ACCOMPLICE LIABILITY FOR MURDER (SB 1437)

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Judge of the Superior Court
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ACKNOWLEDGMENTS

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

REVISIONS TO MEMORANDUM

In addition to non-substantive additions or corrections to the previous memorandum, the memorandum revised in June 2020 contains the following changes or additions:

Pages 19 – 20 – *P v. Gentile* – SB 1437 does not eliminate NPC for second degree murder; *P v. Lopez, P v. Munoz, P v. Dennis* – SB 1437 does eliminate NPC for murder; *P v. Medrano, P v. Sanchez* – SB 1437 eliminates NPC for attempted murder; *P v. Larios* – PC § 1170.95 does eliminate NPC for attempted murder

Page 23 – *P v. Lopez, P v. Munoz* – Section 1170.95 does not apply to attempted murder; *P v. Medrano* – Section 1170.95 applies to attempted murder.

Page 23 – *P v. Cervantes, P v. Flores, P v. Turner, P v. Larios, P v. Sanchez* – Section 1170.95 does not apply to voluntary manslaughter.

Pages 23 – 24 – *P v. Lee* – Provocative act doctrine.

Page 26 – *P v. Cervantes* – may not raise SB 1437 on direct appeal; must use Section 1170.95; *P v. Medrano* – may raise SB 1437 for attempted murder not final.

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I. INTRODUCTION

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), enacted by the Legislature and effective January 1, 2019, made substantial changes to the law relating to the liability of an accomplice under California's felony-murder rule and doctrine of natural and probable consequences.[1] The legislation has three primary components: (1) a restriction of 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 for certain persons convicted of murder under the law prior to January 1, 2019.

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

II. LAW PRIOR TO JANUARY 2019

"Murder" is defined in Penal Code,[2] section 187, subdivision (a), as "the unlawful killing of a human being, or a fetus, with malice aforethought." Malice "may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.)

A. First degree felony murder

Murder may be of the first or second degree: "All murder 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*,[3] 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

[1] Appendix I, *infra*, contains the full text of SB 1437.
[2] Unless otherwise indicated, all further statutory references are to the Penal Code.
[3] Section 288a has been amended and renumbered by SB 1494 as section 287, effective January 1, 2019.

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

B. Second degree felony murder

A defendant also may be convicted of second degree felony murder. The 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 in 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.)

"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 in original.) Accordingly, persons convicted of murder based on the doctrine of natural and probable consequences will be deemed to have been convicted of murder in the second degree.

The natural and probable 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 DATE OF SB 1437

SB 1437 was passed by the Legislature and signed by the governor on September 30, 2018. Because the legislation contains no form of a "savings clause" requiring a different effective date, the legislation 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, where the defendant has not been convicted and sentenced. (*In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).)

A. Effective date of resentencing provisions[5]

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

B. The application of *Estrada*

There remains the question of the proper application of SB 1437 to persons who have been found guilty by plea or jury prior to January 1, 2019, but whose cases are not final as of that date. The issue is whether the defendant will be entitled to an automatic dismissal of the homicide conviction and resentencing, or whether the defendant must first apply for dismissal through the provisions of section 1170.95. Whether the amendments made by SB 1437 are applied retroactively to crimes committed prior to January 1, 2019, depends on the application of the seminal case of *In re Estrada* (1965) 63 Cal.2d 740.

Estrada teaches that "[w]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology." (*Estrada*, supra, 63 Cal.2d at p. 745.)

Our Supreme Court has reviewed the application of *Estrada* in the context of two statutory schemes where the punishment for designated offenses was reduced and previously convicted persons were given an opportunity to be resentenced under the new law. *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*), addresses the retroactivity of Proposition 36, an amendment to the Three Strikes law; *People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*), addresses the retroactivity of Proposition 47, a reduction in the punishment of certain drug and property offenses. The position of the court is best summarized in *DeHoyos* at pages 601-603:

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

"In the decades since *Estrada* was decided, we have clarified that the absence of an express savings clause does not necessarily resolve the question whether a lawmaking body intended a statute reducing punishment to apply retrospectively. '[W]hile such express statements unquestionably suffice to override the Estrada presumption,' we have explained, 'the "absence of an express saving clause . . . does not end 'our quest for legislative intent.' " ' [Citation.] This is because '[o]ur cases do not "dictate to legislative drafters the forms in which laws must be written" to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require "that the [legislative body] demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it." ' [Citation.]

"Proposition 47 contains no express savings clause. It does, however, address the question of retrospective application in conspicuous detail. Separate provisions articulate the conditions under which the new misdemeanor penalty provisions apply to completed sentences [citation], sentences still being served [citation], and sentences yet to be imposed [citations]. The question is whether these provisions sufficiently demonstrate the electorate's intent concerning whether defendants who were sentenced before Proposition 47's effective date, but whose judgments were not yet final, are entitled to automatic resentencing, or must instead petition for resentencing under section 1170.18.

"We considered a similar question in *Conley* . . . . That case concerned the Three Strikes Reform Act of 2012 (Prop. 36 . . .), which prospectively ameliorated sentencing under the statutes collectively known as the 'Three Strikes' law. [Citation.] The Reform Act also offered a possibility of resentencing to third strike prisoners who were currently serving indeterminate life terms for offenses that, if committed after the Act's effective date, would no longer support life terms. The Act's resentencing provision, Penal Code section 1170.126, permitted '[a]ny person serving an indeterminate term of life imprisonment . . . [to] file a petition for a recall of sentence . . . [and] to request resentencing in accordance with' the new, ameliorated penalty provisions. [Citation.] This statute, like Proposition 47's resentencing provision (§ 1170.18), also conditioned relief on the court's determination whether resentencing 'would pose an unreasonable risk of danger to public safety.' [Citation.]

"The issue in *Conley* . . . was whether life prisoners whose judgments were not final on the Reform Act's effective date could obtain relief only under the Act's resentencing provision [citation], or whether they were entitled to be resentenced automatically because of the *Estrada* presumption that laws ameliorating punishment apply to nonfinal sentences. We concluded that the resentencing provision was the exclusive avenue for resentencing of persons who had been sentenced before Proposition 36's effective date. Three considerations led us to this conclusion.

"First, we explained, 'unlike the statute at issue in *Estrada* . . . , the Reform Act [was] not silent on the question of retroactivity. Rather, the Act expressly addresse[d] the

question in [its resentencing provision], the sole purpose of which is to extend the benefits of the Act retroactively.' [Citation.] That provision, we noted, 'dr[ew] no distinction between persons serving final sentences and those serving nonfinal sentences, entitling both categories of prisoners to petition courts for recall of sentence under the Act.' [Citation.] Moreover, we explained, 'the nature of the [Reform Act's] recall mechanism and the substantive limitations it contains call[ed] into question the central premise underlying the Estrada presumption,' namely, that the lawmaking body had 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' [Citation.] We emphasized that, instead of mandating lesser punishment in all cases, voters had conditioned relief on a judicial assessment of the risk that resentencing would pose to public safety. [Citation.] Finally, we noted, our understanding of the recall mechanism was reinforced by consideration of the remainder of the statutory scheme. We noted the sentencing provisions of the Reform Act had established a new set of factors related to the nature of the defendant's current offense that must be ' "plead[ed] and prov[ed]" by the prosecution.' [Citation.] The Reform Act did not, however, specify how that requirement was to be satisfied in the case of a defendant who had already been sentenced. This omission, we concluded, reinforced the conclusion that voters had not contemplated that previously sentenced defendants would be resentenced automatically under these new sentencing procedures, but instead contemplated that such defendants would seek relief under the Reform Act's resentencing provision, which contained no comparable pleading-and-proof requirements. [Citation.]

"Similar considerations lead us to a similar conclusion in this case. Like the Reform Act, Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the statute's benefits retroactively. [Citation.] Those provisions include, as relevant here, a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. [Citation.] Like the parallel resentencing provision of the Reform Act, section 1170.18 draws no express distinction between persons serving final sentences and those serving nonfinal sentences, instead entitling both categories of prisoners to petition courts for recall of sentence. [Citation.] And like the resentencing provision of the Reform Act, section 1170.18 expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' [Citations.]

"Proposition 47, unlike the Reform Act, does not create new sentencing factors that the prosecution must 'plead[ ] and prove[ ]' [citation] to preclude a grant of leniency. We can therefore draw no inferences from the omission of any provision addressing the application of such a pleading-and-proof requirement to individuals who have already been sentenced, as we did in Conley. But our conclusion is strongly reinforced by other indicia of legislative intent. In enacting Proposition 47, voters declared their purpose to

> '[r]equire a thorough review of criminal history and risk assessment of *any individuals* before resentencing to ensure that they do not pose a risk to public safety.' [Citation.] The breadth of this statement of purpose indicates an intent to apply the provisions of section 1170.18, including its risk assessment provision, to all previously sentenced defendants who had not yet completed their sentences, and not just to those whose judgments had become final on direct review. [Citation.]"

Nothing in SB 1437 suggests the issue of its retroactive application would be decided any differently than for Propositions 36 and 47. It is clear that SB 1437 has considerable similarity to Propositions 36 and 47. Like the propositions, it is a statute that changes the level of criminal responsibility for a given act – indeed, certain conduct previously constituting the crime of murder may no longer serve as a basis for a murder conviction. Like Propositions 36 and 47, SB 1437 contains a detailed resentencing provision applicable to persons previously convicted of murder under designated theories. And, like the propositions, SB 1437 contains no "savings clause" that prescribes a particular effective date.

Of course, there also are some clear differences between the statute and the propositions. Unlike the propositions which reduce the punishment for designated crimes, SB 1437 actually eliminates a conviction of murder based on particular circumstances. Also, unlike the propositions, the resentencing provisions of SB 1437 do not require the court to consider the question of the defendant's dangerousness before granting relief.

However, it does not appear these differences are material. Resentencing under section 1170.95 is not automatic. The petitioner first must establish a prima facie basis for relief under the statute. (§ 1170.95, subd. (c).) Even if the prima facie basis for relief is established, the prosecution must be given an opportunity at a hearing to establish the legitimacy of the conviction irrespective of the statutory changes. (§ 1170.95, subd. (d)(1), (3).) These requirements strongly suggest the Legislature did not intend to retroactively apply the new provisions of sections 188 and 189 such that a previously convicted person is automatically entitled to resentencing. Accordingly, based on the Supreme Court's analysis of retroactivity in *DeHoyos* and *Conley*, it does not appear that *Estrada* applies to persons convicted of murder under the law prior to January 1, 2019, but whose cases are not final as of that date. Such persons likely must petition for relief under section 1170.95.

People v. Frandsen (2019) 33 Cal.App.5th 1126, 1142, in footnote 3, briefly addressed the retroactive application of SB 1437: "[SB 1437] amends section 188, subdivision (a)(3) to read: 'Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.' This statutory amendment brings into question the ongoing viability of second degree felony murder in California. The parties have not raised this issue, however, and we need not address it because it does not appear the Legislature intended for this amendment to apply retroactively. (§ 3 [' "No part of [the Penal Code] is retroactive, unless expressly so declared." ']; *People v. Brown* (2012) 54 Cal.4th 314, 319 . . . .)"

IV. AMENDMENT OF FELONY-MURDER RULE

SB 1437 amends Section 189 in the following material respects:

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287[6], 288, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

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

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

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

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

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

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

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

(1) The person was the actual killer.

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

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

(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.

C. The new felony-murder rule

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

(1) The defendant is the actual killer;

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

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

(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.

D. Exceptions to new rule

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

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

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

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

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

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

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

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

a. Major participant

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

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

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

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

- "[I]t is significant to note there is significant overlap 'between the two elements, being a major participant, and having reckless indifference to human life, . . . "for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life." [Citation.]' [Citation.] 'The high court [in *Tison*] also stated: "Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding." [Citation.] In *Banks*, we observed that *Tison* did not specify "those few felonies for which any major participation would 'necessarily exhibit[ ] reckless indifference to the value of human life.' " ' [Citation.] We surmised a possible example would be "the manufacture and planting of a live bomb." [Citation.] Yet we also concluded that armed robbery, by itself, did not qualify. [Citation.]' [Citation.]" (*In re Bennett* (2018) 26 Cal.App.5th 1002, 1015–1016 (*Bennett*).)

b. Reckless indifference to human life

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

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

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

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

The only exception to the new felony-murder rule is when the victim of the homicide is a peace officer: "Subdivision (e) does not apply to a defendant when the victim is a peace officer who was killed while in the course of his or her duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties." (§ 189, subd. (f).) If the defendant is a participant in one of the designated crimes and in the course of committing the felony a peace officer is killed, the defendant may be convicted of first degree felony murder without any additional showing of malice or premeditation. (See *Dillon, supra,* 34 Cal.3d 441*; Chavez*, *supra,* 118 Cal.App.4th 379.) 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.

IV. ELIMINATION OF THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

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

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

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

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

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

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

Section 1 of SB 1437 provides, in part:

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

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

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

The continued use of NPC conflicts directly with the intent of SB 1437 as stated in its preamble. *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).)

People v. Lopez (2019) 38 Cal.App.5th 1087 (*Lopez*), holds SB 1437 eliminates the liability for murder under the NPC doctrine. The court explained: "SB 1437 significantly restricted potential aider and abettor liability, as well as coconspirator liability, for murder under the natural and probable consequences doctrine, effectively overruling Chiu insofar as it upheld second degree murder convictions based on that theory. Now, rather than an objective, reasonable foreseeability standard, as discussed in Prettyman and Chiu, pursuant to new section 188, subdivision (a)(3), to be guilty of murder other than as specified in section 189, subdivision (e), concerning felony murder, the subjective mens rea of 'malice aforethought' must be proved: '[T]o be convicted of murder, a principal in a crime shall act with malice aforethought.' (See also SB 1437 (Stats. 2018, ch. 1015, § 1, subd. (g) ['[a] person's culpability for murder must be premised upon that person's own actions and subjective mens rea'].) And that required element of malice 'shall not be imputed to a person based solely on his or her participation in a crime.' (§ 188, subd. (a)(3).)" (*Lopez* at p. 1103.) Generally in accord with *Lopez* is *People v. Munoz* (2019) 39 Cal.App.5th 738. *Lopez* and *Munoz* have been granted review by the Supreme Court. Generally in accord with *Lopez* and *Munoz* is *People v. Dennis* (2020) 47 Cal.App.5th 838.

People v. Gentile (2019) 35 Cal.App.5th 932 (*Gentile*), which the Supreme Court granted review and ordered not to be published, held SB 1437 does not eliminate the application of NPC to second degree murder. The holding was based on the court's application of *Chiu*: "Contrary to defendant's interpretation, section 189, subdivision (e) does not eliminate all murder liability for aiders and abettors. To the contrary, the amendment expressly provides for both first and second degree murder convictions under appropriate circumstances. Defendant's construction would therefore conflict not only with the plain language of the statute, but also with the holding of *Chiu*, which also held that '[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles.' [Citations.] Considering the statement in *Chiu*, holding that under the natural and probable consequences theory, punishment for second degree murder is commensurate with a defendant's culpability, neither the Supreme Court nor the Legislature intended to relieve an aider-abettor entirely of liability for murder." (*Gentile*, at p. 792.)

People v. Medrano (2019) 42 Cal.App.5th 1001 (*Medrano*), holds that SB 1437 eliminated the use of NPC to establish the crime of attempted murder: "[W]e conclude Senate Bill 1437 precludes any imposition of vicarious liability under the natural and probable consequences doctrine if the charged offense requires malice aforethought. Because malice cannot be imputed to a defendant who aids and abets a target offense without the intent to kill, the natural and probable consequences doctrine is no longer a viable theory of accomplice liability for attempted murder. Put differently, since 'implied malice cannot support a conviction of an attempt to commit murder' [citations], the current version of section 188 requires proof the aider and abettor acted with the intent to kill while aiding and abetting the target offense." (*Medrano*, at p. 1013.) *Medrano* has been granted review. Generally in accord with *Medrano* is *People v. Sanchez* (2020) 46 Cal.App.5th 637. *People v. Larios* (2019) 42 Cal.App.5th 956 (*Larios*), concludes SB 1437 abrogated the NPC doctrine as a basis for attempted murder and

section 1170.95 does not apply to attempted murder. *Larios* and *Sanchez* have been granted review by the Supreme Court.

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

V. 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."[7] (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 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

[7] 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.

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

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

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

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

- The defendant may be found guilty of first degree felony murder under section 189 if he commits or attempts to commit one of the designated felonies if it is proven *either* that (1) the defendant is the actual killer; (2) the defendant is not the actual killer, but with the intent to kill, aids the actual killer in the commission of the murder; *or* (3) the defendant is a major participant in the underlying crime and acts with reckless indifference to human life – *any one* of the proven circumstances will be sufficient for a first degree murder conviction based on the felony-murder rule.

- The defendant may receive the death penalty or life without parole pursuant to section 190.2, subdivision (d), if he commits or attempts to commit one of the designated felonies and it is proven in doing so the defendant (1) acts with reckless indifference to human life; *and* (2) the defendant as a major participant in the underlying crime, aids in the commission of the designated crime – *both* circumstances must be established. Note also that under section 190.2, subdivision (d), there is no requirement the defendant aid in the commission of the murder with the intent to kill.

C. Special findings by jury

Prior to the enactment of SB 1437, it has long been established that jurors need not agree on the particular theory under which the defendant is guilty of first degree murder. " 'It is settled . . . that "in a prosecution for first degree murder it is not necessary that all jurors agree on one or more of several theories proposed by the prosecution; it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant is guilty of first degree murder as that offense is defined by statute." [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.

VI. PETITION FOR RESENTENCING (§ 1170.95)[8]

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

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

1. Persons currently serving a term for murder

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

Appellate courts are divided on the question of whether the right to file a petition applies to attempted murder. *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103-1107; and *People v. Munoz* (2019) 39 Cal.App.5th 738, 753-760, conclude the statutory remedy is not available to persons convicted only of attempted murder. In contrast, *People v. Medrano* (2019) 42 Cal.App.5th 1001, 1008, concludes the remedy is available to persons convicted of attempted murder. *Lopez, Munoz* and *Medrano* have been granted review by the Supreme Court.

Appellate courts are in agreement that section 1170.95 does not apply to convictions for voluntary manslaughter, even when the conviction resulted from a plea down from the charge of murder. (*People v. Cervantes* (2020) 44 Cal.App.5th 884, 887; *People v. Flores* (2020) 44 Cal.App.5th 985; *People v. Turner* (2020) 45 Cal.App.5th 428; *People v. Larios* (2019) 42 Cal.App.5th 956; *People v. Sanchez* (2020) 46 Cal.App.5th 637 [*Larios* and Sanchez have been granted review by the Supreme Court].)

People v. Lee (2020) 49 Cal.App.5th 254 (*Lee*), held a petition filed under section 1170.95 was properly summarily denied because the defendant was convicted of murder based on the provocative act doctrine. As Lee explained: 'The provocative act

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

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

2. Persons who have completed their sentence

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

B. Filing period; date of conviction

Section 1170.95 does not impose any filing deadline, nor does it have any restriction based on the date of conviction. The petition may be filed at any time after January 1, 2019, the effective date of SB 1437[9], regardless of the age of the crime or conviction.

C. Cases on appeal

People v. Martinez (2019) 31 Cal.App.5th 719 [*Martinez*] and *People v. Anthony* (2019) 32 Cal.App.5th 1102 [*Anthony*], hold that the changes made by SB 1437 are not cognizable on direct appeal, but must first be raised by a petition for resentencing brought in the trial court pursuant to section 1170.95. Both cases relied extensively on the Supreme Court decisions in *People v. Conley* (2016) 63 Cal.4th 646, regarding Proposition 36, and *People v. DeHoyos* (2018) 4 Cal.5th 594, regarding Proposition 47.

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

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

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. Medrano (2019) 42 Cal.App.5th 1001 (*Medrano*) holds persons convicted of attempted murder are excluded from the procedures allowed in section 1170.95 but are entitled to the application of SB 1437 under *Estrada*. "Here, there is no clear indication in Senate Bill 1437 or the resulting statutory amendments that the Legislature only intended to provide prospective relief for the ameliorative changes to the law such that a defendant's nonfinal attempted murder conviction would be exempt from relief on appeal. While section 1170.95 expands the scope of relief to defendants convicted of felony murder or murder under the natural and probable consequences theory to those whose judgments are final, it in no way limits retroactive relief to defendants convicted of attempted murder under the natural and probable consequences theory whose convictions are not final." (*Medrano*, at pp. 1018-1019.) *Medrano* has been granted review by the Supreme Court.

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*, 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*, at p. 1156.)

Based on *Awad, Scarbrough* and *Martinez*, it seems likely a defendant who is potentially eligible for relief under section 1170.95 could request a limited remand for resentencing or a stay of the sentence imposed on the murder conviction pending the motion for resentencing. While Proposition 47 motions for resentencing only involve the *reduction* of a felony charge, whereas motions brought under section 1170.95 potentially involve the *dismissal* of a felony charge, there does not appear to be a material difference in the two resentencing motions, at least for the purpose of obtaining permission of the appellate court for a limited remand of the case or a stay of the sentence. Certainly it may be of value to all parties and the court to determine the proper level of a defendant'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*, at p. 1081.)

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

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

> (1) "A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine." (§ 1170.95, subd. (a)(1).) Proof of this requirement is made simply by showing a pleading was filed charging the defendant with murder. Since the prosecution is not required to specify in the pleadings the theory under which the defendant is being prosecuted for murder, the prosecution is allowed to merely charge a generic violation of section 187. Simply making the allegation of murder "allows" the prosecution to pursue a conviction based on any theory, including felony murder and/or the NPC doctrine.
>
> (2) "The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder." (§ 1170.95, subd. (a)(2).) This requirement has two parts: (1) the defendant was convicted of first or second degree murder following a trial; or (2) the defendant accepted a plea offer to the crime of murder in lieu of a trial where he could have been convicted of first or second degree murder. Under the first provision, it is sufficient to show the fact of the conviction of murder; it is not necessary to establish the theory under which the murder conviction was obtained. The scope of the second provision is less clear. It seems to suggest a petitioner may show he accepted a plea offer to a lesser crime in a case where he could have been convicted of first or second degree murder. In other words, it may be argued that a petitioner, charged with murder, who accepts a plea to manslaughter, may have met this requirement. However, the conditions specified in section 1170.95, subdivision (a), must be squared with the opening language of the statute: "A person *convicted of felony murder or murder under a natural and probable consequences* theory may file a petition . . . ." [§ 1170.95, subd. (a), italics added.] The more likely interpretation of subdivision (a)(2) is that it offers relief both to persons who are convicted of first or second degree murder after a trial, as well as those who are convicted of first or second degree murder based on a plea. Indeed, section 1170.95 has been held not to apply to convictions for voluntary manslaughter, even when the conviction resulted from a plea down from the charge of murder. (*People v. Cervantes* (2020) 44 Cal.App.5th 884, 887.)
>
> (3) "The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(3).) In other words, for resentencing to be granted, it must be established that the defendant could not have been convicted of murder under the law as it reads after January 1, 2019. As discussed above, the only changes made by SB 1437 to sections 188

and 189 regard the liability of certain accomplices under first degree felony murder, the application of NPC, and, likely, conviction of second degree felony murder. Accordingly, relief must be granted if the only way to have convicted the defendant of murder was through first degree felony murder, NPC, and, likely, second degree felony murder as they existed prior to January 1, 2019.

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

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

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

(1) "A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)." (§ 1170.95, subd. (b)(1)(A).)

(2) "The superior court case number and year of the petitioner's conviction." (§ 1170.95, subd. (b)(1)(B).)

(3) "Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1)(C).)

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

"The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted." (§ 1170.95, subd. (b)(1).)

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

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

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

The court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) "If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (*Ibid*.)

In applying the mandate of section 1170.95, subdivision (c), appellate courts have identified three steps leading to the issuance of an order to show cause: "an initial review to determine the facial sufficiency of the petition; a prebriefing, 'first prima facie review' to preliminarily determine whether the petitioner is statutorily eligible for relief as a matter of law; and a second, postbriefing prima facie review to determine whether the petitioner has made a prima facie case that he or she is entitled to relief. ([Citations]; *People v. Drayton* (2020) 47 Cal.App.5th 965, 975–976 [§ 1170.95 provides for two separate prima facie reviews, with the first focused on eligibility for relief and the second on entitlement to relief].) (*People v. Tarkington* (2020) ___ Cal.App.5th ___ [B296331](*Tarkington*).)

1. Facial sufficiency of the petition

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

(a) "A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)." (§ 1170.95, subd. (b)(1)(A).) Likely it will be sufficient that the petitioner, in summary fashion, simply alleges the statutory basis of eligibility: "I hereby declare that I am eligible for relief under this section based on all of the requirements of section 1170.95, subdivision (a)." Nothing in section 1170.95 requires the defendant to declare the specific facts under which he contends he is entitled to relief.

(b) "The superior court case number and year of the petitioner's conviction." (§ 1170.95, subd. (b)(1)(B).)

(c) "Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1)(C).)

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

People v. Torres (2020) 46 Cal.App.5th 1168 (*Torres*) holds the jury's finding on a special circumstance allegation—a part of the record of conviction—was properly considered by the trial court in determining whether the petitioner made a prima facie 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.)

2. Preliminary review of *eligibility* for resentencing

The second step is for the court to conduct a prebriefing preliminary review of the prima facie basis for relief. As explained in *Tarkington* at page ___: "[A] prebriefing 'first prima facie review,' is a 'preliminary review of statutory eligibility for resentencing, akin to the procedure employed in a Proposition 36 or Proposition 47 context. [Citations.] The court must determine, based upon its review of readily ascertainable information in the record of conviction and the court file, whether the petitioner is statutorily eligible for relief as a matter of law, i.e., whether he was convicted of first or second degree murder based on a charging document that permitted the prosecution to proceed under the natural and probable consequences doctrine or a felony murder theory. [Citation.] If not, the court can dismiss any petition filed by an ineligible individual. [Citation.] 'The court's role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner.' [Citation.]"

Nothing in the statute precludes the court at this early stage from conducting its own review of other readily available information such as the court's file. It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains

sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or NPC, or just the target non-homicide crime, it would be entirely appropriate to summarily deny the petition based on the petitioner's failure to establish even a prima facie basis of eligibility for resentencing.

The right to appointed counsel does not arise until *after* the court determines the petitioner has meet the prima facie showing necessary for *eligibility* for relief. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137–1138; *People v. Drayton* (2020) 47 Cal.App.5th 965; *Lewis* has been granted review by the Supreme Court.)

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.)[10]

People v. Lewis (2020) 43 Cal.App.5th 1128, 1137–1138 (*Lewis*), held it was appropriate for the trial court to consider the court's file and record of conviction in determining whether the petitioner met his burden of stating a prima facie basis for relief. The court explained that if the petitioner did not meet this initial burden, the trial court could properly summarily deny the petition without even appointing counsel. *Lewis* has been granted review by the Supreme Court.

People v. Verdugo (2020) 44 Cal.App.5th 320 (*Verdugo*), upheld the trial court's use of the record of conviction, including the appellate opinion, in summarily denying a petition under section 1170.95: "Although subdivision (c) does not define the process

[10] The sponsors of SB 1437 take the position that the court has no discretion to summarily deny a facially deficient petition for resentencing, and that the prosecution must file a response in every instance. The sponsors find support for such an interpretation in the bill's legislative history. The Judicial Council, for example, had requested an amendment to specifically permit summary denial when a prima facie basis was not shown—the Legislature, however, did not make the amendment. Merely because the Legislature did not include the requested language does not mean the courts lack the authority to conduct a preliminary screening. Consideration of the Judicial Council request was expressly rejected in *People v. Tarkington* (2020) ___ Cal.App.5th ___ [B296331] because there was no showing in the legislative history that the Legislature ever considered the issue.

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.

People v. Drayton (2020) 47 Cal.App.5th 965 (*Drayton*), describes two points in the process where the petitioner is required to make a prima facie showing for relief. The first showing is that petitioner is *eligible* for relief; the second showing is that petitioner is *entitled* to relief. "Section 1170.95(c) twice uses the phrase 'prima facie showing.' Courts of Appeal have inferred from the structure of the provision that section 1170.95(c) contemplates two separate assessments by the trial court of a prima facie showing: one focused on 'eligibility' for relief and the second on 'entitlement' to relief. As the Second District Court Appeal stated in Verdugo, '[s]ubdivision (c) [ ]prescribes two [ ] court reviews before an order to show cause may issue, one made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief.' (Verdugo, supra, 44 Cal.App.5th at p. 328, 257 Cal.Rptr.3d 510; see also Lewis, supra, 43 Cal.App.5th at p. 1140, 257 Cal.Rptr.3d 265 ['We construe the requirement to appoint counsel as arising in accordance with the sequence of actions described in section 1170.95 subdivision (c); that is, after the court determines that the petitioner has made a prima facie showing that petitioner "falls within the provisions" of the statute, and before the submission of written briefs and the court's determination whether petitioner has made "a prima facie showing that he or she is entitled to relief." '].) [¶] By its text, section 1170.95(c) thus requires the trial

court to make two assessments. The first is whether the petitioner has made a prima facie showing of *eligibility for* relief. A petitioner is eligible for relief if he or she makes a prima facie showing of the three criteria listed in section 1170.95(a)—namely he or she (1) was charged with murder 'under a theory of felony murder or murder under the natural and probable consequences doctrine,' (2) was convicted of first or second degree murder, and (3) can no longer be convicted of first or second degree murder 'because of changes to Section 188 or 189 made effective January 1, 2019.' (§ 1170.95(a)); Verdugo, supra, 44 Cal.App.5th at p. 329, 257 Cal.Rptr.3d 510; see also § 1170.95, subd. (b)(1)(A)[stating the petition must 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)'].) For example, Courts of Appeal have affirmed the trial court's summary denial of petitions based on a finding that petitioner could not make a prima facie showing of eligibility where the petitioner was convicted of a crimes not listed in section 1170.95(a), such as manslaughter. (E.g., *Flores*, *supra*, 44 Cal.App.5th at pp. 990, 993, 258 Cal.Rptr.3d 205.)" (*Drayton*, at pp. 975-976; footnote omitted; italics in original.)

People v. Offley (2020) 48 Cal.App.5th 588 (*Offley*), discusses the circumstances where the defendant 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. (Beltran, supra, 56 Cal.4th at p. 941, 157 Cal.Rptr.3d 503, 301 P.3d 1120.) Implied malice also involves a mental component, namely a ' "conscious disregard for the danger to life that the [defendant's] act poses." ' (Id. at pp. 941–942, 157 Cal.Rptr.3d 503, 301 P.3d 1120.) 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." ' (People v. Jimenez (2015) 242 Cal.App.4th 1337, 1358, 197 Cal.Rptr.3d 1.) [¶] 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.' (People v. Lucero(2016) 246 Cal.App.4th 750, 759, 201 Cal.Rptr.3d 207.) 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. (Id. at pp. 759–760, 201 Cal.Rptr.3d 207; In re Tameka C.(2000) 22 Cal.4th 190, 198, 91 Cal.Rptr.2d 730, 990 P.2d 603.) 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*, 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*, at pp. 599-600.)

People v. Smith (2020) 49 Cal.app.5th 85 (*Smith*), holds a jury's finding that the defendant was a "major participant" in an underlying robbery and acted with "reckless indifference to human life" did not preclude the defendant 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 p. ___.) Since the facts of defendant's conduct could not be determined as a matter of law, the trial court errored in not providing the defendant 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*, at p. ___; footnote omitted.)

Prima facie basis not shown

In *People v. Lewis (2020)* 43 Cal.App.5th 1128, the court affirmed the summary denial of a section 1170.95 petition where a prior appellate decision found the petitioner directly aided and abetted the actual killer in the commission of the homicide. The court

explained: "In our prior opinion, we agreed with defendant that the trial court erred in instructing the jury on the natural and probable consequences doctrine. [Citation.] We explained that we were required to reverse the judgment ' "unless there is a basis in the record to find that the verdict was based on a valid ground." ' [Citation.] The only ' "valid ground" ' available to the jury was the prosecution's alternative theory that defendant acted as a direct aider and abettor. We concluded that the evidence that defendant 'directly aided and abetted [the perpetrator] in the premeditated murder . . . is so strong' that the instructional error was harmless 'beyond a reasonable doubt.' [Citation.] Stated differently, we held that the record established that the jury found defendant guilty beyond a reasonable doubt on the theory that he directly aided and abetted the perpetrator of the murder. The issue whether defendant acted as a direct aider and abetter has thus been litigated and finally decided against defendant. [Citation.] This finding directly refutes defendant's conclusory and unsupported statement in his petition that he did not directly aid and abet the killer, and therefore justifies the summary denial of his petition based on the authorities and policy discussed above. [Citation.]" (*Lewis*, at pp. 1138–1139.) *Lewis* has been granted review by the Supreme Court.

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

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

In *People v. Edwards* (2020) 48 Cal.App.5th 666, the court upheld the trial court's summary denial of the petition under section 1170.95 that was based on a review of the record of conviction. Such a review showed as a matter of law petitioner was not charged with or convicted of second degree felony murder or murder under the natural or probable consequences doctrine.

3. Evaluation of *entitlement* to resentencing

The third step is for the court to conduct a postbriefing review of the petitioner's *entitlement* to resentencing.

Because there will be briefing by the parties, the petitioner would be entitled to appointed counsel if requested. Although most prison inmates are indigent, not all are without any assets. Prior to appointment of counsel at public expense, the court may wish to conduct at least a cursory review of the petitioner's financial status.

The process is explained in *Tarkington* at page ___: "'Because the court is only evaluating whether there is a prima facie showing the petitioner falls within the provisions of the statute, . . . if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction,' evaluation of the petition proceeds to the 'second prima facie review,' in which 'the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief.' [Citation.] In this second prima facie evaluation, the court employs the familiar standard for issuance of an order to show cause in a habeas corpus proceeding. That is, the court must take petitioner's factual allegations as true and make a preliminary assessment regarding whether he or she would be entitled to relief if the factual allegations were proved. ([Citation]; *People v. Drayton*, *supra*, 47 Cal.App.5th at p. 980 [when evaluating whether petitioner has made a prima facie showing of entitlement to relief, court cannot weigh evidence or make credibility determinations, but need not credit factual assertions that are untrue as a matter of law].)"

Drayton concludes, although it is not a perfect analogy, that the law relating to the court's review of a petition for writ of habeas corpus provides the proper guidance in determining whether the petitioner has met the prima facie showing required in section 1170.95, subd. (c), at least as to the *entitlement* to relief. "[W]ith respect to the trial court's assessment of whether the petitioner has made a prima facie showing of entitlement to relief under section 1170.95(c), we conclude habeas corpus procedures are sufficiently similar to provide a reasonable construction of the meaning of the relevant language in subdivision (c). (See Verdugo, supra, 44 Cal.App.5th at p. 328, 257 Cal.Rptr.3d 510.) [¶] Using the habeas corpus procedures as a guide to the legislative intent with respect to the court's review of the ' "prima facie showing that [the petitioner] is entitled to relief" ' under section 1170.95(c), we conclude that, when assessing the prima facie showing, the trial court should assume all facts stated in the section 1170.95 petition are true. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328, 257 Cal.Rptr.3d 510.) The trial court should not evaluate the credibility of the petition's assertions, but it need not credit factual assertions that are untrue as a matter of law—for example, a petitioner's assertion that a particular conviction is eligible for relief where the crime is not listed in subdivision (a) of section 1170.95 as eligible for resentencing. Just as in habeas corpus, if the record 'contain[s] facts refuting the allegations made in the petition ... the court is justified in making a credibility determination adverse to the petitioner.' (Serrano, supra, 10 Cal.4th at p. 456, 41 Cal.Rptr.2d 695, 895 P.2d 936.) However, this authority to make determinations without conducting an evidentiary hearing pursuant to section 1170.95, subd. (d) is limited to readily ascertainable facts from the record (such as the crime of conviction), rather than

factfinding involving the weighing of evidence or the exercise of discretion (such as determining whether the petitioner showed reckless indifference to human life in the commission of the crime). [¶] If, accepting the facts asserted in the petition as true, the petitioner would be entitled to relief because he or she has met the requirements of section 1170.95(a), then the trial court should issue an order to show cause. (§ 1170.95(c).) Once the trial court issues the order to show cause under section 1170.95(c), it must then conduct a hearing pursuant to the procedures and burden of proof set out in section 1170.95, subd. (d) unless the parties waive the hearing or the petitioner's entitlement to relief is established as a matter of law by the record. (§ 1170.95, subd. (d)(2).) Notably, following the issuance of an order to show cause, the burden of proof will shift to the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).)" (*Drayton*, at pp. 980-981.)

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

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

Even if the prosecution fails to file a response, nothing in section 1170.95 precludes the court from requesting further information or an informal response from the 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."

4. 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 section I, *infra*.

5. Informal handling of petition by stipulation

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

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

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

Such a jury finding was 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 defendant's participation in the crime began before or during the killing, (2) the defendant was a major participant in the crime and (3) the defendant

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*, at p. 419.)

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

In *Torres, supra*, (2020) 46 Cal.App.5th 1168, the court held the petitioner was not barred from relief even though the jury found he was a major participant who acted with reckless indifference to human life. The court explained: "[O]ur Supreme Court's decisions, clarifying what it means for an aiding and abetting defendant to be a 'major participant' in an underlying felony and to act with 'reckless indifference to human life,' construed section 190.2 in a significantly different, and narrower manner than courts had previously construed the statute. Both cases were decided over a decade after the jury made its findings in Torres's case. *Banks, supra*, 61 Cal.4th 788, which elucidated the meaning of 'major participant,' was decided in 2015, and *Clark, supra*, 63 Cal.4th 522, which addressed the meaning of 'reckless indifference to human life,' was decided in 2016. Accordingly, in determining if Torres could be convicted today of first-degree murder, we cannot simply defer to the jury's pre-*Banks* and *Clark* factual findings that Torres was a major participant who acted with reckless indifference to human life as those terms were interpreted at the time. As we stated in *In re Miller* (2017) 14 Cal.App.5th 960 (*Miller*), '[a] [d]efendant's claim that the evidence presented against him failed to support [a] robbery-murder special circumstance [finding made prior to *Banks* and *Clark*] . . . is not a "routine" claim of insufficient evidence.' [Citation.] The 'claim does not require resolution of disputed facts; the facts are a given.' [Citation.] The question is whether they are legally sufficient in light of *Banks* and *Clark*. [Citation.]" (*Torres*, at p. 1179.)

7. **Deadline for determining prima facie basis**

Section 1170.95 does not specify a deadline for the court's determination of the prima facie basis for relief. The prosecution has 60 days to file a response and petitioner an additional 30 days to file a reply. (§ 1170.95, subd. (c).) There is nothing in section 1170.95 that resembles California Rules of Court, rule 4.551(a)(3)(A), which requires a ruling on a habeas petition within 60 days. However, because the statute establishes a number of deadlines for filing of pleadings and setting of a hearing, it may be fairly inferred that the Legislature expects these petitions to be handled expeditiously,

depending on the extent and availability of the information necessary to determine whether the petitioner has shown a prima facie basis for relief.

8. Ruling by the court

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

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

I. Setting of hearing (§ 1170.95, subd. (d)(1))

If the court finds the petitioner has shown a prima facie basis for relief, the court must set a hearing on the merits of the petition within 60 days after the order to show cause is issued. The setting may be later on a showing of good cause. (§ 1170.95, subd. (d)(1).)

J. Hearing on the grounds for relief

1. Burden of proof

"At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (§ 1170.95, subd. (d)(3).) In other words, the petitioner is eligible for resentencing unless the prosecution establishes beyond a reasonable doubt petitioner could have been convicted of first or second degree murder after the changes to sections 188 and 189 made by SB 1437. (§ 1170.95, subd. (a)(3).) If the prosecution establishes conviction could occur under any one of the six remaining valid theories of murder, the petition should be denied. (See discussion, *infra*.) This differs from the standard established in *People v.Chiu* (2014) 59 Cal.4th 155, 166-167,

which requires reversal unless the reviewing court concludes "beyond a reasonable doubt that the jury based its verdict on [a] legally valid theory." *Chiu* would require the prosecution to prove the right theory *did* apply; SB 1437 only requires that a correct theory *could* apply.

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

"The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) What constitutes the "record of conviction" is well established. The "record of conviction" 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 2018, § 4:5, pp. 4-20 - 4-42 (2019).)

SB 1437 does not specify the exact scope and nature of the "new evidence" the parties may offer. The statute appears to permit live testimony and admission of new physical evidence. To the extent the resentencing process is similar to Propositions 36 and 47, the strict rules of evidence do not apply. "An eligibility hearing is a type of sentencing proceeding. Nothing in Proposition 47 suggests the applicable rules of evidence are any different than those which apply to other types of sentencing proceedings. Accordingly, limited use of hearsay such as that found in probation reports is permitted, provided there is a substantial basis for believing the hearsay information is reliable. [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.)

3. Presence of the petitioner

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

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

4. The issues at the hearing

The hearing under section 1170.95 is not a trial *de novo* on all the original charges; rather, it is "a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts. . . ." (§ 1170.95, subd. (d)(1).) The hearing potentially will involve the following issues:

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

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

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

Likely most of the litigation under section 1170.95 will be to determine whether the petitioner could be convicted of murder after the changes made by SB 1437. For the

petitioner to be eligible for relief, it must be shown that "[t]he petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(3).) Because the prosecution carries the burden of proof, however, the issue is more precisely whether the prosecution can establish beyond a reasonable doubt, that the petitioner is guilty of first or second degree murder under 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 defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his or her duties.

Whether the Petitioner was potentially convicted under multiple theories of liability

The record may reflect that the prosecution sought the petitioner's murder conviction based on multiple theories, including application of the felony-murder rule and/or NPC. In cases where the petitioner was convicted after a jury trial, instructions and argument of counsel will likely reflect consideration of all available theories of liability. It is not the obligation of the petitioner to convince the court that the felony-murder rule or NPC was actually used by the jury in whole or in part in the petitioner's conviction. Indeed,

since the jury need not disclose its theory of liability or even agree on any particular theory, neither of the parties will be able to show the actual basis of the petitioner's conviction. It is the burden of the prosecution to show, beyond a reasonable doubt, the petitioner could be found guilty of murder under a valid theory of the law effective January 1, 2019. (See § 1170.95, subds. (a)(3), (d)(3).)

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

1. Vacating of conviction

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

2. Resentencing of petitioner

If the petitioner successfully challenges the murder conviction, the court is to "resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1), (3).) If the target offense was identified in the murder count of the complaint, that offense will then form the basis of the resentencing. (§ 1170.95, subd. (e).)

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

It is unclear whether the redesignation of the target offense for the new base term includes the count-specific conduct enhancements. In granting relief, the court is to vacate the underlying conviction and "any allegations and enhancements attached to the conviction." (§ 1170.95, subd. (d)(3).) It seems the intent of the Legislature is to place the petitioner after resentencing in a situation where the murder and any related enhancements no longer exist. It is consistent with this intent that the resentencing should 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).

Determining target offense

If the defendant had been charged with a generic allegation of murder, without the target offense having been specified in the complaint, the court must identify a target offense for the purpose of the resentencing. "If petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes. Any applicable statute of limitations shall not be a bar to the court's redesignation of the offense for this purpose." (§ 1170.95, subd. (e).) Although the language is ambiguous, it seems to suggest that if the target offense was not charged in the complaint, the court must determine the target offense either by reference to the fact of a conviction of a specific offense in a separate count of the complaint, or to the underlying felony (target offense) identified in the instructions. As an example, if the defendant is convicted of first degree murder based on a generic allegation of murder[12], and the prosecution relied on a felony-murder theory because of a robbery, the target offense can be taken from the fact the petitioner was convicted of the robbery in a separate count, or from the reference to robbery as the underlying felony in the jury instructions. If the target offense was separately charged in the complaint, likely the sentence for that count was stayed under section 654.

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

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

People v. Howard (2020) ___ Cal.App.5th ___ [A157285] (*Howard*), addresses the determination of the target offense. The defendant was convicted of first degree felony murder after the victim of a residential burglary was shot by the defendant's accomplice. In the underlying trial, the defendant was not separately charged with

[12] 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.

residential burglary and the jury was only instructed on the general law of burglary without reference to degree. Because the defendant 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*, at p. ___.)

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

Evidence that can be considered at resentencing

In resentencing the petitioner, the court likely may use any evidence admissible in the original sentencing proceeding. In that regard, if it is apparent the petitioner will be remaining in custody on other charges, the court may find it useful to refer the

petitioner to the probation department for a supplemental report. Because the court may consider adding a parole period after the completion of the sentence (§ 1170.95, subdivision (g)), likely the court will be able to consider the petitioner's performance in prison in setting any new term or period of post-sentence supervision.

The court should 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." (*People v. Anthony, supra,* 32 Cal.App.5th at p. 1156, 244 Cal.Rptr.3d 499; *People v. Perez* (2018) 4 Cal.5th 1055, 1063–1064, 232 Cal.Rptr.3d 51, 416 P.3d 42 [retroactive application of Proposition 36, the Three Strikes Reform Act of 2012, is a legislative act of lenity that does not implicate Sixth Amendment rights].) [¶] Here, the process by which a trial court redesignates the underlying felony pursuant to section 1170.95, subdivision (e) does not implicate Howard's constitutional jury trial right under *Apprendi v. New Jersey* (2000) 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 or *Alleyne v. United States* (2013) 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314. The redesignation does not increase Howard's sentence. We reject [the defendant's] argument that the residential burglary designation violated his constitutional due process rights." (*Howard*, at p. ___.)

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

"A person who is resentenced pursuant to this section shall be given credit for time served. The judge may order the petitioner to be subject to parole supervision for up to three years following the completion of the sentence." (§ 1170.95, subd. (g).) The addition of the second sentence suggests the court may order the supervision period even though the petitioner's credits exceed the new sentence and the three-year period of parole.

In calculating the custody credits on resentencing, the court should be guided by *People v. Buckhalter* (2001) 26 Cal.4th 20, 23: "When . . . an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the "subsequent sentence." (§ 2900.1.) On the other hand, a convicted felon once sentenced, committed, and delivered to prison is not restored to presentence status, for purposes of the sentence-credit statutes, by virtue of a limited appellate remand for correction of sentencing errors. Instead, he remains 'imprisoned' (§ 2901) in the custody of the Director "until duly released according to law' (*ibid.*), even while temporarily confined away from prison to permit his appearance in the remand proceedings. Thus, he cannot earn good behavior credits under the formula specifically applicable to

persons detained in a local facility, or under equivalent circumstances elsewhere, '"prior to the imposition of sentence' for a felony. (§ 4019, subds. (a)(4), (b), (c), (e), (f); see fn. 6, *post*.) Instead, any credits beyond *actual custody time* may be earned, if at all, only under the so-called worktime system separately applicable to convicted felons serving their sentences in prison. (§§ 2930 et seq., 2933.)" (Italics in original.) In other words, the court should determine the *actual time* credit earned in county jail prior to the original sentencing, the *actual time* earned in state prison, and the *conduct credit* earned in county jail pending the original sentencing; *conduct credit* for time spent in prison is determined by the Department of Corrections and Rehabilitation.

Abstract of conviction to CDCR

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

Disposition report to DOJ

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

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

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

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

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

appellate ruling of legal insufficiency is functionally equivalent to an acquittal and precludes a retrial. [Citation.] An analogous trial court finding is also an acquittal for double jeopardy purposes. [Citations.]"

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

M. Right to appeal

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

Ruling denying relief

If the trial court denies the motion, likely the petitioner may appeal the decision, subject to review by an appellate court under the "substantial evidence" rule discussed in *Hatch*: "Specifically, . . . appellate courts must review 'the whole record in the light most favorable to the judgment' and decide 'whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [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 in original.)

Ruling granting relief

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

VII. Constitutionality of SB 1437

Soon after the enactment of SB 1437, district attorneys across the state requested dismissal of petitions brought under section 1170.95. They primarily argued the legislation conflicted with

initiatives enacted by the voters without a proper vote of either the public or the Legislature. Trial courts disagreed over the outcome of these issues.

Two companion opinions resolved all constitutional challenges in favor of the legislation. *People v. Lamoureux* (2019) 42 Cal.App.5th 241 (*Lamoureux*), and *People v. Superior Court (Gooden)*(2019) 42 Cal.App.5th 270 (*Gooden*), in divided opinions, concluded the legislation was constitutional; the Supreme Court subsequently denied petitions for review and denied requests not to publish the cases. Substantially in accord with these cases are *People v. Solis* (2020) 46 Cal.App.5th 762 [the elimination of the NPC doctrine by SB 1437 was constitutional]; *People v. Cruz* (2020) 46 Cal.App.5th 740 [SB 1437 did not amend Propositions 7 or 115]; and *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]. In accord with the foregoing cases is *People v. Smith* (2020) 49 Cal.App.5th 85 [SB 1437 did not unconstitutionally amend section 190].

People v. Prado (2020) ___ Cal.App.5th ___ [G058172] (*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. ___, italics in original.)

People v. Johns (2020) ___ Cal.App.5th ___ [E072412] (*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 p. ___.)

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

Gooden rejected the People's argument that SB 1437 improperly amended Propositions 7 and 115. The court summarized the changes made by those propositions: "Proposition 7. . . increased the punishment for first degree murder from a term of life imprisonment with parole eligibility after seven years to a term of 25 years to life. (Prop. 7, §§ 1–2.) It increased the

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

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

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

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

Similarly, *Gooden* rejected claims that SB 1437 amended Proposition 115. The court found the purpose of the initiative was to add certain crimes to the list of predicate offenses triggering the first degree felony-murder rule: "Senate Bill 1437 did not augment or restrict the list of predicate felonies on which felony murder may be based, which is the pertinent subject matter of Proposition 115. It did not address any other conduct which might give rise to a conviction for murder. Instead, it amended the mental state necessary for a person to be liable for

murder, a distinct topic not addressed by Proposition 115's text or ballot materials." (*Gooden*, *supra*, 42 Cal.App.5th at p. 287, footnote omitted.)

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

B. SB 1437 does not violate the separation of powers

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

> "We conclude the rationale of the *Way* and *Younger* decisions is directly applicable here. Like the challenged laws in the *Younger* and *Way* cases, section 1170.95 can produce outcomes resembling the consequences of an executive commutation. Specifically, in cases where a petitioner makes a prima facie showing of entitlement to relief (§ 1170.95, subd. (c)), and the prosecution fails to carry its burden of proving the petitioner is ineligible for resentencing (*id.*,subd. (d)(3)), murder sentences may be vacated and sentences recalled (*id.*, subd. (d)(1)). Although section 1170.95 requires resentencing on remaining counts, such that a given prisoner's overall sentence may not actually be shortened (*id.*, subd. (d)(1)), it is apparent and undisputed that at least some successful petitioners will obtain shorter sentences or even release from prison.
>
> However, the objective of the Legislature in approving section 1170.95—like the legislative aims underpinning the challenged laws in the *Way* and *Younger* cases—was not to extend "an act of grace" to petitioners. [Citations.] Rather, the Legislature's statement of findings and declarations confirms it approved Senate Bill 1437 as part of a broad penal reform effort. The purpose of that undertaking was to ensure our state's murder laws "fairly address[ ] the culpability of the individual and assist[ ] in the reduction of prison overcrowding, which partially results from lengthy sentences that are not commensurate with the culpability of the individual." (Stats. 2018, ch. 1015, § 1, subd. (e); see *People v. Munoz* (2019) 39 Cal.App.5th 738, 763, 252 Cal.Rptr.3d 456 (*Munoz*) [discussing "the Legislature's dual intents [in enacting Senate Bill 1437]—making conviction and punishment commensurate with liability, and reducing prison overcrowding"].)

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

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

C. SB 1437 does not violate Marsy's Law

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

The People also argued that section 1170.95 deprives victims of the right to have their safety and the safety of the public considered prior to granting a petition for relief. The court stated, however, that "the decision whether to vacate the murder conviction and resentence the petitioner is not the only determination required by section 1170.95. If a court rules a petitioner is entitled to vacatur of his or her murder conviction, it must then resentence the petitioner on any remaining counts. (*Id.*, subd. (d)(1).) During resentencing, the court may weigh the same sentencing factors it considers when it initially sentences a defendant, including whether the defendant presents 'a serious danger to society' and '[a]ny other factors [that] reasonably relate to the defendant or the circumstances under which the crime

was committed.' (Cal. Rules of Court, rule 4.421(b)(1), (c).) At minimum, the trial court's ability to consider these factors during resentencing ensures the safety of the victim, the victim's family, and the general public are 'considered,' as required by Marsy's Law. (Cal. Const., art. I, § 28, subd. (b)(16).)" (*Lamoureux*, *supra*, 42 Cal.App.5th at p. 266.)

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

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

APPENDIX I: TEXT OF SB 1437

SECTION 1.
The Legislature finds and declares all of the following:

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

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

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

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

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

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

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

SECTION 2.
Section 188 of the Penal Code is amended to read:

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

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

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

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

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

SECTION 3.
Section 189 of the Penal Code is amended to read:

189.
(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287[13], 288, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

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

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

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

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

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

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

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

(1) The person was the actual killer.

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

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

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

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

have known that the victim was a peace officer engaged in the performance of his or her duties.

SECTION 4.
Section 1170.95 is added to the Penal Code, to read:

1170.95.
(a) A person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine.

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

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

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

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

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

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

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

(c) The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines

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

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

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

(3) At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing. If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges. The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.

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

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

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

SECTION 5.

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

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

I. PROPER VENUE FOR MOTION

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

II. ELIGIBILITY TO FILE PETITION

A. Petitioner was convicted of first or second degree murder by felony-murder rule and/or doctrine of natural and probable consequences. (§ 1170.95, subd. (a).)

B. "A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine." (§ 1170.95, subd. (a)(1).)

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

D. "The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(3).)

III. CONTENT OF PETITION

A. "A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a)." (§ 1170.95, subd. (b)(1)(A).)

B. "The superior court case number and year of the petitioner's conviction." (§ 1170.95, subd. (b)(1)(B).)

C. "Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1)(C).)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. **Burden of proof**: "At the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." (§ 1170.95, subd. (d)(3).)

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

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

D. **Issues at the hearing**:

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

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

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

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

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

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

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

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

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

E. **If relief granted**:

1. Vacate murder conviction and any count-specific enhancement or allegation. (§ 1170.95, subd. (d)(3).)

2. Determine target offense (§ 1170.95, subd. (e))

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

   b. From conviction of separate count in complaint.

   c. From jury instructions.

   d. 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 been previously been [*sic*] sentenced, provided that the new sentence, if any, is not greater than the initial sentence." (§ 1170.95, subd. (d)(1), (3).)

5. Credit petitioner with time served – Court to determine presentence actual and conduct credit, and actual time credit for time in CDCR; CDCR to determine conduct credit while in prison. (§ 1170.95, subd. (g).)

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

APPENDIX III: ORDER SUMMARILY DENYING PETITION

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF [COUNTY]

[COURTHOUSE]

[DEPARTMENT #]

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

IN CHAMBERS

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

[ ] Petitioner was not convicted of murder.

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

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

DISPOSITION

For the foregoing reasons, the petition for recall and resentencing is DENIED.
The Clerk is ordered to serve a copy of this order upon Petitioner, and upon the Office of the District Attorney, as counsel for the People of the State of California.

Dated: _____ _____

[JUDGE'S NAME]
Judge of the Superior Court

Send copy of order to:
[Petitioner's address]

[Address for Office of the District Attorney]

APPENDIX IV: ORDER ISSUING ORDER TO SHOW CAUSE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF [COUNTY]

[COURTHOUSE]

[DEPARTMENT #]

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

IN CHAMBERS

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

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

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

[ ] Petitioner has filed a reply to the response. OR

[ ] The time to file a reply has expired.

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

[ ] The Public Defender is appointed to represent Petitioner.

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

Dated: _____ _____

[JUDGE'S NAME]
Judge of the Superior Court

Send copy of order to:

[Petitioner's address]

[Address for Office of the District Attorney]