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.]" (*Harper*, *supra*, 76 Cal.App.5th at p. 459, footnote omitted.)

- **Whether petitioner acted with reckless indifference to human life**: "Courts must view the totality of the circumstances to determine whether the defendant acted with reckless indifference to human life. [Citation.] Clark identified five relevant, but nonexclusive, factors for evaluating this subjective requirement: (1) the 'defendant's awareness that a gun [or other deadly weapon] will be used,' whether the defendant personally used a lethal weapon, and the number of lethal weapons used; (2) the defendant's '[p]roximity to the murder and the events leading up to it' and opportunity to either restrain the crime or aid the victim; (3) whether the murder took placed 'at the end of a prolonged period of restraint of the victim[ ] by the defendant'; (4) the 'defendant's knowledge of ... a cohort's likelihood of killing'; and (5) whether the defendant made an 'effort[ ] to minimize the risks of violence in the commission of a felony ....' [Citation.] Again, no single factor is necessary, nor is any one necessarily sufficient. [Citation.]" (*Harper*, *supra*, 76 Cal.App.5th at p. 460, footnote omitted.)

People did not meet burden of proof

People v. Ramirez (2021) 71 Cal.App.5th 970 (*Ramirez*), found the trial court's finding that petitioner acted with reckless indifference was not supported by substantial evidence under the standard set by *Banks*, *Clark* and *Scoggins*. "Considering the totality of the circumstances in the light most favorable to the judgment [citation], substantial evidence does not support the superior court's finding Ramirez acted with the requisite mental state of reckless indifference to human life. There is no evidence Ramirez was armed during the felony or supplied the sole murder weapon. Rather, it was Rios who instigated and planned the carjacking, provided the gun, and fired it. Although Ramirez was aware Rios had a gun and intended to use it during the carjacking, that is not sufficient to prove the requisite mental state. [Citaion.] ['The mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life.']; [citation] [aiders and abettors with simple awareness that confederates were armed and the armed felony carried a risk of death 'lack the requisite reckless indifference to human life']; [citation] ['Although [petitioner] was aware that [the shooter] had a gun, [petitioner] did not use a gun himself, and there was no evidence he supplied the gun to [shooter].'].)" (*Ramirez*, *supra*, 71 Cal.App.5th at pp. 987-988.)

People v. Cooper (2022) 77 Cal.App.5th 393 (*Cooper*), held the trial court improperly found the petitioner to be a "major participant" who acted "with reckless indifference to human life." Petitioner had been convicted after jury trial of first degree murder, kidnapping and that he was an armed principal in the commission of the two crimes; he was acquitted of being a felon in possession of a firearm. The hearing on the merits of the petition was based primarily on the original appellate opinion affirming petitioner's convictions and on the trial transcript. The trial court's denial of the petition under section 1172.6 was based in part on its conclusion that petitioner possessed and fired a gun. The appellate court reversed. "We hold that a trial court cannot deny relief in a

section 1170.95 proceeding based on findings that are inconsistent with a previous acquittal when no evidence other than that introduced at trial is presented." (*Cooper*, *supra*, 77 Cal.App.5th at p. 398.)

In *People v. Arnold* (2023) 93 Cal.App.5th 376 (*Arnold*), the court applied the reasoning of *Cooper* in reversing the denial of a petition because the court's reasons conflicted with the jury's finding that petitioner did not use a knife in the commission of the homicide. *Arnold* found the doctrine of collateral estoppel is appliable in these circumstances. (*Arnold*, *supra*, 93 Cal.App.5th at pp. 386-387.)

People v. Curiel (2023) 15 Cal.5th 433 (*Curiel*), discusses the application of issue preclusion. " 'In general, whether a prior finding will be given conclusive effect in a later proceeding is governed by the doctrine of issue preclusion, also known as collateral estoppel.' [Citation.] 'The doctrine of collateral estoppel, or issue preclusion, is firmly embedded in both federal and California common law. It is grounded on the premise that "once an issue has been resolved in a prior proceeding, there is no further factfinding function to be performed." [Citation.] "Collateral estoppel ... has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." ' [Citation.]" [¶] 'As traditionally understood and applied, issue preclusion bars relitigation of issues earlier decided "only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." ' [Citation.] 'The party asserting collateral estoppel bears the burden of establishing these requirements.' [Citation.]" (*Curiel*, *supra*, 15 Cal.5th at pp. 451-452; also see discussion of issue preclusion in *People v. Bratton* (2023) 95 Cal.App.5th 1100, 1117; and *People v. Beaudreaux* (2024) ___ Cal.App.5th ___ [A166001].)

Curiel also observed, however, that meeting of the threshold requirements of issue preclusion does not end the matter. " '[W]hile these threshold requirements are necessary, they are not always sufficient: "Even if the[ ] threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles' of promoting efficiency while ensuring fairness to the parties.' [Citation.]" [¶] In *Strong*, we applied 'one well-settled equitable exception to the general rule' of issue preclusion, which 'holds that preclusion does not apply when there has been a significant change in the law since the factual findings were rendered that warrants reexamination of the issue.' [Citation.] 'This exception ensures basic fairness by allowing for relitigation where "the change in the law [is] such that preclusion would result in a manifestly inequitable administration of the laws." [Citation.] It also reflects a recognition that in the face of this sort of legal change, the

equitable policies that underlie the doctrine of issue preclusion — 'preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation' [citation] — are at an ebb.' [Citation.]" (*Curiel*, *supra*, 15 Cal.5th at pp. 453-454.)

In *People v. Henley* (2022) 85 Cal.App.5th 1003 (*Henley*), the trial court denied a petition under section 1172.6 because the petitioner used a firearm in the commission of the homicide. At least in part on that basis, petitioner was found to be a major participant who acted with reckless indifference to human life. Petitioner appealed the denial because the trial court's findings were inconsistent with the jury's verdict finding the use allegation "not true." Here the respondent offered no new evidence on the issue of petitioner's use or being armed with a gun; respondent offered the same evidence as presented to the jury – evidence the jury found insufficient to prove the enhancement. The Unless and until that Court instructs us to take a different approach, we will employ the one set forth in Flores and Gallo. That is, we will invite the defendant to file a supplemental brief and conduct an independent review of the record. In cases in which defendant does not file a brief and our review does not reveal an arguable issue, we will issue a short concise unpublished opinion affirming the trial court's decision and explaining the reason for our decision for the benefit of defendant and counsel. The trial court's error turned an acquittal into its opposite. (*Henley*, *supra*, 85 Cal.App.5th at pp. 1019-1020.)

Similar to *Henley*, the trial court in *People v. Jones* (2022) 86 Cal.App.5th 1076 (*Jones*), found petitioner was a major participant in the crime and acted with reckless indifference to human life because evidence established he helped plan the robbery where the victim was shot, provided the firearm to the shooter, encouraged the shooter to kill the victim, and even admitted that he "blasted" the victim. Under such circumstances the trial court could make such a finding, even though the jury found the use of a firearm allegation not true. Merely possessing or supplying the gun was not litigated by the jury's verdict. (*Jones*, *supra*, 86 Cal.App.5th at pp. 1084-1087.)

People v. Guiffreda (2023) 87 Cal.App.5th 112, found insufficient evidence to support the trial court's finding petitioner acted with reckless indifference to human life. The court's finding did not properly consider, among other things, the following factors: (1) petitioner did not know the weapon would be used during the robbery (2) petitioner lacked an opportunity to restrain the killer or aid the victim; (3) the time during which the robbery was committed was very short; and (4) petitioner didn't know that the accomplice would use lethal force.

Whether the Petitioner was potentially convicted under multiple theories of liability

The record may reflect that the prosecution sought the petitioner's murder conviction based on multiple theories, including application of the felony-murder rule and/or NPC. In cases where the petitioner was convicted after a jury trial, instructions and argument

of counsel will likely reflect consideration of all available theories of liability. It is not the obligation of the petitioner to convince the court that the felony-murder rule or NPC was actually used by the jury in whole or in part in the petitioner's conviction. Indeed, since the jury need not disclose its theory of liability or even agree on any particular theory, neither of the parties will be able to show the actual basis of the petitioner's conviction. It is the burden of the prosecution to show, beyond a reasonable doubt, the petitioner could be found guilty of murder under a valid theory of the law effective January 1, 2019. (See § 1172.6, subds. (a)(3), (d)(3).)

4. Relief granted by the court and resentencing (§ 1172.6, subd. (d)(3).)

a. Vacating of conviction

If the prosecution fails to meet its burden of proof to show that the petitioner could have been convicted of murder under the law effective January 1, 2019, "the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges ." (§ 1172.6, subd. (d)(3).) In other words, the court must vacate the underlying murder conviction, and any count-specific conduct enhancements such as the use of weapons and any special circumstance allegations under section 190.2.

b. Resentencing of petitioner

If the petitioner successfully challenges the murder conviction, the court is to "resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1172.6, subd. (d)(1).) If the target offense was identified in the murder count of the complaint, that offense will then form the basis of the resentencing. "The petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes if the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and the target offense was not charged. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose." (§ 1172.6, subd. (e).)

Because section 1172.6, subdivision (d)(1), provides that resentencing is to occur "as if petitioner had not previously been sentenced," the court will be free to resentence all counts, including the consecutive or concurrent structure of the sentence on multiple counts. The only restriction is that the new sentence may be equal to, but not greater than, the total original sentence.

People v. Ramirez (2021) 71 Cal.App.5th 970 (*Ramirez*), holds petitioner, a juvenile at the time of the underlying crime, who successfully petitions the court pursuant to

section 1172.6, is entitled to "resentencing" in juvenile court pursuant to Proposition 57 and Senate Bill 1391. (*Ramirez*, *supra*, 71 Cal.App.5th at pp. 996-1000.) "Because Ramirez was 15 at the time of the offenses, pursuant to the changes made by Senate Bill 1391 to Welfare and Institutions Code section 707, subdivision (a), Ramirez's remaining counts are not subject to a motion to transfer to adult criminal court. Therefore, we remand with directions for the trial court to transfer the matter to the juvenile court. The juvenile court shall treat Ramirez's remaining convictions as juvenile adjudications and impose an appropriate disposition." (*Ramirez*, *supra*, 71 Cal.App.5th at p. 1000.)

People v. Gonzalez (2023) 87 Cal.App.5th 869 (*Gonzalez*), holds in granting relief under section 1172.6, the trial court may not reduce a first degree murder conviction to murder in the second degree. "[U]nder section 1172.6, a trial court has two options in adjudicating a resentencing petition: Deny the petition and leave in place the murder conviction or grant the petition and vacate the murder conviction and resentence the defendant on the remaining charges or target offense or underlying felony. Reducing a first degree murder conviction to second degree murder is not an option under section 1172.6." (*Gonzalez*, *supra*, 87 Cal.App.5th at p. 881, footnote omitted.)

People v. Fouse (2024) 98 Cal.App.5th 1131 (*Fouse*), discusses the procedure under which the court resentences the target offense where the original target offense was pled and proved. "In reviewing the plain language of section 1172.6, subdivisions (d)(3) and (e), we agree with defendant's first contention—because it is undisputed the target offenses were charged (and defendant was convicted thereof), the statute required the court to resentence defendant on the remaining charges. It did not permit the court to redesignate the attempted murder convictions to assaults with a firearm on a peace officer and felony evading a police officer. That is, section 1172.6, subdivision (d)(3) provides that when an attempted murder conviction is no longer valid under the amended law, the prior conviction 'shall be vacated and the petitioner shall be resentenced on the remaining charges.' (§ 1172.6, subd. (d)(3).) Relevant here, '[t]he petitioner's conviction *shall be redesignated as the target offense or underlying felony for resentencing purposes if* the petitioner is entitled to relief pursuant to this section, murder or attempted murder was charged generically, and *the target offense was not charged*.' (§ 1172.6, subd. (e), italics [added by *Fouse*] .) But, because here the target offenses were charged, section 1172.6, subdivision (e)'s redesignation procedure did not apply. Indeed, to hold otherwise would avoid the plain meaning of the language of the statute and render meaningless the conditional language of section 1172.6, subdivision (e)." (*Fouse*, *supra*, 98 Cal.App.th at pp. 1145-1146.)

Designation of the target offense also is discussed in People v. Patterson (2024) 99 Cal.App.5th 1215, ___: "We think it is quite clear as a matter of plain language that section 1172.6, subdivision (e) only permits redesignation of a felony-murder conviction to the underlying felony(ies) on which the defendant's felony-murder conviction was actually based. First, the very definition of an 'underlying' felony in this context is the felony upon which the felony-murder theory tendered to the jury was based. It does not

refer to any and all felonies the defendant committed, but rather only those that "underlie" the felony-murder. Second, the use of a definite article in the phrase "the ... underlying felony," further suggests it refers to the specific felony that actually underlied the defendant's murder conviction at trial. [¶] To determine the felony(ies) on which the felony-murder conviction was actually based, the court can look to jury instructions, verdicts, and stipulations between the parties."

Determining target offense

If the petitioner had been charged with a generic allegation of murder, without the target offense having been specified in the complaint, the court must identify a target offense for the purpose of the resentencing. "If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose." (§ 1172.6, subd. (e).) It is unclear whether the redesignation of the target offense for the new base term includes the count-specific conduct enhancements. In granting relief, the court is to vacate the underlying conviction and "any allegations and enhancements attached to the conviction." (§ 1172.6, subd. (d)(3).) It seems the intent of the Legislature is to place the petitioner after resentencing in a situation where the murder and any related enhancements no longer exist. It is consistent with this intent that the resentencing should not include any count-specific conduct enhancements or other allegations previously charged against the petitioner, unless they can be established relative to the target offense by evidence established at the hearing on the petition. For example, if defendants A and B (the petitioner) participated in a robbery where A, the only armed person, shot and killed the victim, but the prosecution failed to meet its burden of proving petitioner was ineligible for resentencing, B could be convicted and sentenced on the robbery, the target offense, and a gun enhancement for being armed within the meaning of section 12022, subdivision (a)(1).

Prior to resentencing, the petitioner is entitled to reasonable notice of the crime that will be specified as the new target offense, the length of the proposed sentence and how the sentence would be calculated (*People v. Del Rio* (2023) 94 Cal.App.5th 47, 55.)

The appellate courts disagree over whether in designating the new target offense, the court may consider enhancements. *People v. Howard* (2020) 50 Cal.App.5th 727 (*Howard*), concludes enhancements established at the hearing on the motion may be included as part of the new target offense. "When the court redesignates the murder conviction as the underlying felony (§ 1170.95, subd. (e)), may the court impose enhancements relative to that felony? As discussed above, section 1170.95 subdivision (e) is silent with respect to how a court resentences a defendant after redesignating the underlying felony. Consistent with the legislative goal of placing Howard after resentencing in a situation where the murder and any related enhancements no longer

exist, Howard's resentencing may not include count-specific enhancements unless the People establish them related to the underlying felony by evidence presented at the hearing on the section 1170.95 petition. Our conclusion finds support in the principle that '[t]o the extent the court is determining the sentence to impose after striking the murder conviction, the traditional latitude for sentencing hearings should be allowed.' [Citation.] (*Howard*, *supra*, 50 Cal.App.5th at pp. 741-742.)

People v. Arellano (2022) 86 Cal.App.5th 418 (*Arellano*), holds the redesignated target offense should not include enhancements. "In our view, the plain meaning of the phrase '[t]he petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes' in section 1172.6, subdivision (e), does not authorize enhancements to be attached to the redesignated conviction for resentencing." (*Arellano*, *supra*, 86 Cal.App.5th at p. 434.) *Arellano* bases it's conclusion on the fact that an enhancement is not an "offense," but merely additional punishment for an offense. (*Ibid*, at pp. 435-436.) "By directing that the vacated conviction shall be redesignated only 'as the target offense or underlying felony for resentencing purposes' (§ 1172.6, subd. (e)) and failing to mention sentence enhancements, the Legislature spoke to both redesignation of the conviction and resentencing for that conviction. That is, through the specific language it chose for section 1172.6, subdivision (e), the Legislature stated that 'for resentencing purposes,' the newly redesignated conviction shall include only the offense upon which liability for murder or attempted murder was based. [¶] Although this interpretation of section 1172.6, subdivision (e), limits resentencing to the target offense or underlying felony, such interpretation does not result in absurd consequences the Legislature did not intend. It simply limits a petitioner's exposure in a relatively definite manner to only a specific offense and avoids the complexities that could arise in deciding which of the myriad sentencing enhancements in our penal law might be applicable to a particular factual scenario. Given that subdivision (e) applies when 'the target offense was not charged,' the Legislature reasonably could have intended to limit a petitioner's potential punishment in this conditional and uncertain circumstance." (*Arellano*, *supra*, 86 Cal.App.5th at p. 436.)

Although the language of section 1172.6, subdivision (d)(3), is ambiguous, it seems to suggest that if the target offense was not charged in the complaint, the court must determine the target offense either by reference to the fact of a conviction of a specific offense in a separate count of the complaint, or to the underlying felony (target offense) identified in the instructions. As an example, if the petitioner is convicted of first degree murder based on a generic allegation of murder[15], and the prosecution relied on a felony-murder theory because of a robbery, the target offense can be taken from the

[15] 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.

fact the petitioner was convicted of the robbery in a separate count, or from the reference to robbery as the underlying felony in the jury instructions. If the target offense was separately charged in the complaint, likely the sentence for that count was stayed under section 654.

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

If it is necessary to resentence the petitioner on a crime not charged in the original complaint, section 1172.6, subdivision (e), provides that "[a]ny applicable statute of limitations shall not be a bar to the court's redesignation of the offense for [resentencing] purpose[s]."

People v. Howard (2020) 50 Cal.App.5th 727 (*Howard*), addresses the determination of the target offense. The petitioner was convicted of first degree felony murder after the victim of a residential burglary was shot by the petitioner's accomplice. In the underlying trial, the petitioner was not separately charged with residential burglary and the jury was only instructed on the general law of burglary without reference to degree. Because the petitioner was not charged with or convicted of residential burglary, the defense argued the target offense could only be second degree burglary. The court rejected the argument: "In our view, the absence of a first degree burglary instruction and verdict did not preclude the court from redesignating Howard's conviction as first degree burglary, because the evidence at trial demonstrated beyond any dispute the building was a residence. As Howard acknowledges, the plain language of section 1170.95, subdivision (e) contemplates a situation where—as here—the underlying felony was not charged. It follows that where the underlying felony is not charged, there will be no jury instruction or verdict form. Additionally, we question the practicality of requiring a trial court to ignore evidence established at trial when designating the underlying felony pursuant to section 1170.95, subdivision (e). (In re I.A. (2020) 48 Cal.App.5th 767, 775, 262 Cal.Rptr.3d 234 [examining evidence offered at contested adjudication to determine whether the juvenile court's section 1170.95 subdivision (e) finding was supported by sufficient evidence; suggesting a court cannot redesignate an offense 'for which there is no support in the record'].) [¶] To the extent Howard contends section 1170.95 subdivision (e) requires the trial court to designate the lesser degree of the underlying felony—even when the evidence at trial shows the commission of the greater degree—we disagree. Subdivision (e) states the court 'redesignate[s] ... the ... underlying felony for resentencing purposes.' (§ 1170.95, subd. (e).) It does not direct the court to impose the lesser degree of the felony offense. Had the Legislature intended to dictate such a result, 'it easily could have done so.' (People v. Flores (2020) 44 Cal.App.5th 985, 993, 258 Cal.Rptr.3d 205 [declining to expand section 1170.95 to include offenses not mentioned in statute].)" (*Howard*, supra, 50 Cal.App.5th at p. 738.)

"When the court redesignates the murder conviction as the underlying felony (§ 1170.95, subd. (e)), may the court impose enhancements relative to that felony? As discussed above, section 1170.95 subdivision (e) is silent with respect to how a court resentences a defendant after redesignating the underlying felony. Consistent with the legislative goal of placing Howard after resentencing in a situation where the murder and any related enhancements no longer exist, Howard's resentencing may not include count-specific enhancements *unless* the People establish them related to the underlying felony by evidence presented at the hearing on the section 1170.95 petition. Our conclusion finds support in the principle that '[t]o the extent the court is determining the sentence to impose after striking the murder conviction, the traditional latitude for sentencing hearings should be allowed.' [Citation.]" (*Howard*, supra, 50 Cal.App.5th at pp. 741-742, italics original.)

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

People v. Howard (2020) 50 Cal.App.5th 727 (*Howard*), found the judicial fact-finding process necessary for the redesignation of the crimes did not violate the petitioner's right to a jury trial. "The retroactive relief provided by section 1170.95 reflects an act of lenity by the Legislature 'that does not implicate defendants' Sixth Amendment rights.' [Citations.] [¶] Here, the process by which a trial court redesignates the underlying felony pursuant to section 1170.95, subdivision (e) does not implicate Howard's constitutional jury trial right under Apprendi v. New Jersey (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 or Alleyne v. United States (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314. The redesignation does not increase Howard's sentence. We reject Howard's argument that the residential burglary designation violated his constitutional due process rights." (Howard, supra, 50 Cal.App.5th at p. 740.)

In *People v. Silva* (2021) 72 Cal.App.5th 505 (*Silva*), petitioner was convicted of two felony murders arising out of a home invasion robbery involving six victims. The trial court granted petitioner's motion under section 1172.6 to set aside the murder convictions. The trial court then designated the six robbers for sentencing, although the robberies were never submitted to the jury for decision. Petitioner contended he could be resentenced only on two robberies derived from the two dismissed murder convictions. *Silva* relied heavily on *Howard* in rejecting petitioner's Sixth Amendment claims. (See *Silva*, *supra*, 72 Cal.App.5th at p. 520.)

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

Silva further observes: "[W]e conclude a redesignation and resentencing procedure that abandons the most basic tenets of notice and an opportunity to be heard would be fundamentally unfair and would violate due process, and we refuse to so construe section 1170.95. Under section 1170.95, the resentencing judge retains much discretion to impose a range of possible sentencing choices, and his or her discretionary choices have a direct impact on the petitioner's liberty interests, depending on the choice of redesignated crime(s) and the structure of the sentence imposed. In this case, for instance, the parties have proposed resentencing Silva to somewhere between six and 24 years in prison, and though any sentence in that range would be a reduction from his former sentence, the vast range available implicates the petitioner's liberty interest. We conclude, as in any sentencing proceeding, the protections for "life, liberty, or property" embodied in the due process clauses of the Fifth and Fourteenth Amendments demand fundamental fairness in a section 1170.95 resentencing." (*Silva*, *supra*, 72 Cal.App.5th at p. 523.) "*What we hold here, specifically, is that as a matter of procedural due process*

Silva was entitled to know, reasonably in advance of the court resentencing him, which crimes the prosecution sought to have redesignated as underlying felonies, the length of sentence the prosecution proposed, and how that recommended sentence was calculated." (*Silva*, *supra*, 72 Cal.App.5th at p. 523, italics added.)

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

Evidence that can be considered at resentencing

In resentencing the petitioner, the court likely may use any evidence admissible in the original sentencing proceeding. In that regard, if it is apparent the petitioner will be remaining in custody on other charges, the court may find it useful to refer the petitioner to the probation department for a supplemental report. Because the court may consider adding a parole period after the completion of the sentence (§ 1172.6, subdivision (g)), likely the court will be able to consider the petitioner's performance in prison in setting any new term or period of post-sentence supervision.

To the extent the resentencing process is similar to Propositions 36 and 47, the strict rules of evidence do not apply. "An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. [Citations.]" (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1095; see *People v. Banda* (2018) 26 Cal.App.5th 349, 357.)

In *People v. Hall* (2019) 39 Cal.App.5th 831 (*Hall*), the court approved the use of reliable hearsay from probation and police reports in the context of a petition for resentencing under Proposition 64, the marijuana initiative. The court observed: "In determining whether a convicted felon is eligible for resentencing to a misdemeanor under Proposition 47 (Pen. Code, § 1170.18), reliable hearsay statements in a probation report are admissible. [Citation.] The structure of Proposition 47 is similar to Proposition 64. 'Proposition 47 . . . "created a new resentencing provision: [Penal Code] section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were

added or amended by Proposition 47 . . . . [Citation.]" [Citations.]' [Citation.] [¶] Since reliable hearsay statements in a probation report are admissible to show whether a petitioner is eligible for resentencing under Proposition 47 [citation], it logically follows that they are also admissible to show whether a petitioner is eligible for relief under Proposition 64. The Court of Appeal in *Sledge* reasoned: 'An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. [Citations.]' [Citation.] In *People v. Saelee* (2018) 28 Cal.App.5th 744, 756 . . . , the court applied similar reasoning to Proposition 64: 'Nothing in Proposition 64 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. [Citation.]'[Citation.]" (*Hall*, at p. 838.)

In approving the trial court's use of a portion of the arrest report, *Hall* also rejected any application of *People v. Sanchez* (2016) 63 Cal.5th 665 and *Crawford v. Washington* (2004) 541 U.S. 36: " 'In [*People v.*] *Sanchez* . . . , the [California] Supreme Court held . . . . that an expert's opinion testimony concerning defendant's gang membership was inadmissible in a criminal trial because the expert had relied on testimonial hearsay in police reports. [Citation.] The holding was based on *Crawford v. Washington* (2004) 541 U.S. 36 . . . , in which 'the United States Supreme Court held . . . that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses.' [Citation.] [¶] Appellant cites no authority suggesting that *Crawford* applies to a proceeding in which a convicted felon is seeking to dismiss or redesignate his felony conviction because of the electorate's post-conviction act of lenity, e.g., Proposition 64. In *Crawford* the United States Supreme Court observed: 'The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions. [Citations.]' [Citation.] Appellant's Proposition 64 application to dismiss or redesignate his 1996 felony marijuana conviction is not a criminal prosecution." (*Hall*, *supra*, 39 Cal.App.5th at p. 844.)

Notice to victim

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

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

"The retroactive relief provided by section 1170.95 reflects an act of lenity by the Legislature 'that does not implicate defendants' Sixth Amendment rights." [Citations.] [retroactive application of Proposition 36, the Three Strikes Reform Act of 2012, is a

legislative act of lenity that does not implicate Sixth Amendment rights].) [¶] Here, the process by which a trial court redesignates the underlying felony pursuant to section 1170.95, subdivision (e) does not implicate Howard's constitutional jury trial right under Apprendi v. New Jersey (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 or Alleyne v. United States (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314. The redesignation does not increase Howard's sentence. We reject [the defendant's] argument that the residential burglary designation violated his constitutional due process rights." (*Howard*, *supra*, 50 Cal.App.5th at p. 740.)

Court-ordered parole supervision

As originally enacted, section 1172.6 allowed the court, after resentencing, to place the petitioner on parole for up to three years. (§ 1172.6, subd. (g).) SB 775 amended section 1172.6, subdivision (h), to provide for a parole period of up to two years.

Credit for time served; post-sentence supervision (§ 1172.6, subd. (g))

Section 1172.6, subdivision (h), directs the court to give the petitioner credit for time served. *People v. Wilson* (2020) 53 Cal.App.5th 42 (*Wilson*), addressed the allocation of custody credits when, because of resentencing under section 1172.6, the petitioner ends up with more credit than the new sentence. Wilson observes that section 1172.6, subdivision (g), provides: "A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to [two] years following the completion of the sentence." (Italics added.) Wilson concludes "the only reasonable reading of section 1170.95 is that the trial court has discretion to impose a period of parole and that the court's discretion is not constrained by excess custody credits." (*Wilson*, *supra*, 53 Cal.App.5th at p. 52.) The excess credits will not reduce the period of parole imposed under section 1172.6, subdivision (g).

Generally in accord with *Wilson* is *People v. Lamoureux* (2020) 57 Cal.App.5th 136 (*Lamoureux*). "[W]e conclude section 1170.95, subdivision (g) does not require a court to automatically apply a person's excess custody credits to offset the person's parole supervision period. We conclude, instead, that a court has discretion to order a resentenced person to be subject to parole supervision for up to three years in duration upon the person's release from custody." (*Id*. at p. 150.) *Lamoureux* further held the excess custody credit should be applied to the restitution fine ordered in the case. (Id. at p. 152.)

Generally in accord with the foregoing cases is *People v. Rojas* (2023) 95 Cal.App.5th 48, 54 (*Rojas*), which holds the resentencing court is required to calculate any custody credits in accordance with *People v. Buckhalter* (2001) 26 Cal.4th 20 (*Buckhalter*). The court also holds any excess custody credit may be applied to reduce any fees and fines, including the restitution and parole revocation fines. (*Id*. at p. 55.) Because of the

provisions of section 1172.6, subdivision (h), however, the court should not apply any excess credit to reduce any applicable parole period. (Id. at p. 57-59.) The court also has jurisdiction to address any issues of direct victim restitution. (See *id*., at pp. 59-61.)

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

Abstract of conviction to CDCR

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

Disposition report to DOJ

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

c. *People v. Stamps* is inapplicable to proceedings under section 1172.6

Although no published opinion has addressed the issue, it is unlikely *People v. Stamps* (2020) 9 Cal.5th 785 (*Stamps*), will have any application to proceedings conducted under section 1172.6.

People v. Stamps

Stamps addresses the ability of the trial court and prosecution to revisit the terms of a plea bargain because of a change in the law that reduces a sentence imposed as a result of a plea agreement. *People v. Henderson* (2021) 67 Cal.App.5th 785 (*Henderson*), summarizes *Stamps*: "In *Stamps*, the parties entered into a negotiated plea with a specified prison term, which included a prior serious felony enhancement. [Citations.] After the defendant entered his plea, the Legislature passed Senate Bill No. 1393 (2017-2018 Reg. Sess.), which granted the trial court discretion to strike the prior serious felony enhancement in the furtherance of justice. [Citation.] The defendant appealed, seeking remand to allow the trial court to strike the enhancement from the agreed-upon sentence but otherwise keep the plea bargain intact. [Citation.] The California Supreme Court concluded that Senate Bill No. 1393 applied retroactively but rejected defendant's argument that, on remand, the trial court could dismiss the five-year prior serious felony enhancement while otherwise maintaining the plea agreement. [Citation.] Noting that the parties entered into a plea agreement for a specified prison term based on the prior serious felony enhancement, the Court said the trial court could not unilaterally modify the terms absent the prosecution's agreement. [Citation.] Relying on the stipulated nature of the sentence, the Court explained that ' "Senate Bill No. 1393 does not entitle defendants who negotiated stipulated sentences 'to whittle down the sentence "but otherwise leave the plea bargain intact." ' " ' [Citation.] That would fundamentally alter the terms of the agreement, depriving the People of the benefit of their bargain. [Citation]." (*Henderson*, *supra*, 67 Cal.App.5th at p. 788.) *Stamps* ordered a limited remand of the case to the trial court to give the defendant an opportunity to request section 1385 relief for dismissal of the prior serious felony conviction. If the trial court denied the relief, that would be the end of the matter. (*Stamps*, 9 Cal.5th at pp. 705-706.)

As *Stamps* observed: "However, if the court is inclined to exercise its discretion [under section 1385], . . . , such a determination would have consequences to the plea agreement. . . . [T]he court is not authorized to unilaterally modify the plea agreement by striking the serious felony enhancement but otherwise keeping the remainder of the bargain. If the court indicates an inclination to exercise its discretion under section 1385, the prosecution may, of course, agree to modify the bargain to reflect the downward departure in the sentence such exercise would entail. Barring such a modification agreement, 'the prosecutor is entitled to the same remedy as the defendant—withdrawal of assent to the plea agreement ....' [Citation.] [¶] Further, the court may withdraw its prior approval of the plea agreement. The court's authority to withdraw its approval of a plea agreement has been described as 'near-plenary.' [Citations.] The court's exercise of its new discretion to strike the serious felony enhancement, whether considered a new circumstance in the case or simply a reevaluation of the propriety of the bargain itself, would fall within the court's broad discretion to withdraw its prior approval of the plea agreement. Section 1192.5 contemplates that '[a] change of the

court's mind is thus always a possibility.' [Citation.]" (*Stamps*, *supra*, 9 Cal.5th at pp. 707-708.)

In the context of section 1172.6, the issue is whether the court or the prosecution may renegotiate the terms of a homicide conviction obtained by plea when the court intends to grant relief based on the new statute. In considering whether *Stamps* applies to proceedings under section 1172.6, the court first must determine whether motions under its provisions apply to plea agreements, and second, if they do apply and the court intends to grant relief, the court must then determine whether *Stamps* gives the prosecution or the court the ability to revisit the terms of any prior plea agreement.

Section 1172.6 is applicable to convictions obtained by plea agreement

Section 1172.6 clearly contemplates its provisions will apply to homicide convictions obtained by plea. Relief is available, among other requirements, if "[t]he petitioner was convicted of murder, attempted murder, or manslaughter following a trial or *accepted a plea offer in lieu of a trial* at which the petitioner could have been convicted of murder or attempted murder." (§ 1172.6, subd. (a)(2); italics added.)

***Stamps* does not apply to convictions obtained because of a plea agreement**

Once the court determines section 1172.6 applies to a conviction by plea and that the petitioner is entitled to resentencing relief, the court must then determine whether the plea agreement has any further role in the proceedings. As explained in *Stamps*, even if the petitioner is entitled to retroactive application of a statute, the petitioner also must establish the right to relief even if it contravenes the terms of a plea agreement. "[I]t is not enough for defendant to establish that the amended section 1385 applies to him retroactively under Estrada in order to receive the remedy he seeks. In order to justify a remand for the court to consider striking his serious felony enhancement while maintaining the remainder of his bargain, defendant must establish not only that Senate Bill 1393 applies retroactively, but that, in enacting that provision, the Legislature intended to overturn long-standing law that a court cannot unilaterally modify an agreed-upon term by striking portions of it under section 1385." (*Stamps*, *supra*, 9 Cal.5th at p. 701.)

Whether a plea agreement has any bearing on the resentencing authority of the court under section 1172.6 depends on the nature of the relief authorized by the statute. Section 1172.6, subdivision (d)(3), provides in relevant part: "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*." (Italics added.) The effect of the statute is clear: upon the People's failure of proof, the conviction is changed to the new charge and the petitioner is resentenced based on the new charge *and on whatever other charges remain*. Nowhere in section 1170.95 is it suggested the court must return the parties to their

pre-plea status to consider charges and allegations dismissed in the course of plea negotiations.[16] Section 1170.95 clearly authorizes and directs the court to resentence the petitioner based on a crime not contemplated in a plea agreement and to a lower term but "not greater than the initial sentence." (§ 1172.6, subd. (d)(1).) It appears section 1172.6, subdivision (d)(3), has been written in a manner sufficient to show "the Legislature intended to overturn long-standing law that a court cannot unilaterally modify an agreed-upon term. . . ." (*Stamps*, *supra*, 9 Cal.5th at p. 701.)

d. Relief under sections 1172.6 and 851.8 for factual innocence

People v. Hollie (2023) 97 Cal.App.5th 513, holds a successful petition under section 1172.6 does not automatically entitle the petitioner to a finding of factual innocence for the murder conviction under section 851.8. " 'Factually innocent' as used in [section 851.8, subdivision (b)] does not mean a lack of proof of guilt beyond a reasonable doubt or even by a preponderance of evidence. Defendants must show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action. In sum, the record must exonerate, not merely raise a substantial question as to guilt.' [Citations.] Indeed, that is the premise of section 851.8, subdivision (e), which provides, when a person has been acquitted of a charge, the trial judge has discretion—but is not obligated—to make a finding of factual innocence. Granting Hollie's section 1172.6 petition did not exonerate him of Treder's murder." (*Hollie*, *supra*, 97 Cal.App.5th at pp 521-522, footnotes omitted.)

H. 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 1172.6 is granted. Such a right is unlikely under the double jeopardy clause.

While determining whether the petitioner has established grounds for resentencing, the court is given limited jurisdiction to hear evidence proving the crime of murder. Section 1172.6, subdivision (d)(3), provides "[t]he prosecutor and the petitioner may . . . offer new or additional evidence to meet their respective burdens." Certainly the authority to hear new evidence and reconsider previously admitted evidence related to the murder is similar to a retrial – but it is being done solely in the context of determining eligibility for resentencing, and is triggered by the petitioner's request for relief. Under these circumstances, the double jeopardy clause is not implicated.

If the court hears all the evidence, whether from the record of conviction or new evidence presented by the parties, and thereafter grants relief, the court is making a factual

[16] Consideration of dismissed charges or allegations may be necessary in determining the target offense under section 1172.6, subdivision (e).

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

If in the context of a motion for resentencing under section 1172.6, 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.

I. Right to appeal

Ruling denying relief

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

Ruling granting relief

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

the people,' and is appealable under section 1238, subdivision (a)(5)." (*Hampton*, *supra*, 74 Cal.App.5th at p. 1101.)

No right to *Wende* review

People v. Delgadillo (2022) 14 Cal.5th 216 (*Delgadillo*), concludes a petitioner has no right to a review under *People v. Wende* (1979) 25 Cal.3d 436, when appointed counsel submits a notice to the appellate court indicating an appeal from a ruling on a motion under section 1172.6 lacks arguable merit. (Ibid, at p. 222.) However, upon counsel submitting such a notice, the appellate court "should provide notice to the defendant that counsel was unable to find any arguable issues; the defendant may file a supplemental brief or letter raising any argument the defendant wishes the court to consider; and if no such supplemental brief or letter is timely filed, the court may dismiss the appeal as abandoned." (*Ibid*.)

Further describing the process following a denial of a motion under section 1172.6, *Delgadillo* "prescribe[d] the following framework. When appointed counsel finds no arguable issues to be pursued on appeal: (1) counsel should file a brief informing the court of that determination, including a concise recitation of the facts bearing on the denial of the petition; and (2) the court should send, with a copy of counsel's brief, notice to the defendant, informing the defendant of the right to file a supplemental letter or brief and that if no letter or brief is filed within 30 days, the court may dismiss the matter. [Citations.] [¶] If the defendant subsequently files a supplemental brief or letter, the Court of Appeal is required to evaluate the specific arguments presented in that brief and to issue a written opinion. The filing of a supplemental brief or letter does not compel an independent review of the entire record to identify unraised issues. [Citations.] If the defendant does not file a supplemental brief or letter, the Court of Appeal may dismiss the appeal as abandoned. [Citation.] If the appeal is dismissed as abandoned, the Court of Appeal does not need to write an opinion but should notify the defendant when it dismisses the matter. [Citation.] While it is wholly within the court's discretion, the Court of Appeal is not barred from conducting its own independent review of the record in any individual section 1172.6 appeal. [Citations.]" (*Delgadillo*, *supra*, 14 Cal.5th at pp. 231-232.)

Generally in accord with *Delgadillo* are *People v. Flores* (2020) 54 Cal.App.5th 266; *People v. Gallo* (2020) 57 Cal.App.5th 594; *People v. Figueras* (2021) 61 Cal.App.5th 108 (granted review); *People v. Cole* (2020) 52 Cal.App.5th 1023 (granted review); and *People v. Griffin* (2022) 85 Cal.App.5th 329.

Dismissal of a second petition under section 1172.6 while a first petition still on appeal

People v. Burhop (2021) 65 Cal.App.5th 808 (*Burhop*) and *People v. Cress* (2023) 87 Cal.App.5th 421 (*Cress*), address the circumstance where a petitioner appeals a denial of relief under section 1172.6 and while that appeal is pending files a second petition for relief. *Burhop* holds the trial court lacks jurisdiction to *grant* the second petition because the appeal of the first petition deprives the court of further jurisdiction to "affect" the judgment. (*Burhop*, *supra*, 65 Cal.App.5th at pp. 813-816.) *Cress* holds the trial court did not violate jurisdictional limits

because the dismissal of the second motion did not "affect" the validity of the ruling on the first petition. (*Cress*, *supra*, 87 Cal.App.5th at p. 549.)

J. Convictions challenged on direct appeal

Section 1172.6, subdivision (g), permits a defendant to challenge a conviction on direct appeal based on the changes to sections 188 and 189: "A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." *People v. Perez* (2022) 78 Cal.App.5th 192 (*Perez*), holds when such a challenge is successful, the correct remedy is to remand the matter to the trial court to allow the taking of additional evidence. "Senate Bill No. 775 was silent on what the appropriate remedy is for a defendant who successfully challenges the validity of his conviction on direct appeal. Thus, it is unclear whether we should find the evidence insufficient and vacate the murder conviction or whether we must find the evidence insufficient and remand the matter to the trial court to allow the prosecution to offer new or additional evidence to meet its burden to prove beyond a reasonable doubt that the defendants are guilty under a still valid theory of murder. Section 1170.95, subdivision (d)(3) allows both parties to produce additional evidence and gives the prosecution an opportunity to establish a valid theory of murder, such as direct aiding and abetting implied or express malice murder. While the Legislature amended both subdivisions (d)(3) and (g), it did not state that vacation of the conviction on appeal without a subdivision (d)(3) hearing is the appropriate remedy. [¶] Here, we conclude that reversing the convictions and remanding the matter to give the prosecution the opportunity to retry the attempted murder counts against Sanchez and Rosas is appropriate. The statutes clearly contemplate an opportunity for the prosecution to present new or additional evidence to show that defendants can still be convicted under a valid theory of aiding and abetting. Moreover, double jeopardy principles do not forbid retrial here even though the prosecutor acknowledged at trial that there was insufficient evidence to support a direct aiding and abetting theory. Where the prosecution makes its case under the law as it stood at trial, double jeopardy is not implicated as it would otherwise be where there is insufficient evidence. [Citations.] Thus, we reverse the attempted murder counts as to Sanchez and Rosas and direct the trial court to allow the prosecutor to retry those counts based on a currently valid theory." (*Perez*, *supra*, 78 Cal.App.5th at p. 205.)

VIII. Constitutionality of SB 1437

Soon after the enactment of SB 1437, district attorneys across the state requested dismissal of petitions brought under section 1172.6. They primarily argued the legislation conflicted with initiatives enacted by the voters without a proper vote of either the public or the Legislature. Trial courts disagreed over the outcome of these issues.

Two companion opinions resolved all constitutional challenges in favor of the legislation. *People v. Lamoureux* (2019) 42 Cal.App.5th 241 (*Lamoureux*), and *People v. Superior Court*

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

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

People v. Johns (2020) 50 Cal.App.5th 46 (*Johns*), also upholds the constitutionality of SB 1437: "We agree with Johns that S.B. 1437 is constitutional and he is entitled to have the trial court consider his petition. Proposition 7 addressed the punishment appropriate for murder, not the elements of the offense, and Proposition 115 added predicates for applying the felony-murder rule, which S.B. 1437 left intact. We therefore conclude S.B. 1437 addressed related but distinct areas of the law which the initiatives left in the power of the Legislature to amend. (People v. Kelly(2010) 47 Cal.4th 1008, 103 Cal.Rptr.3d 733, 222 P.3d 186 (Kelly).) The new statutory provisions therefore did not amend either ballot initiative. We also conclude retroactive application of S.B. 1437 through the petitioning process doesn't violate the separation of powers doctrine or the Victims' Bill of Rights of 2008 (Marsy's Law), as the district attorney argues." (*Johns*, at pp.54-55.)

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

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

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

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

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

The court also rejected the argument that section 1172.6 violates Proposition 7 because it allows a court to set aside a murder conviction that was valid when obtained. The court

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

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

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

B. SB 1437 does not violate the separation of powers

The People asserted in *Lamoureux* that SB 1437 usurped the governor's clemency power because section 1172.6 "legally erases" the conviction and penalties. The court rejected the argument, relying on *Way v. Superior Court* (1977) 74 Cal.App.3d 165 (*Way*), and *Younger v. Superior Court* (1978) 21 Cal.3d 102 (*Younger*).

> "We conclude the rationale of the *Way* and *Younger* decisions is directly applicable here. Like the challenged laws in the *Younger* and *Way* cases, section 1170.95 can produce outcomes resembling the consequences of an executive commutation. Specifically, in cases where a petitioner makes a prima facie showing of entitlement to relief (§ 1170.95, subd. (c)), and the prosecution fails to carry its burden of proving the petitioner is ineligible for resentencing (*id.*,subd. (d)(3)), murder sentences may be vacated and sentences recalled (*id.*, subd. (d)(1)). Although section 1170.95 requires resentencing on remaining counts, such that a given prisoner's overall sentence may not

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

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

Lamoureux also rejected a claim that section 1172.6 interfered with the court's "core function of resolving controversies between parties insofar as section 1170.95 permits prisoners serving final sentences to seek relief." (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 256.) The People relied primarily on *People v. Bunn* (2002) 27 Cal.4th 1 (*Bunn*) and *People v. King* (2002) 27 Cal.4th 29 (*King*). In disagreeing with the People's claim, the court observed: "Unlike legislation authorizing the refiling of criminal charges against a previously-acquitted defendant, or the refiling of actions between private parties, section 1170.95 does not present any risk to individual liberty interests. On the contrary, it provides potentially ameliorative benefits to the only individuals whose individual liberty interests are at stake in a criminal prosecution—the criminal defendant himself or herself. In such cases, we do not believe the separation of powers analysis conducted in *Bunn* and *King* controls. Indeed, the parties have directed us to no decisions applying the *Bunn* and *King* separation of powers analysis to bar legislation allowing the reopening of already-final judgments of *conviction* (as distinct from already-final judgments of *dismissal*), and we have found none." (*Lamoureux*, at p. 261.) The court also relied on cases upholding similar resentencing procedures utilized in Propositions 36 and 47. (*Id*. at pp. 262-263.)

C. SB 1437 does not violate Marsy's Law

Lamoureux also rejected the People's argument that section 1172.6 interfered with the victims' right, under Marsy's Law, to "a speedy trial and prompt and final conclusion of the case and any related post-judgment proceedings." (Cal. Const., art. I, § 28, subd. (b)(9).) The court observed that it was not the intent of SB 1437 to eliminate postjudgment proceedings, including certain procedural rights available to victims: "Both the Legislature and courts have recognized that victims may exercise these rights during postjudgment proceedings that existed at the time the

electorate approved Marsy's Law, as well as postjudgment proceedings that did not exist when Marsy's Law was approved. [Citations.] It would be anomalous and untenable for us to conclude, as the People impliedly suggest, that the voters intended to categorically foreclose the creation of any new postjudgment proceedings not in existence at the time Marsy's Law was approved simply because the voters granted crime victims a right to a 'prompt and final conclusion' of criminal cases. (Cal. Const., art. I, § 28, subd. (b)(9).)" (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 265, footnote omitted.)

The People also argued that section 1172.6 deprives victims of the right to have their safety and the safety of the public considered prior to granting a petition for relief. The court stated, however, that "the decision whether to vacate the murder conviction and resentence the petitioner is not the only determination required by section 1172.6. If a court rules a petitioner is entitled to vacatur of his or her murder conviction, it must then resentence the petitioner on any remaining counts. (*Id.*, subd. (d)(1).) During resentencing, the court may weigh the same sentencing factors it considers when it initially sentences a defendant, including whether the defendant presents 'a serious danger to society' and '[a]ny other factors [that] reasonably relate to the defendant or the circumstances under which the crime was committed.' (Cal. Rules of Court, rule 4.421(b)(1), (c).) At minimum, the trial court's ability to consider these factors during resentencing ensures the safety of the victim, the victim's family, and the general public are 'considered,' as required by Marsy's Law. (Cal. Const., art. I, § 28, subd. (b)(16).)" (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 266.)

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

Finally, *Lamoureux* rejected the People's argument that section 1172.6 violates the principle of double jeopardy because the statute permits the prosecution to present evidence during the resentencing process, and may interfere with the petitioner's right to due process and jury trial. The argument was summarily rejected: "[W]e need not decide these matters to resolve this appeal. The People are the individuals on whose behalf violations of criminal laws are prosecuted. [Citation.] But they do not represent the particularized interests of persons who have been accused of criminal offenses or petitioners seeking relief from convictions. Therefore, the People lack standing to challenge the hearing and remedy provisions of section 1170.95 based on any alleged infringement on petitioners' constitutional rights. [Citations.]" (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 267.)

APPENDIX I: TEXT OF SB 1437 AS AMENDED BY SB 775 AND AB 200

SECTION 1 [OF SB 1437].

The Legislature finds and declares all of the following:

(a) The power to define crimes and fix penalties is vested exclusively in the Legislative branch.

(b) There is a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides.

(c) In pursuit of this goal, in 2017, the Legislature passed Senate Concurrent Resolution 48 (Resolution Chapter 175, 2017–18 Regular Session), which outlines the need for the statutory changes contained in this measure.

(d) It is a bedrock principle of the law and of equity that a person should be punished for his or her actions according to his or her own level of individual culpability.

(e) Reform is needed in California to limit convictions and subsequent sentencing so that the law of California fairly addresses the culpability of the individual and assists in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual.

(f) It is necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.

(g) Except as stated in subdivision (e) of Section 189 of the Penal Code, a conviction for murder requires that a person act with malice aforethought. A person's culpability for murder must be premised upon that person's own actions and subjective mens rea.

SECTION 1 [OF SB 775].

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

(a) Clarifies that persons who were convicted of attempted murder or manslaughter under a theory of felony murder and the natural probable consequences doctrine are permitted the same relief as those persons convicted of murder under the same theories.

(b) Codifies the holdings of People v. Lewis (2021) 11 Cal.5th 952, 961-970, regarding petitioners' right to counsel and the standard for determining the existence of a prima facie case.

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

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

SECTION 2.

Section 188 of the Penal Code is amended to read:

188.
(a) For purposes of Section 187, malice may be express or implied.

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

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

(3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

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

SECTION 3.

Section 189 of the Penal Code is amended to read:

189.
(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287[17], 288, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

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

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

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

(1) “Destructive device” has the same meaning as in Section 16460.

(2) “Explosive” has the same meaning as in Section 12000 of the Health and Safety Code.

(3) “Weapon of mass destruction” means any item defined in Section 11417.

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

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

(1) The person was the actual killer.

(2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

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

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

SECTION 4.

Section 1170.95 [1172.6] is added to the Penal Code, to read:

1172.6 [AS ENACTED BY SB 1437, AMENDED BY SB 775, AND RENUMBERED BY AB 200]

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

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime, or attempted murder under the natural and probable consequences doctrine.

(2) The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX II: CHECKLIST FOR HEARING UNDER PEN. CODE, § 1172.6

I. PROPER VENUE FOR MOTION

The petition is filed in the court where the conviction occurred. (§ 1172.6, subd. (b)(1).)

II. ELIGIBILITY TO FILE PETITION

A. Petitioner was convicted of first or second degree murder, attempted murder or manslaughter by felony-murder rule and/or doctrine of natural and probable consequences. (§ 1172.6, subd. (a).)

B. "A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime, or attempted murder under the natural and probable consequences doctrine.." (§ 1172.6, subd. (a)(1).)

C. "The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder." (§ 1172.6, subd. (a)(2).)

D. "The petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1172.6, subd. (a)(3).)

III. REQUIRED CONTENT OF PETITION [Facial review]

A. "A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)." (§ 1172.6, subd. (b)(1)(A).)

B. "The superior court case number and year of the petitioner's conviction." (§ 1172.6, subd. (b)(1)(B).)

C. "Whether the petitioner requests the appointment of counsel." (§ 1172.6, subd. (b)(1)(C).)

D. "If any of the information required by [§ 1172.6, 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." (§ 1172.6, subd. (b)(2).)

IV. SERVICE OF THE PETITION (§ 1172.6, subd.(b)(1))

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

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

V. DETERMINATION OF PRIMA FACIE BASIS FOR RELIEF (§ 1172.6, subd. (c))

A. Appoint counsel if requested. (§ 1172.6, subd. (c).)

B. Set informal conference for potential resolution. (§ 1172.6, subd. (d)(2).)

C. Filing of response by prosecution (60 days) and reply by petitioner (30 days). (§ 1172.6, subd. (c).)

D. Set hearing to determine if prima facie basis for relief established. (§ 1172.6, subd. (c).)

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

2. If prima facie basis shown – issue order to show cause and set matter for hearing within 60 days of issuance of o.s.c., unless extended for good cause. (§ 1172.6, subd. (d)(1).)

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

VI. HEARING ON MERITS OF PETITION (S 1172.6, subd. (d))

A. **Burden of proof**: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019." "A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. (§ 1172.6, subd. (d)(3).)

B. **Evidence**: "The prosecutor and the petitioner may . . . offer new or additional evidence to meet their respective burdens." (§ 1172.6, subd. (d)(3).) Admission of evidence is governed by the Evidence Code, except:

1. The court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed.
2. The court may consider the procedural history of the case as recited in an appellate opinion.
3. Hearsay admitted at a preliminary hearing under section 872, subdivision (b) is inadmissible, unless admissible under another exception to the hearsay rule.

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

D. **Issues at the hearing**:

1. Whether petitioner was convicted with the use of the felony-murder rule or by the doctrine of natural and probable consequences.

2. Whether petitioner could be convicted of murder under the law after January 1, 2019, under any of the following theories:

   a. The petitioner was the actual killer, having killed the victim with malice aforethought.

   b. The petitioner was not the actual killer, but as a principal aided and abetted the commission of the murder.

   c. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was the actual killer.

   d. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree.

   e. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the petitioner was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2.

   f. In the commission or attempted commission of a designated felony listed in section 189, subdivision (a), in which a death occurred, the victim was a peace officer who was killed while in the course of his or her duties, where the petitioner knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

3. If prosecution does not meet burden of proof, grant relief (next section); if prosecution meets burden of proof, deny petition.

E. **If relief granted**:

1. Vacate murder conviction and any count-specific enhancement or allegation. (§ 1172.6, subd. (d)(3).)

2. Determine target offense (§ 1172.6, subd. (e))

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

2. From conviction of separate count in complaint.

3. From jury instructions.

4. From other available evidence, if the conviction resulted from a plea.

3. Consider referral to probation department for supplemental report.

4. Resentence petitioner on remaining counts "in the same manner as if the petitioner had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1172.6, 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. (§ 1172.6, subd. (h).)

6. Determine whether to impose up to two years of post-sentence parole. (§ 1172.6, subd. (h).)

7. Send copy of order and amended abstract of conviction to CDCR.

   Send disposition report to DOJ.