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S.B. 1437 – REFORMATION OF MURDER LIABILITY

PROMISES AND PERILS

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I. OVERVIEW

In 2018, the Legislature enacted the most consequential overhaul of California homicide law in decades – S.B. 1437 (Stats. 2018, c. 1015), effective Jan. 1, 2019 (attached as Appendix). S.B. 1437 rolls back or abrogates the principal theories of attenuated liability under which many defendants have been convicted of first- and second-degree murder, even though they did not personally act with either express or implied malice. Most significantly: 1) S.B. 1437 limits aider-abettor liability for first-degree felony-murder liability to those who were "major participants" in the predicate felony and acted with "reckless indifference to human life"; and 2) it appears to abrogate the "natural and probable consequences" theory of murder liability by requiring that a defendant personally acted with malice aforethought and by barring imputation of malice based on commission of some other offense.

A. Legislative intent.

S.B. 1437's uncodified statement of legislative intent and findings declares "a need for statutory changes to more equitably sentence offenders in accordance with their involvement in homicides" to serve the "bedrock principle of the law and equity that a person should be punished for his or her actions according to his or her own level of individual culpability." Stats. 2018, c. 1015, § 1(b) & (e). The findings specifically declare the need to "amend the felony-murder rule and the natural and probable consequences doctrine … 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." *Id.* § 1(f). "Except as stated in [the amended felony murder statute, Pen. Code § 189(e)][1], a conviction for murder requires that a person act with malice aforethought. A person's culpability must be premised upon that person's own actions and subjective mens rea." *Id.* § 1(g).

B. Primary changes in substantive homicide law.

The legislation seeks to accomplish those objectives through amendments to the first-degree felony-murder statute, § 189, and to the statutory definition of malice, § 188.

1 First-degree felony-murder.

S.B. 1437 amends § 189(e) by limiting first-degree felony-murder liability for a homicide during an enumerated felony to three categories: (a) "the actual killer"; (b) a defendant who "was not the actual killer, but, *with the intent to kill*," aided or abetted the actual killer; and (3) an aider-abettor who "was a *major participant* in the underlying felony and acted with *reckless indifference to human life*." (Emphasis added.)

This amendment effectively imports the limitations of the *felony-murder special circumstance*, § 190.2(c)-(d), into the criteria for first-degree murder liability. Under S.B. 1437's amendment of the first-degree murder statute, § 189(e), an aider-abettor is liable for first-degree felony-murder only if he or she either intends to kill or meets both the "*Tison* factors" ("major participant" in the felony and "reckless indifference to human life"). *Tison v. Arizona* (1987) 481 U.S. 137 (limiting eligibility for capital punishment for felony-murder aider-abettors).[2]

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[1] Statutory references are to the Penal Code.

[2] However, § 189(e)'s limitations on aider-abettor liability do *not* apply "when the victim is a peace officer who was killed in the course of his or her duties, where the defendant knew or reasonably should have known" of the victim's status. § 189(f). Thus, an aider-abettor who knew or should have known of the officer's status may be liable for first-degree felony-murder even if the aider does not meet the *Tison* criteria ("major participant" and "reckless indifference to human life").

2 No imputation of malice.

The legislation amends the statutory definition of malice, § 188. Except as provided in § 189(e), the amended first-degree felony-murder statute, "in order to be convicted of murder, *a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.*" § 188(a)(3) (emphasis added).

The apparent intent of this language is to abrogate the "natural and probable consequences" (NPC) theory of murder liability. Until now, the NPC doctrine has allowed murder liability for an aider-abettor in some lesser target crime (such as assault with a deadly weapon) based on some other participant's commission of a murder with malice, even where the aider had neither express or implied malice. While *People v. Chiu* (2014) 59 Cal.4th 155, repudiated NPC as a basis for liability for *first-degree premeditated murder*, *Chiu* left that doctrine intact as a ground for second-degree murder liability. But S.B. 1437 appears to abrogate the doctrine as to second-degree murder as well. Because S.B. 1437 allows murder liability based only upon the individual defendant's mens rea (as confirmed in the uncodified legislative intent section), murder can no longer be based only on the putative natural and probable consequences of the lesser crime in which the aider participated. Instead, murder liability requires that the defendant personally acted with express or implied malice.

Although the principal impact of the amendment of the malice statute appears to be the abrogation of NPC liability for murder, the legislation's bar on "imputing" malice based on participation in another crime is also likely to impact two other homicide doctrines, as discussed further in Part V -- the *second-degree* felony-murder rule and "provocative act" murder.

C. Retroactive remedy, § 1170.95.

Much like other recent criminal justice reform legislation, such as Propositions 36 and 47, in addition to revising substantive criminal law, S.B. 1437 also creates a retroactive relief mechanism. § 1170.95 establishes a new superior court resentencing procedure. A defendant may petition for resentencing on the ground that "he could not be convicted of first or second

degree murder" under the legislation's amendments of § 188 and § 189. § 1170.95(a)(3). As discussed in greater detail in Part VI, where a § 1170.95 petition clears a sequence of "prima facie showing" determinations, the court "shall hold a hearing to determine whether to vacate the murder conviction" and to resentence the defendant. § 1170.95(d)(1). At the hearing, "the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." "The prosecutor and the petitioner may rely on the record of conviction or offer new and additional evidence" at the hearing. § 1170.95(d)(3).

If the court finds the defendant is entitled to relief, it shall vacate the murder conviction and resentence the defendant. The statute also provides that if there was no separate conviction count for the "target offense" (i.e., the predicate for either felony-murder or the natural and probable consequences theory), the murder conviction "shall be redesignated as the target offense or underlying felony for resentencing purposes." § 1170.95(e).

II. RESOURCES FOR ATTORNEYS.

A. S.B. 1437 List serve.

There is a very active list serve for defense attorneys (both trial and appellate) litigating issues under S.B. 1437. There are literally scores of postings on the list serve every week on a variety of questions arising throughout the state. For appellate attorneys, following the list serve also provides a useful window into many unresolved issues concerning the remedial statute, § 1170.95, that are currently percolating at the superior court level but have not yet been the subject of appellate opinions.

There is also a Google documents drive associated with the list serve. The Google site includes briefs (again, both trial and appellate) on numerous issues concerning both the substantive import of the legislation's revisions of homicide law and the many procedural questions arising in litigation of § 1170.95 petitions.

To join the list serve and also to obtain access to the Google documents, an attorney should send an email request to senatebill1437@gmail.com. The list serve is restricted to defense attorneys, so the email request should identify

the sender as a criminal defense attorney working on S.B. 1437 cases (either trial or appellate).

B. Obtaining transcripts and other case documents.

It will frequently be necessary for defense counsel litigating § 1170.95 petitions to obtain transcripts and other records from the underlying murder case. Although this onus will fall mainly on trial counsel, appellate attorneys too are finding it necessary to seek out prior records, especially in cases where the superior court summarily denied the § 1170.95 petition without appointing counsel.

1 Appellate opinion and briefs.

Beginning sometime in mid-2001, the California Courts of Appeal have been posting unpublished opinions on the judiciary's Opinions site. However, it has only been in the past few years that the on-line dockets for California appeals have routinely included links to slip opinions. Nonetheless, all unpublished opinions filed since mid-2001 should be available through Westlaw or Lexis.

Beginning in 1986, all First District criminal appeals with appointed counsel have gone through FDAP. Regardless of whether an appeal was a panel or a staff case, FDAP's files should include the complete appellate briefs and the opinion, but (except in very rare cases) not the transcripts.

2 Transcripts.

As every criminal appellate attorney knows, generally the appellate record should be returned to the client on the conclusion of the appeal (unless the attorney is planning to continue to represent the client in habeas or other proceedings). Consequently, counsel on a § 1170.95 case should initially inquire whether the client still has the transcripts. However, in many cases – especially where the appeal occurred years or decades ago – the client will no longer have the transcripts, and it will be necessary for counsel to attempt to obtain them elsewhere.

If the client had counsel on the superior court § 1170.95 petition, it's possible that attorney will already have obtained the transcripts (even if they weren't formally lodged below). However, especially in this initial wave, many

appeals are being taken from summary denials where the court did not appoint counsel or after an initial round of briefing by counsel prior to obtaining transcripts. That leaves two other principal avenues for obtaining the prior transcripts – state archives and the Attorney General's Office.

After the remittitur issues on an appeal, the Court of Appeal sends the transcripts and other records to state archives. The appellate docket will generally reflect that action and identify the records' location in archives. Counsel can request the Clerk's Office to recall its files from storage. However, for criminal appeals which resulted in affirmance of the conviction, the rules only require the courts to retain "the original reporter's transcript for 20 years after the [appellate] decision becomes final." Cal. Rules of Court, rule 10.1028(d)(2). (For cases older than that, counsel should still first check archives, since it's possible that the transcripts may not yet actually have been purged.)

Fortunately, the Attorney General's Office's current policy is to retain its set of transcripts from criminal cases with indeterminate life sentences *for 100 years*.[3] Consequently, if the judiciary's transcripts have been purged and other possible means of obtaining the transcripts have been exhausted, counsel should request the Attorney General's Office to recall and arrange for scanning of its transcripts. The Attorney General's Office has designated paralegal Michelle Quach, Michelle.Quach@doj.ca.gov , as the contact person for all cases in which the criminal appeal was handled by the San Francisco office – i.e., appeals in the First and Sixth Districts. For appeals from other districts, counsel should contact the supervising attorney in the relevant Attorney General's Office.

C. Judge Couzens's analysis.

J. Richard Couzens, retired judge of the Placer County Superior Court, has authored a memorandum analyzing S.B. 1437, including its substantive homicide amendments and the § 1170.95 remedial procedure. Couzens, Accomplice Liability for Murder (SB 1437) (July 2019). The memorandum is

[3] It is not clear how long the Attorney General's 100-year retention policy has been in place. It's possible that at some prior time that office may have had a shorter retention period.

widely available, including through the CCAP web site: https://www.capcentral.org/criminal/murder_sb1437/docs/couzens_accomplice_liability_murder_sb1437_072019.pdf

Judge Couzens has authored or co-authored practice guides and memoranda on Three Strikes and many other sentencing questions. Because there is little or no case law addressing most of the questions concerning S.B. 1437, it is quite possible that superior courts which look to his analysis as persuasive. Consequently, it is a good idea for defense counsel to be familiar with Judge Couzens's positions on specific issues.

III. CONSTITUTIONALITY OF S.B. 1437.

A. Common challenges.

District Attorneys have split in their approaches to S.B. 1437. Some District Attorneys have accepted the basic legitimacy of the law (while still contesting defendants' entitlement to relief on a case-by-case basis). However, several District Attorneys' Offices (including in such populous counties as Los Angeles, Orange, and Santa Clara) have challenged the overall constitutionality of the legislation's reformation of homicide law. While some superior courts have rejected those challenges and have upheld the law, unfortunately several courts have found S.B. 1437 unconstitutional on one or more of several asserted grounds.

The common theme of many of those challenges is the argument that S.B. 1437 represents an unconstitutional legislative amendment of prior voter initiatives, because the Assembly and Senate enacted it by simple majority votes rather than two-thirds super-majorities. The challengers' principal arguments have been:

1. That S.B. 1437 amends Proposition 7, the 1978 death penalty initiative.
2. That the legislation amends Proposition 115, a 1990 initiative which (among other things) expanded the predicate offenses for first-degree felony-murder and added the *Tison* factors (major participant and reckless

indifference to human life) to the felony-murder special circumstance.

3 That it deprives crime victims of rights afforded by "Marsy's Law," Proposition 9 (adopted in 2008).

4 That the legislation violates separation-of-powers principles by usurping executive clemency authority and by permitting the reopening of final judgments.

5 That, if allowed to stand, it would render California's death penalty invalid under the Eighth Amendment on the ground that, with the elimination of first-degree murder liability for aiders who do not satisfy the *Tison* criteria, California law would no longer sufficiently "narrow" the categories of murders eligible for the death penalty.

B. The *Lamoureux* and *Gooden* opinions upholding S.B. 1437.

There are currently appeals pending throughout the state on these issues – including both defense appeals from superior court rulings finding the law unconstitutional and People's appeals from orders upholding the law. (These include several in the First District, including from San Mateo and Humboldt Counties (where superior courts declared the law unconstitutional) and from Solano County (where the court upheld the law).) The appeals challenging S.B. 1437's validity have been prosecuted by the respective District Attorneys' Offices, *not* by the Attorney General. In fact, *the Attorney General's Office has intervened by filing amicus curiae briefs supporting S.B. 1437's constitutionality.*

In a pair of concurrently-decided opinions filed in November 2019, Division One of the Fourth District has upheld the constitutionality of S.B. 1437 and has squarely rejected most of the leading challenges. *People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, holds that the legislation does not represent an improper legislative amendment of either Proposition 7 (1978) or Proposition 115 (1990). In *People v. Lamoureux* (2019) 42 Cal.App.5th 241, the same panel reiterated *Gooden*'s Prop. 7 and Prop. 115 holdings and further held that the legislation does not contravene either Marsy's Law (Prop. 9 (2008)) or separation-of-powers principles.

To date, *Gooden* and *Lamoureux* are the only opinions addressing any of the constitutional challenges to S.B. 1437. Those opinions are not yet final, and the respective District Attorneys' Offices have filed petitions for review. As noted above, there are many other appeals still pending on those issues, and it remains possible that another appellate court may disagree with one or more of those holdings. Also, neither *Gooden* or *Lamoureux* addressed the argument that the legislation renders California's death penalty invalid by insufficiently "narrowing" death-eligible murders. No appellate case has addressed that issue to date.[4]

IV. *ESTRADA* RETROACTIVITY.

A. The *Estrada* argument and why it matters.

Since the enactment of S.B. 1437, appellate attorneys with pending appeals from murder convictions potentially affected by the legislation's substantive revisions of murder liability have striven to seek review of those issues in the appeals themselves under the *Estrada* doctrine. *In re Estrada* (1965) 63 Cal.2d 740. Under *Estrada*, ameliorative legislation curtailing the scope of criminal liability or sentencing is ordinarily deemed applicable to all cases not yet "final" on direct review, unless there appears to be a contrary legislative intent.

A preliminary question is why the possible opportunity to raise these issues in an already-pending appeal matters when S.B. 1437 already establishes its own retroactive relief mechanism – a superior court resentencing petition under new § 1170.95. In other words, why should appellate counsel attempt

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[4] However, it is not clear whether the "insufficient narrowing" argument is actually a distinct challenge to the constitutionality of S.B. 1437. Those adverse rulings that have discussed "narrowing" – such as several orders by judges of the Orange County Superior Court – appear to have treated that subject passingly as part of the claim that the legislation contravened Propositions 7 and/or 115. Those orders suggested that, because S.B. 1437 effectively makes first-degree felony-murder liability coextensive with the scope of the felony-murder special circumstance, it jeopardizes the validity of California's death penalty and thus contravenes the voters' intent in enacting initiatives authorizing that punishment.

to obtain review on direct appeal, despite adverse case law on the availability of such review, when the newly-established superior court procedure is available?

For some defendants with very clear entitlements to relief under § 1170.95, that procedure may represent the preferable remedy because it would provide certain and probably speedier relief.[5] But, for many (probably most) defendants, appellate review of those issues under the *Estrada* doctrine, *if available*, would provide a better prospect for relief, because the submission of an invalidated murder theory would be subject to the *Chapman* prejudice test. *Chapman v. California* (1967) 386 U.S. 18. In contrast, as discussed in Part VI, there is considerable uncertainty regarding the ultimate standard for relief in a § 1170.95 hearing, but it likely is not as favorable to the defense as *Chapman* review.

For these reasons, following the legislation's enactment, appellate attorneys have generally opted to pursue *Estrada* retroactivity arguments in pending appeals. However, as discussed below, those arguments have proven unsuccessful.

B. *Estrada* retroactivity rejected.

In recent years, numerous other pieces of criminal justice reform legislation have been found retroactive to non-final cases under *Estrada*. These have included Proposition 57's abolition of "direct filing" of adult criminal charges against juveniles, legislation giving sentencing courts discretion to strike formerly-mandatory firearm use and prior "serious felony" enhancements,

[5] For example, if the jury in the first-degree felony-murder case had acquitted on a felony-murder special circumstance or if the trial court had dismissed the special circumstance under § 1118.1, either of those dispositions would represent a finding that the defendant was not a major participant or did not act with reckless indifference to life. Such a prior jury or court finding would entitle the defendant to relief as a matter of law – and without the necessity for a full hearing – under § 1170.95(d)(2).

and amendments abolishing enhancements for most prior drug convictions and most prior prison terms. [6]

While those recent laws were silent on retroactivity, the courts deemed them applicable to all cases not yet "final" at the time of the relevant enactments,[7] but not to already-final cases. Ironically, however, when the Legislature takes the additional step of creating a mechanism for *all* defendants to seek retroactive relief, that *expansion* of the availability of relief may leave defendants with pending appeals worse off than if the legislation said nothing about retroactivity. The Supreme Court found that Proposition 36's reformation of third-strike sentencing and Proposition 47's reduction of many theft and drug offenses to misdemeanors were not retroactive on pending appeals, because each of those initiatives established superior court mechanisms for pursuing retroactive relief. *People v. Conley* (2016) 63 Cal.4th 646 (Prop. 36); *People v. DeHoyos* (2018) 4 Cal.5th 594 (Prop. 47).

The *Conley* and *DeHoyos* holdings seemingly should have been distinguishable from S.B. 1437. The superior court resentencing mechanisms for Propositions 36 and 47 (§§ 1170.126 and 1170.18 respectively) each expressly conditioned resentencing upon a superior court factual determination that the defendant would not pose an unreasonable risk of danger to the public if released. That prerequisite of Props. 36's and 47's remedial statutes was crucial to the Supreme Court's holdings in *Conley* and *DeHoyos* that the voters intended to restrict any retroactive relief to inmates who could establish their lack of dangerousness, regardless of whether their cases were final. In contrast, S.B. 1437's remedial statute, § 1170.95, does not require any comparable dangerousness inquiry or any other determination

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[6] See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-974; *People v. Milan* (2018) 20 Cal.App.5th 450, 454-456; *People v. Lopez* (2019) 42 Cal.App.5th 337.

[7] As in other contexts, a conviction is deemed "final" for *Estrada* purposes when the U.S. Supreme Court denies certiorari on a defendant's direct appeal or (if there was no cert. petition) on the last date on which a timely cert. petition could have been filed – 90 days after the California Supreme Court's denial of review. *People v. Vieira* (2005) 35 Cal.4th 264, 305-306.

beyond whether the defendant could be convicted of murder under the revised homicide statutes.

Unfortunately, the appellate courts have uniformly rejected the *Estrada* argument. Those opinions have found that, because S.B. 1437 creates a superior court resentencing procedure, § 1170.95 is the exclusive mechanism for pursuing retroactive relief, even as to non-final cases. The appellate courts relied on *Conley* and *DeHoyos* – despite the absence of any separate requirements comparable to Propositions 36 and 47's inquiries into lack of present dangerousness. *People v. Martinez* (2019) 31 Cal.App.5th 719; *People v. Anthony* (2019) 32 Cal.App.5th 1102; see also *People v. Carter* (2019) 34 Cal.App.5th 831.

C. Sixth Amendment/*Apprendi* implications as to non-final cases.

The refusal to entertain S.B. 1437 arguments on direct review implicates constitutional considerations, as well as retroactivity and statutory construction principles. Under *Apprendi v. New Jersey* (2000) 530 U.S. 466, and other authorities, the Sixth Amendment entitles a defendant to jury determination of any facts necessary to support a greater offense or to authorize a higher punishment range. Yet, the refusal to allow appellate review of S.B. 1437 arguments in non-final cases effectively deprives those defendants of the opportunity for *Chapman* review of the failure to require jury findings on the facts required for murder liability under the revised homicide statutes.

If (contrary to the current case law) the homicide revisions were found reviewable on direct appeal under *Estrada*, the delivery of jury instructions inconsistent with those revisions would be deemed constitutional error. The failure to instruct correctly on the elements of murder liability (such as failure to instruct on the *Tison* factors for first-degree felony-murder) and delivery of instructions on a legally unauthorized alternative theory of

liability (natural and probable consequences) are each forms of instructional error subject to the *Chapman* prejudice test.[8]

Chapman review focuses on whether the jury actually relied on a valid theory of conviction or otherwise made the necessary findings. See *Neder v. United States* (1999) 527 U.S. 1, 19; *People v. Mil* (2012) 53 Cal.4th 400, 417-419. Thus *Chapman review does not allow a reviewing court to usurp the jury's factfinding function by reweighing the strength of the evidence.* In contrast, as discussed in Part VI-H, there is considerable uncertainty as to the standard for relief in a § 1170.95 proceeding. There is no provision for jury determination, and it appears that the judge may effectively sit as fact-finder.

People v. Anthony (2019) 32 Cal.App.5th 1102, however, held that the Sixth Amendment does not require *Chapman* review in this context. The appellate court relied on a line of cases holding that the Sixth Amendment/*Apprendi* right to jury determination of facts does not apply where the Legislature sets up a retroactive resentencing procedure such as § 1170.95. See *People v. Perez* (2018) 4 Cal.5th 1055 (cited in *Anthony*); *Dillon v. United States* (2010) 560 U.S. 817 (cited in *Perez*). However, the *Anthony* court's reliance on those authorities is questionable: *Dillon and Perez each involved convictions that had become final long before enactment of the relevant sentencing revisions, rather than non-final cases still on direct appeal.*

D. The puzzle of S.B. 1437 review-grants.

The California Supreme Court has denied review in *Martinez*, *Anthony*, and numerous other cases posing the *Estrada* retroactivity issue (and the related Sixth Amendment questions posed by the denial of the opportunity for *Chapman* review). But the Supreme Court *has* granted review in two cases concerning the substantive implications of S.B. 1437's revisions of the

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[8] *Chapman v. California* (1967) 386 U.S. 18*;* see, e.g., *In re Martinez* (2017) 3 Cal.5th 1216 (*Chapman* review where intervening change of law (*Chiu)* was fully retroactive); *People v Ramos* (2016) 244 Cal.App.4th 99, 102-104 (*Chapman* review where intervening ameliorative legislation applied to pending appeals under *Estrada*).

homicide statutes. Yet, surprisingly, although both review-grants involve non-final cases and thus seemingly implicate the question of *Estrada* retroactivity, the Supreme Court apparently will *not* be considering the *Estrada* issue in either case.

People v. Gentile (2019) 35 Cal.App.5th 932, review gr. & depublished, S256698, is especially puzzling. In its initial grant of review, the Supreme Court defined the issues as: 1) whether S.B. 1437 "eliminate[s] second-degree murder liability under the natural and probable consequences doctrine"; 2) *whether the legislation "appl[ies] retroactively to cases not yet final on appeal";* and 3) whether the delivery of the NPC theory was "prejudicial error." S256698 dkt; Sept. 11, 2019.[9] That initial specification of issues on review indicated that, after passing up multiple opportunities to review the *Estrada* retroactivity issue, the Supreme Court had decided to take up that issue after all. Yet, a month later, apparently on its own motion, *the Court amended its specification of issues to delete the retroactivity question*. S256698 dkt; Oct. 30, 2019.

The Court has also granted review on whether S.B. 1437 "appl[ies] to attempted murder liability under the natural and probable consequences doctrine." *People v. Lopez* (2019) 38 Cal.App.5th 1087, review gr. S258175.[10] Yet *Lopez* too is a still-pending appeal in a non-final case tried before S.B. 1437. The review-grant on the substantive issue of the legislation's applicability to attempted murder seemingly begs the question of whether that claim is even reviewable on appeal or only via a superior court § 1170.95 petition (as held in *Martinez* and *Anthony*). Yet (as with *Gentile*), the review-grant in *Lopez* does not include the *Estrada* retroactivity question.

E. The possible attempted murder anomaly – *Medrano.*

A more recently-decided appellate case may provide a possible explanation for the Supreme Court's willingness in its *Lopez* review-grant to consider the substantive question of the legislation's applicability to attempted murder in

[9] For discussion of the NPC issue under review in *Gentile*, see Part V.
[10] For discussion of the attempted murder issue under review in *Lopez*, see Part V.

a pending appeal from a pre-S.B. 1437 conviction. But the new case sets up a further anomaly.

As discussed further in Part V-E below, *People v. Medrano* (2019) 42 Cal.App.5th 1001, holds that S.B. 1437's amendment of § 188(a)(3) bars natural and probable consequences as a theory of liability for *attempted murder* as well as for murder itself. However, *Medrano* and its companion case, *People v. Larios* (2019) 42 Cal.App.5th 956, hold that a defendant convicted of attempted murder under that theory is *not eligible to petition for relief under § 1170.95*, because that remedial statute allows petitions only by defendants convicted of "murder" and does not refer to "attempted murder." But the corollary of the *Medrano-Lopez* court's view of the limited scope of § 1170.95 is that (in contrast to someone convicted of murder) a defendant convicted of attempted murder under NPC *is* able to raise the raise the submission of that theory *on appeal from that conviction*. Because (according to *Larios* and *Medrano*) the Legislature has *not* provided a special superior court remedy as to attempted murder convictions, the usual *Estrada* presumption controls and the ameliorative legislation applies on a pending attempted murder appeal (though not on a murder appeal). Consequently, the *Medrano* court reviewed the submission of the unauthorized NPC theory of attempted murder under *Chapman*. Demonstrating the rigor of that standard, the *Medrano* court found the error prejudicial because it could not "conclude beyond a reasonable doubt that the jury did not rely upon this now invalid theory to convict [the defendants] of attempted murder or that it made the findings necessary to convict the defendants under an alternative, valid legal theory." *Medrano*, 42 Cal.App.5th at 1021.

The holdings in *Medrano* are welcome, as to both the substantive implications of the § 188 amendments for attempted murder and the right to challenge the submission of the NPC theory on appeal from that conviction. But they do create an anomaly in the overall state of the case law on S.B. 1437. Under *Medrano*, *a defendant with a non-final conviction of attempted murder (an offense not explicitly mentioned in S.B. 1437) is in a better position than someone convicted of the explicitly-mentioned offense of murder.* He or she is able to raise the issue on direct appeal and receive the benefit of *Chapman* review. (On the other hand, under *Medrano*'s companion case *Larios* someone with a final conviction of attempted murder is worse off. Due

to the exclusion of attempted murder from § 1170.95, he or she is left with *no remedy*.)

In any event, petitions for review have been filed in both *Medrano* (S259948) and *Larios* (S259983).

F. S.B. 1437 claims not raiseable on habeas.

In re Cobbs (2019) 41 Cal.App.5th 1073, holds that habeas corpus is not available to challenge the submission of an NPC theory of murder liability. The result in *Cobbs* is not surprising, because the conviction there had become final in 2001. Even when applicable, *Estrada* retroactivity covers only cases not yet final at the time of the ameliorative legislation's enactment. (However, the *Cobbs* opinion also states more broadly that § 1170.95 is the exclusive remedy for convicted defendants to raise claims based on S.B. 1437 (as held in *Martinez* and *Anthony*).)

V. Substantive questions on effect of the amended homicide statutes.

This section of the materials will focus strictly on the substantive effects of the amendments of the statutory malice definition (§ 188) and the felony-murder statute (§ 189) on theories of murder liability, rather than on remedies.

A. First-degree felony-murder.

This subject is straightforward. There appears to be no dispute on the effect of inclusion of the "*Tison* factors" – "major participant" in the predicate felony and "reckless indifference to human life" – in the requirements for first-degree felony-murder liability, § 189(e). These amendments have effectively eliminated the difference between aider-abettor liability for the offense of first-degree felony-murder and eligibility for either LWOP or capital punishment under the felony-murder special circumstance, § 190.2(d). Previously, an aider-abettor in the robbery or other enumerated felony, who did not intend to kill and who failed to satisfy one or both of the *Tison* factors (major participant and reckless indifference) was still guilty of first-degree felony-murder, but was not subject to the special circumstance. However,

amended § 189(e) has now incorporated those requirements into the elements for first-degree felony-murder liability as well.

The "major participant" and "reckless indifference" elements necessarily carry the same meaning under amended § 189(e) as in the special circumstances. Consequently, the case law construing those terms now applies to first-degree felony-murder liability as well – including the California Supreme Court's recent authorities raising the bar for those elements – *People v. Banks* (2016) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522, and subsequent appellate and habeas opinions applying *Banks* and *Clark*. See Part VI-G, *infra*.

B. Natural and probable consequences liability.

Amended § 188(a)(3) provides that (with the exception of first-degree felony-murder liability under § 189(e)), a murder conviction requires that the defendant personally acted with malice aforethought. It bars "imputing" malice based on a defendant's participation in some other offense. Until recently, there appeared to be a consensus that, through § 188(a)(3), the Legislature has abrogated the natural and probable consequences (NPC) theory of aiding-abetting as a basis for murder liability. The California Supreme Court has already repudiated aider-abettor liability under the NPC theory (as opposed to "traditional" or "direct" aiding in the murder) as a basis for *first-degree* premeditated murder. *People v. Chiu* (2014) 59 Cal.4th 155. § 188(a)(3) goes one step further than *Chiu* and appears to abolish NPC as to second-degree murder as well. The explicit reference in S.B. 1437's uncodified findings to the necessity "to amend the felony murder rule and the natural and probable consequences doctrine" also supports that common understanding of the amendment's import. S.B. 1437, c. 1015, § 1(f).

Nonetheless, the California Supreme Court has granted review on whether "the amendment to Penal Code section 188 [by S.B. 1437] eliminate[s] second degree murder liability under the natural and probable consequences doctrine." *People v. Gentile* (2019) 35 Cal.App.5th 932, review gr. & depublished, S256698. Why the grant of review on this seemingly-clear point? The answer may lie in the appellate opinion in *Gentile*. In rejecting the challenge to second-degree murder liability, the appellate court there oddly

focused on § 189(e), the amended first-degree felony-murder statute. The *Gentile* opinion did not even discuss amended § 188(a)(3), although that statute, rather than § 189(e), is the one that appears to abrogate the NPC theory of murder liability. *Gentile* at 942-944.[11]

Significantly, in granting review in *Gentile*, the Supreme Court took the relatively unusual step of also depublishing the appellate opinion – meaning that it is not citable during the pendency of the review, even for non-precedential "potentially persuasive value." Cal. Rules of Court, rule 8.1115(e)(2) & (e)(3).

C. Second-degree felony-murder.

Under amended § 188(a)(3), a murder conviction (except for *first-degree* felony-murder) requires that a "principal … act with malice aforethought. Murder *shall not be imputed to a person based solely on his or her participation in a crime*." (Emphasis added.) In addition to its likely effect on NPC liability for murder, this bar on "imputing" murder liability also appears intended to abolish *second-degree felony-murder*. As explained in the California Supreme Court's most recent opinion on the subject, the long-criticized second-degree felony-murder doctrine "'*imputes the requisite malice* for a murder conviction to those who commit a homicide during the perpetration of a felony inherently dangerous to human life.'" *People v. Chun* (2009) 45 Cal.4th 1172, 1184 (emphasis added). Consequently, at least as much as the natural and probable consequences theory, second-degree murder appears to come squarely within § 188(a)(3)'s proscription against imputation of malice based only on participation in some other offense.

[11] In a previous (pre-S.B. 1437) opinion, the appellate court had already reversed Gentile's first-degree murder conviction under *Chiu*, based on prejudicial error in submission of the NPC theory of first-degree murder liability. On remand, the prosecution accepted a reduction of that conviction to second-degree. In his appeal from that disposition, Gentile argued he was entitled to full reversal of the murder conviction, rather than only a reduction in degree, because S.B. 1437 had abrogated NPC liability as to second-degree murder as well.

Moreover, unlike S.B. 1437's rollbacks of first-degree felony-murder liability and NPC liability for second-degree murder, *the legislation's likely abolition of second-degree felony-murder does not appear to be limited to aider-abettors*. A defendant who personally commits an act resulting in the victim's death will not automatically be liable for murder when that act occurs during commission of an inherently dangerous felony. Instead, the defendant will be guilty of murder only if he or she personally acted with express or implied malice.

One published decision has flatly stated that S.B. 1437 abolishes second-degree felony-murder, *In re White* (2019) 34 Cal.App.5th 933, 937 fn. 2, while another has observed that it brings that doctrine "into question," *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1142 fn. 3. However, neither of those cases decided any issues under S.B. 1437. Instead, *White* and *Frandsen* each rejected void-for-vagueness challenges to second-degree felony-murder. Consequently, although helpful, those statements would likely not be considered "holdings" on the legislation's abolition of that doctrine.

D. Provocative act murder.

S.B. 1437, including its uncodified statement of findings, makes clear the Legislature's intent to limit felony-murder and natural and probable consequences liability. There is no explicit reference to the "provocative act" theory of murder. Under that doctrine, a defendant may be convicted of murder based on a killing committed by a third-party who is not an accomplice of the defendant, where the homicide is the result of the defendant's own "provocative act," such as participation in a gun battle. See generally 4 Witkin & Epstein, Cal. Criminal Law (2017), Crimes Against the Person, §§ 207-208.

Nonetheless, the case law strongly suggests that "provocative act" murder is a form of natural and probable consequences liability. "When the defendant commits an inherently dangerous felony, the victim's self-defensive killing is generally found to be a natural and probable response to the defendant's act...." *People v. Gonzalez* (2012) 54 Cal.4th 643, 655-656; see also *id.* at 657 ("[t]he death of one of the participants was a natural and probable consequence of [defendant's] conduct"); *People v Concha* (2009) 47 Cal.4th

653, 661. Similarly, the CALCRIM instructions on "provocative act" murder explicitly require "natural and probable consequences" findings. CALCRIM 560, 561.

In view of the prominence of "natural and probable consequences" in both the Supreme Court's explanation of the doctrine and the standard jury instructions, "provocative act" murder appears to be a sub-species of natural and probable consequences liability. It is another doctrine that allows murder liability to be imputed based on commission of some other crime, without any finding the defendant personally acted with malice aforethought.

The question of the legislation's applicability to provocative act murder is currently being litigated in multiple cases, but there is not yet any published case law, good or bad, on the subject.

E. Attempted murder.

1 S.B. 1437 and attempted murder.

The § 188(a)(3) amendment makes clear that, with the exception of first-degree felony-murder (per revised § 189(e)), a defendant is liable for murder only if he or she personally acted with either express or implied malice. Malice may not be "imputed" based on commission of some other crime. § 188(a)(3). As discussed earlier, this amendment effectively repeals the natural and probable consequences theory of murder liability. An aider can only be convicted of murder based on "traditional" aiding-abetting – that is, where he or she acts with the requisite malice.

But what about *attempted* murder? There is no reference to attempted murder in the revisions of §§ 188 and 189, in new § 1170.95, or in the uncodified legislative intent section of S.B. 1437. Yet, logically the amendment of § 188 would appear to bar natural and probable consequences liability for attempted murder as well as murder itself. Ordinarily, *an attempted crime requires at least the same mens rea as the target offense*.[12] If

[12] "An attempt to commit a crime consists of two elements: *a specific intent to commit the crime*, and a direct but ineffectual act done toward its commission." § 21a (emphasis added).

murder requires that the defendant personally act with malice, the same should be true of attempted murder. Thus, following the § 188(a)(3) amendment, an aider should only be liable for attempted murder where he or she intended to kill.

As noted earlier, the Supreme Court has granted review on the applicability of S.B. 1437 to attempted murder in *People v. Lopez* (2019) 38 Cal.App.5th 1087, review gr., S258175. The appellate courts in *Lopez* and in *People v. Munoz* (2019) 39 Cal.App.5th 738, granted-and-held, S252291, each read the omission of any explicit reference to attempted murder as evincing the Legislature's "obvious intent to exclude attempted murder from the ambit of the Senate Bill 1437 reform." *Lopez* at 1104. *Lopez* and *Munoz* each further held that this construction excluding attempted murder did not present any equal protection violation.

In two concurrently-decided opinions, the Fifth District disagreed with *Lopez* and *Munoz* and held that amended § 188(a)(3)'s "abrogation of the natural and probable consequences doctrine … necessarily applies to attempted murder," as well as murder. *People v. Larios* (2019) 42 Cal.App.5th 956, 968; *People v. Medrano* (2019) 42 Cal.App.5th 1001. The Fifth District reasoned that, under well settled principles, an attempted offense requires the same mens rea as the offense itself. Consequently, because § 188(a)(3) does not expressly exempt attempted murder from the requirement that a defendant personally act with malice and from its bar on imputation of malice, that provision applies equally to attempted murder liability.

Larios and *Medrano* are not yet final. In view of the review-grant on the same issue in *People v. Lopez,* S258175, the Supreme Court is almost certain to grant review in *Larios* and *Medrano* as well.

2 Possible extension of *Chiu* to attempted murder with premeditation.

In addition to the issue of S.B. 1437's applicability to the NPC theory of attempted murder, the Supreme Court's grant of review in *People v. Lopez,* S258175, also includes a distinct question on a different ground for limiting (though not abolishing altogether) NPC liability for attempted murder: "In order to convict an aider and abettor of attempted willful, deliberate and

premeditated murder under the natural and probable consequences doctrine, must a premeditated attempt to murder have been a natural and probable consequence of the target offense? In other words, should *People v. Favor* (2012) 54 Cal.4th 868 be reconsidered in light of *Alleyne v. United States* (2013) 570 U.S. 99 and *People v. Chiu* (2014) 59 Cal.4th 155?" Note, however, that this possible extension of *Chiu*'s reasoning would apply only to attempted murder with premeditation (§664(a)/187) and would not otherwise bar NPC liability for attempted murder.

VI. § 1170.95 -- SUBSTANTIVE AND PROCEDURAL QUESTIONS.

§ 1170.95 is the new superior court petition procedure intended to provide a means for defendants to seek retroactive relief from murder convictions based on S.B. 1437's changes in substantive homicide law. This section will address the scope of eligibility to petition for § 1170.95 relief, as well as some of the many questions regarding the standards and procedures governing each stage of the petition and hearing process.

A. Applicability of § 1170.95 – juvenile cases.

§ 1170.95(a) allows "[a] person *convicted* of felony murder or murder under a natural and probable consequences theory" to file a petition. Although the statute uses the term "convicted," *In re R.G.* (2019) 35 Cal.App.5th 141, confirms that a defendant may also employ the § 1170.95 procedure to seek relief from a juvenile adjudication of murder.

B. Applicability of § 1170.95 – offenses other than murder.

There are at least two apparent mismatches between the scope of convictions affected by S.B. 1437's revisions of homicide and the express terms of § 1170.95's provisions on eligibility to petition for relief.

1 Attempted murder.

As discussed in Part V-E, there is a split of authority regarding whether amended § 188(a)(3) bars NPC liability for *attempted murder,* and that issue is currently before the Supreme court in *People v. Lopez*, review gr., S258175.

The Fifth District has held that this revision of the homicide statute does bar that theory of attempted murder liability. *People v. Larios* (2019) 42

Cal.App.5th 956. However, in *Larios*, that court held that, due to the omission of attempted murder from § 1170.95, a defendant may not employ that petition procedure to seek relief from an attempted murder conviction.

Although rejected in *Larios*, there are two bases for challenging that holding. First, once a court accepts the premise (as the Fifth Dist. did) that S.B. 1437's substantive amendments preclude NPC liability for attempted murder, statutory construction principles support reading § 1170.95 to include attempted murder convictions as well. That construction would avoid absurd consequences and would correct what was likely a "drafter's oversight." Second, a construction excluding attempted murder from § 1170.95, could potentially violate federal and state equal protection principles. That constitutional argument feeds back into the statutory construction analysis. Under the principle of "constitutional doubt" or "constitutional avoidance," where possible a court should adopt a statutory construction that avoids the necessity of resolving any difficult constitutional questions a different construction would pose. That provides further reason to construe § 1170.95 as applying to attempted murder in order to harmonize it with S.B. 1437's substantive homicide amendments.

2 Manslaughter pleas.

§ 1170.95(a)(2) refers to a "petitioner convicted of first degree or second degree murder following a trial or [who] *accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first or second degree murder*." (Emphasis added.) But the prefatory language of § 1170.95(a) authorizes a petition only by a "person convicted of felony murder or murder under a natural and probable consequences."

Several superior courts have summarily denied § 1170.95 petitions by defendants who had been charged with murder but had accepted plea offers in which they agreed to manslaughter convictions (usually for voluntary manslaughter). A number of appeals on that issue are currently pending in the First District and elsewhere.

This is yet another area where a strict adherence to the literal language of one provision of S.B. 1437 would produce anomalous results which could frustrate legislative intent. As reflected in § 1170.95(a)(2), the drafters of S.B.

1437 intended to afford an avenue for relief not only to those convicted at trial, but also to defendants who "accepted a plea offer" in order to avoid the likely murder conviction they were facing under then extant-law.

In particular, often less culpable aiders in a charged murder – particularly aiders in a predicate felony alleged as a basis for first-degree felony-murder – are offered plea bargains for voluntary manslaughter. Yet, under S.B. 1437's revisions, an aider in the predicate felony who was not a "major participant" in that crime and did not act with "reckless indifference" to life should not be guilty of any homicide offense and should be resentenced only for the predicate felony.

As with several other unsettled issues under S.B. 1437, there is also a second anomaly. There is no question that the language of § 1170.95(a) allows a petition by someone who had been charged with first-degree felony-murder and accepted a plea offer for *second-degree murder*. However, a construction excluding those who instead accepted offers for voluntary manslaughter leaves those defendants with no means to petition for resentencing to a non-homicide. *Yet those defendants who were able to resolve their cases with pleas to voluntary manslaughter were likely considered less culpable than those who were only given the opportunity to plead to second-degree murder.*

C. Brief tour of the stages of § 1170.95 review.

1 Pleading eligibility and appointment of counsel

On its face, the statute appears to require only a fairly simple petition to initiate the process, including "a declaration by the petitioner that he or she is eligible for relief ... based on all the requirements of subdivision (a)." § 1170.95(b)(1)(A). Those eligibility criteria include that: (1) the accusatory pleading allowed a prosecution under a felony-murder or a natural and probable consequences theory; (2) the petitioner was convicted of murder at trial or accepted a plea offer; and (3) "[t]he petitioner could not be convicted of first or second degree murder because of" S.B. 1437's amendments to §§ 188 and 189. The court "shall review the petition to 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…." § 1170.95(c).

2 Prima facie determination and OSC.

Following appointment of counsel, the statute sets a schedule for opposition and reply briefs. If the court finds that the petitioner "makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." § 1170.95(c).

3 Hearing and relief.

If the court issues an OSC, it shall order a hearing, at which the prosecution bears the burden to prove "beyond a reasonable doubt, that the petitioner is ineligible for resentencing. …. The prosecutor and the petitioner may rely on the record of conviction or offer new and additional evidence…." § 1170.95(d)(3). If the prosecution fails to sustain its reasonable doubt burden and the court finds the petitioner is entitled to relief, it shall vacate the murder conviction (and enhancements to that count) and resentence on any "remaining charges." § 1170.95(d)(3). If there was no separate charge and conviction count for the "target offense," the "conviction shall be resdesignated as the target offense or underlying felony for resentencing purposes." § 1170.95(e).

D. Initial screening, appointment of counsel, and summary denials.

To date, most or all of the § 1170.95 appeals have been taken from summary denials of petitions, often without appointment of counsel. As summarized above, § 1170.95(c) appears to require two distinct preliminary assessments of the sufficiency of the petition before it can proceed to a hearing. First, the court "shall review the petition to determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." The next sentence provides that "the court shall appoint counsel," if the petitioner has requested counsel. § 1170.95(c). However, if the court does appoint counsel, there is then a round of opposition and reply briefing, after which the court must make *another* assessment whether the petitioner "makes a prima facie showing that he or she is entitled to relief."

§ 1170.95(c) raises numerous questions about these pre-hearing stages of the process, particularly regarding the scope of the preliminary judicial screening of a petition prior to appointment of counsel:

1. Is the court limited to the "face" of the petition and whether the defendant has made the three recitals conforming to the eligibility criteria of 1170.95(b)(1)(A)? (Note that many or most petitions are being filed pro se by inmates using a checklist form that encourages limiting the initial petition to those recitals.)
2. Can the court request a response from the prosecution without appointing defense counsel?
3. If the court may look beyond the "four corners" of the petition itself, *what specific records may it consider and for what purposes*?
4. How does the initial "prima facie showing" assessment prior to appointment of counsel differ from the later assessment (after appointment of counsel and a round of briefing) of whether the petition states "a prima facie showing that [the petitioner] is entitled to relief"?

E. Recent affirmances of summary denials.

1 *Lewis*, *Cornelius*, and *Verdugo*.

As these materials were being prepared and finalized, three appellate opinions were filed affirming summary denials at the initial screening stage without appointment of counsel. *People v. Lewis* (Jan. 6, 2020; B295998) __ Cal.App.5th __, 2020 Cal.App.LEXIS 9; *People v. Cornelius* (Jan. 7, 2020; B296605) __ Cal.App.5th __, 2020 Cal.App.LEXIS 11; *People v. Verdugo* (Jan. 15, 2020; B296630) __ Cal.App.5th __, 2020 Cal.App.LEXIS 33.[13]

All three opinions take the position that a court may look beyond a petition's conclusory recitals of the three eligibility criteria and may look to other documents from the "record of conviction" to determine that the petition doesn't state a prima facie case and that the petitioner is ineligible for relief.

[13] Although these are all Second District cases, they were decided by three different divisions of that court.

A superior court's consultation of additional documents to conclusively resolve the petition without appointment of counsel and the benefit of adversarial briefing is problematic for many reasons. Reference to the "record of conviction" at this preliminary screening stage appears to run contrary to the structure of the statute, because § 1170.95(d)(3) provides that the parties may choose to rely on the "record of conviction" *at the post-OSC hearing on the merits*. That said, as the opinions note, this approach is consistent with pre-OSC habeas standards, which allow a court to deny a habeas petition for failure to state a prima facie case on the ground that judicial records conclusively defeat the claims.

These opinions may be less problematic if they can be confined to their precise holdings. In *Cornelius*, the petitioner was ineligible for relief because the jury's enhancement findings of personal firearm discharge (§§ 12022.53, 12022.5) established that the jury had convicted him as the actual killer rather than as an aider-abettor.

In *Lewis*, the superior court had relied on the prior appellate opinion, which had found *Chiu* error harmless under *Chapman* and had affirmed the *first-degree* murder conviction. The superior court's reliance on that prior opinion in summarily denying the § 1170.95 petition was proper, because the appellate court had "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." That is, the prior opinion held that the jury had convicted on a direct aiding theory and thus that Lewis had personally acted with premeditation, rather than on an NPC theory. *Lewis*, 2020 Cal.App.LEXIS 9 at *12-*13.

Verdugo too upheld the superior court's consideration of a prior appellate opinion. Verdugo had been convicted of first-degree (premeditated) murder and conspiracy to commit murder. The prior appellate opinion established that, in returning convictions of those two offenses, the jurors necessarily found that Verdugo himself "specifically intended to inflict death." *Verdugo*, 2020 Cal.App.LEXIS 33 at *26. Thus, like *Lewis*, *Verdugo* can be construed as allowing for consideration of the appellate opinion only for its *holding* on what findings the jurors necessarily made

Ideally, these three opinions should be narrowly construed as holding only that, at this preliminary pre-appointment stage, a superior court may consider *the jury's express verdicts and enhancement findings* and *a prior appellate opinion's holdings that the jury necessarily made all the necessary findings that the defendant personally acted with malice*. Unfortunately, it will be tempting for courts to read those opinions more broadly as allowing a superior court to review any available portions of the "record of conviction." It is especially important to limit the precise purposes for consideration of a prior opinion. It is one thing to consider an appellate court's holding determining that the jury necessarily made particular factual findings. But it would be especially dangerous to allow consideration of an appellate opinion's statement of facts as definitive and for the superior court then to make its own factual finding based on that summary, without consideration of the complete trial transcript, and without the opportunity to offer additional evidence at a hearing on the petition.

Although not addressed in *Lewis*, *Cornelius*, or *Verdugo*, we are aware that some superior courts have looked to still less reliable materials, such as preliminary hearing transcripts or even police reports. By their very nature, those documents are not intended to present a full development of the facts. On the contrary, their purpose is only to determine whether there is sufficient basis to *initiate* a prosecution. Those documents ordinarily do not reflect any development of defense evidence.

2 Potential opportunity for remands or filing of amended petitions in view of intervening clarification of pleading requirements.

The premise of the widely-circulated Restore Justice form § 1170.95 petition is that, to clear the initial prima facie screening and to qualify for appointment of counsel, it is sufficient to recite that the petitioner meets each of the 3 eligibility criteria of § 1170.95(a). See petition form appended to *Verdugo* opinion, 2020 Cal.App.LEXIS 33. Each of the newly-decided opinions (*Lewis*, *Cornelius*, and *Verdugo*) rejects that premise. Moreover, *Lewis* even implies that, if the petitioner ultimately intends to present new evidence at the hearing to "contradict a fact established by the record of conviction," he may need to "include or refer to such evidence in his petition." *Lewis*, 2020 Cal.App.LEXIS 9 at *13-*14 & fn. 9.

The three recently-filed opinions appear to "raise the bar" for the contents of pro se § 1170.95 petitions well above the very modest threshold suggested by the commonly used form petition. By analogy to several cases construing the Prop. 47 remedial statute, § 1170.18, these intervening clarifications of the pleading requirements for a § 1170.95 petition may provide a hook for obtaining a second chance for filing a sufficient petition. In light of the upending of prior expectations represented by the three new opinions, defendants should be allowed to seek relief from summary denials by filing amended petitions. Appellate courts should either remand for that purpose or should make clear in their opinions that any affirmance is without prejudice to filing an amended petition in superior court. See *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909 (remand in Prop. 47 appeal, where intervening case law clarified showing required); *People v. Page* (2017) 3 Cal.5th 1175, 1189-1190 (Prop. 47 denial affirmed without prejudice to refiling petition, where intervening case clarified pleading and proof requirements); *People v. Perkins* (2016) 244 Cal.App.4th 129, 141-142 (denial affirmed without prejudice to filing of new petition "that supplies evidence of his eligibility" where "the omission is the fault of the form, rather than defendant").

F. Second prima facie determination.

One of the more curious features of § 1170.95(b)(3) is its apparent provision for two separate "prima facie showing" determinations before a petition can proceed to a hearing and possible relief. The first occurs when the superior court reviews the initial petition, prior to appointment of counsel. As discussed in the preceding section, recent opinions allow a court to summarily deny a petition, at that initial screening stage, without appointment of counsel, for failure to make a "prima facie showing." Yet, the statute further provides that, if the court does appoint counsel and receives briefing from both sides, it must then make another "prima facie showing" determination in order to issue an order to show cause.

Ordinarily, a term of art like "prima facie showing" would carry the same meaning throughout the statute. Yet, the statute's provision for successive determinations implies that the second, post-briefing determination either represents a somewhat higher standard or involves review of additional

materials.[14] The recent *Verdugo* opinion commented that, in the briefing preceding this second assessment, "the prosecutor may be able to identify additional material[s] from the record of conviction … that establish the petitioner is not entitled to relief," and defense counsel's reply "may rebut the prosecutor's claim of ineligibility." *Verdugo*, 2020 Cal.App.LEXIS 33 at *16 fn. 9.

G. Issues posed by special circumstance findings.

As noted earlier, amended § 189(e) imports the "*Tison* factors" from the felony-murder special circumstance (§ 190.2(d)) into the requirements for first-degree felony-murder liability. This new equivalence between the special circumstance and liability for the offense of first-degree felony-murder poses important implications, good and bad, for seeking § 1170.95 relief in cases in which that special circumstance was charged.

1 Relief without hearing – prior findings rejecting *Tison* factors.

The statute identifies one situation in which the petitioner is entitled to relief as a matter of law without the necessity for a hearing on the matter. "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 [murder] conviction and resentence the petitioner." § 1170.95(d)(2). The import of that provision should be clear: Either a jury acquittal on a special circumstance or a judicial finding rejecting that charge for insufficient evidence mandates relief. Yet, in *People v. Ramirez* (2019) 41 Cal.App.5th 923, a prior appellate habeas opinion had vacated the special circumstance on sufficiency grounds, but the superior court summarily denied the defendant's later § 1170.95 petition. In reversing that denial, the *Ramirez* court confirmed that the statute "impos[es] a

[14] There are slight differences in phrasing – a "prima facie showing that the petitioner falls within the provisions of" the statute (§ 1170.95(c), 1st sentence) vs. a "prima facie showing that the petitioner is entitled to relief" (last sentence). As the *Lewis* opinion commented, "it is not clear what, if any, substantive differences exist" between the two formulations. *Lewis*, 2020 Cal.App.LEXIS 9 at *16 fn. 10.

mandatory duty on the court to vacate defendant's sentence and resentence him whenever there is a prior finding of this court" of insufficient evidence of the *Tison* factors. *Ramirez* at 932. The same rationale should apply to a jury acquittal on a special circumstance and to similar judicial findings, such as a § 995 or § 1118.1 dismissal or an appellate reversal of the special circumstance for insufficient evidence.

2 Special circumstance findings – pre- and post-*Banks*.

While an acquittal/reversal/dismissal of a special circumstance effectively guarantees relief from the first-degree murder conviction under § 1170.95(d)(2), conversely an intact special circumstance finding presents a potential barrier to such relief. Whether that barrier is surmountable depends in large part on the timing of the murder trial and direct appeal relative to the Supreme Court's opinions in *People v. Banks* (2015) 61 Cal.4th 788, and *People v. Clark* (2016) 63 Cal.4th 522.

In *Banks* and *Clark*, the Supreme Court tightened the standards for both the "reckless indifference" and "major participant" requirements. That is, those opinions required a higher level of culpability to satisfy those elements and overruled some prior appellate cases that had upheld special circumstances based on lesser showings.[15] Consequently, in assessing the impact of a prior special circumstance finding on the ability to seek §1170.95 relief from the

[15] We will not attempt to address here the particulars of how *Banks* and *Clark* refined the understanding of the circumstances necessary to satisfy those elements. Those holdings have been summarized in the many subsequent appellate cases applying *Banks* and *Clark*, as well as in prior homicide articles available through FDAP's website. See e.g., O'Connell, "The Latest Developments in California Homicide Law" (Jan. 2018), pp. 14-16. http://www.fdap.org/downloads/articles_and_outlines/Homicide_2018.pdf For present purposes, it suffices to say that *Banks* and *Clark* represented a sufficient change in the case law that defendants whose cases had previously been affirmed on appeal have been permitted to challenge the special circumstance findings on habeas, notwithstanding the usual procedural bars on post-affirmance habeas petitions. E.g., *In re Taylor* (2019) 34 Cal.App.5th 543, 554-556.

first-degree murder conviction, counsel should first consider the timing of the trial and the briefing and decision of the appeal relative to *Banks* and *Clark*.

a. Pre-*Banks/Clark* cases.

Together *Banks* and *Clark* represent enough of a "game changer" in the sufficiency requirements for the two "*Tison* factors" that *a special circumstance finding should not preclude a §1170.95 challenge to a first-degree felony-murder conviction if the case was tried and affirmed on appeal prior to those opinions*. If the appellate court explicitly upheld the sufficiency of the evidence to support the "major participant" and "reckless indifference" requirements, that holding may be subject to re-examination because the appellate court relied on then-extant case law undermined by the intervening *Banks* and *Clark* opinions. Similarly, if the prior appeal did not address the sufficiency of the evidence to support the special circumstance verdict, the state of the prior case law may explain prior appellate counsel's failure to brief that issue.

None of this means that a pre-*Banks* special circumstance finding is necessarily invalid. It does, however, mean that current counsel should review the underlying facts within the framework prescribed in *Banks* and *Clark* and should independently assess there may be a viable ground to challenge the "major participant" and/or "reckless indifference" elements.

Where counsel believes there is a viable argument that the facts do not support one or both of the *Tison* factors ("major participant" and "reckless indifference to human life"), the next question is the proper procedure for pursuing that challenge. Even before enactment of S.B. 1437, numerous cases had allowed defendants to raise *Banks-Clark* challenges to special circumstance verdicts, where their direct appeals had been decided prior to those landmark opinions. E.g., *In re Miller* (2017) 14 Cal.App.5th 960; *In re Bennett* (2018) 26 Cal.App.5th 1002. More recently, in *In re Taylor* (2019) 34 Cal.App.5th 543, 562, the appellate court granted habeas relief and vacated the special circumstance finding based on *Banks* and *Clark*. But the opinion stated that the defendant must file a § 1170.95 petition in superior court in order to obtain relief from the underlying first-degree murder conviction.

As *Taylor* reflects, that "two step" process– a habeas challenge to the special circumstance, followed by a § 1170.95 petition in superior court – represents one way of seeking relief. Where a habeas court has found insufficient evidence of one or both *Tison* factors and has set aside the special circumstance, the defendant should then have a clear entitlement to relief from the first-degree murder conviction when he or she files a § 1170.95 petition. § 1170.95(d)(2).

It is unclear, however, whether that "two step" process is the *only* method of pursuing relief where there is a pre-*Banks/Clark* special circumstance finding. May a defendant instead use a § 1170.95 petition to obtain relief from *both* the special circumstance and the murder conviction in a single proceeding? Or can a superior court require a defendant first to obtain habeas relief from the special circumstance before the court will entertain a § 1170.95 challenge to the murder conviction?

A still more difficult challenge is posed where there was a previous unsuccessful habeas challenge to a special circumstance, especially if that petition resulted in a post-OSC opinion or order upholding the special circumstance. Ordinarily, a summary denial of a writ petition without an opinion does not have "law of the case" or res judicata effect. Cf. *People v. Medina* (1972) 6 Cal.3d 484, 492-493. However, it is possible that a court might still view a later § 1170.95 petition on the same ground as procedurally barred as a "successive petition." To date, there is no published case law on any of these questions.

b. Post-*Banks/Clark* cases.

It will be much more difficult to proceed on a § 1170.95 petition if an appellate court upheld a judgment including the special circumstance in an appeal briefed and decided *after Banks* and *Clark*.

Where the jury was properly instructed on the "major participant" and "reckless indifference" elements of the special circumstance and the defendant did not challenge that verdict on sufficiency grounds in his post-*Banks/Clark* appeal, the jury's special circumstance finding will likely bar §

1170.95 relief. Cf. *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 419.[16]

That still leaves the question of whether there is any recourse if: (1) the original appeal was briefed and decided after *Banks* and *Clark*; 2) the prior appeal did not raise any sufficiency challenge to the special circumstance; and 3) current § 1170.95 counsel, nonetheless, believes that the evidence is insufficient to support the "major participant" and/or "reckless indifference" elements. In that situation, the most appropriate course would likely be to file a habeas corpus petition alleging ineffective assistance of prior appellate counsel.

c. Felony-murder convictions without special circumstances.

The preceding discussion applies only to cases in which a felony-murder special circumstance was charged. Of course, in many cases, the prosecution will charge an aider-abettor with first-degree felony-murder without any special circumstance charge. In contrast to an acquittal (or comparable judicial finding) rejecting a special circumstance, the absence of a special circumstance charge in the original murder case will not automatically entitle a defendant to relief under § 1170.95 (though it may be persuasive evidence that the prosecution did not believe the defendant satisfied the *Tison* criteria).

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[16] *Gutierrez-Salazar* was a direct appeal from the conviction, rather than a § 1170.95 appeal. The appellate court found it unnecessary to decide the *Estrada* retroactivity question of S.B. 1437's applicability on pending appeals, because it found that any instructional error as to the felony-murder conviction was necessarily harmless. Through its special circumstance verdict, "the jury made the requisite findings to sustain a felony-murder conviction under the amended law." The defendant's appeal did "not challenge the sufficiency of the evidence regarding the felony-murder special circumstance finding." *Gutierrez-Salazar* at 419. However, the appellate court added, "nothing in this opinion should be construed as limiting defendant's right to file a petition in the trial court, pursuant to section 1170.95. Any available relief, of course, may be constrained by the doctrine of law of the case. [Citation.]" *Ibid.*

If there was no special circumstance charged, the defendant is entitled to § 1170.95 review because the instructions on first-degree felony-murder did not require the jury to make findings on the two *Tison* factors, as now required under amended § 189(e). (The conflicting interpretations of the framing of that review are discussed immediately below in Part VI-H.)

H. The standard for relief, § 1170.95(d)(3).

Where a trial court issues an OSC under § 1170.95(c), it must set the matter for a hearing. During the hearing, "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(d)(3).

This brings us to the most consequential and unresolved question concerning § 1170.95 proceedings– the ultimate standard for obtaining relief. "At the hearing …, the burden shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." § 1170.95(d)(3).

Despite the statute's placement of a reasonable doubt burden on the prosecution, there is considerable litigation at the superior court level over what exactly that standard means. There are three possible constructions, ranging from good to terrible, as sketched below.

1 Good – *Chapman*-like review.

§ 1170.95 is intended to provide a remedy for defendants to seek review of their prior convictions under S.B. 1437's amendments of the homicide statutes. In most § 1170.95 cases, *the prior jury was never required to make the findings now necessary to support liability under the amended statutes*.

A first-degree felony-murder verdict is subject to review because (unless there was a special circumstance charged) the jury was never required to make findings on the two *Tison* factors – major participant and reckless indifference to human life. A second-degree murder conviction is subject to § 1170.95 review where the case was tried in part on one of the theories abrogated by amended § 188(a)(3) – natural and probable consequences, second-degree felony-murder, or "provocative act" murder.

In each of these scenarios, the prior jury instructions were erroneous under the revised homicide statutes. The instructions either omitted elements necessary to a valid conviction (the *Tison* factors) or included a legally invalid alternative theory of liability (such as NPC). *Both forms of instructional error are subject to Chapman review on direct appeal of a conviction. Chapman v. California* (1967) 386 U.S. 18. Moreover, the recent *Martinez* opinion holds that *Chapman* review also applies on habeas review where there has been an intervening change in substantive law which is fully retroactive. *In re Martinez* (2017) 3 Cal.5th 2017 (*Chapman* standard applicable on habeas review of *Chiu* error (NPC theory of first-degree murder liability)).

Under this view, the "reasonable doubt" burden, as used in § 1170.95(d)(3), should be read as tantamount to the "beyond a reasonable doubt" prejudice test of *Chapman v. California*. Thus, as with *Chapman* review in other contexts, the focus of that review should be on whether *the prior jury actually relied on a legally valid theory or otherwise made all the findings necessary for conviction.* Significantly, of the three competing views of the § 1170.95(d)(3) standard, *Chapman* review is the only one which respects the defendant's right to *jury determination of every fact necessary to conviction on a valid theory.*

2 Intermediate – judge as fact-finder.

In many respects, a § 1170.95 hearing appears to bear greater resemblance to a trial than an appeal. "Burden of proof" is a concept more closely associated with fact-finding proceedings. Although the parties may choose to rely on the "record of conviction," the statute also gives each side the option of offering "new or additional evidence." § 1170.95(d)(3). Presumably, when one or both parties do present new evidence, the judge will make factual findings on that evidence. Yet, the ultimate standard for relief must be the same regardless of whether the case is submitted on the prior "record of conviction" or also involves presentation of new evidence. These aspects of the statute all appear to cast the superior court judge in the role of a fact-finder, as in a bench trial, rather than that of a reviewing court assessing the effect of instructional error (as on an appeal). By this interpretation, in a § 1170.95(d)(3) hearing, the trial judge, sitting as fact-finder, would independently determine the

defendant's liability under the amended homicide statutes, applying the reasonable doubt standard, just as a judge does during a bench trial.

Judge Couzens's analysis of S.B. 1437 appears to support this interpretation: "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 a valid theory. Couzens, Accomplice Liability for Murder (SB 1437) (July 2019), p. 36.

3 Terrible – sufficiency review.

Many prosecutors are pressing for another interpretation of the § 1170.95(d)(3) standard, which, if adopted, would gravely impair many or most defendants' prospects for obtaining relief under the new procedure. This argument focuses on the object of the "reasonable doubt" inquiry – "the burden shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is *ineligible* for resentencing." § 1170.95(d)(3) (emphasis added). The problem lies in the framing of the standard in term of a defendant's "eligibility" for relief. According to prosecutors, this standard refers to the previous subdivisions setting out the criteria for petitioning for relief. Those include that "[t]he petitioner *could not be convicted* of first or second degree murder because of changes to Sections 188 and 189," enacted by S.B. 1437. § 1170.95(a)(3) (emphasis added).

According to this theory, a § 1170.95 petitioner is only "eligible" for relief if he or she "could not be convicted" under the amended statutes. Under this prosecution-favored interpretation, the judge in a § 1170.95 hearing does not sit as an independent trier of fact but merely assesses whether the evidence is sufficient that a reasonable fact-finder *could* find the defendant guilty under the revised homicide statutes. Under this view, the "reasonable doubt" burden enters the analysis only in the same limited way as when a trial court assesses the sufficiency of evidence for a § 1118.1 motion for acquittal or an appellate court decides a sufficiency claim under *Jackson v. Virginia* (1979) 443 U.S. 307.

This view equating the ultimate standard for § 1170.95 relief to mere sufficiency-of-evidence review would effectively gut the remedial statute. It

would allow a court to deny a § 1170.95 petition on the ground that the evidence appears sufficient that a hypothetical reasonable juror could convict under the amended statutes. But, in marked contrast to § 1118.1 or *Jackson v. Virginia* review, *no fact-finder – neither a jury nor the § 1170.95 hearing judge -- would ever independently determine the defendant's guilt under the reasonable doubt standard.*

There is no appellate case law yet construing the § 1170.95(d)(3) standard. Most of the appeals currently pending are from summary denials of § 1170.95 appeals, rather than post-hearing denials. In any event, of the many unresolved issues flagged in these materials, this is the most consequential.

I. Evidentiary issues.

A number of evidentiary issues are also percolating in the superior courts. As with the § 1170.95(d)(3) standard, there is no case law yet on any of these subjects, nor are we aware of any currently pending appeals posing these issues. Because those issues have not yet been fleshed out, we will only briefly note some of the leading questions but will not attempt to offer any further analysis at this point:

1 What portions of the "record of conviction" are reviewable at a post-OSC hearing (as opposed to during the pre-OSC "prima facie showing" assessments)?

- **a.** What about hearsay materials such as police reports, probation reports, and police hearsay testimony at a preliminary hearing?

2 Does the Sixth Amendment confrontation clause apply in a § 1170.95(d)(3) hearing on the ground that such a hearing is tantamount to a trial because it requires a redetermination of the defendant's guilt?

- **a.** If the Sixth Amendment does not apply, to what extent does due process impose limitations on hearsay and other evidence of questionable reliability?

3 Do all the ordinary statutory rules of evidence apply in such a hearing?

4 May the prosecution present evidence of a defendant's statements during a parole hearing about his role in the offense?

5 Are transcripts from separately-tried co-defendants' trials admissible, even though the defendant would not have had any opportunity to cross-examine those witnesses?

J. The § 1170.95 remedy – resentencing on the "remaining charges" or "target offense."

Where a court finds that the defendant is entitled to relief, the prescribed remedy is to vacate the murder conviction and "resentence" the defendant "on the remaining charges." § 1170.95(d)(3). If there was no separate charge for the "target offense," the murder conviction "shall be redesignated as the target offense or underlying felony for resentencing purposes." § 1170.95(e). In other words, the defendant is to be resentenced on whatever target or predicate offense was used as the basis for felony-murder or natural and probable consequences liability.

In this respect, the § 1170.95 remedy is very different from the traditional direct appeal or habeas remedies for prejudicial error going to elements of the offense or theories of liability. Except where an appellate court reverses on sufficiency of evidence grounds, the usual remedy is reversal *for a new trial*. But the § 1170.95 remedy does not appear to provide an option to retry the defendant for murder under the amended statutes.

The "redesignation" remedy also may have implications for the unresolved issues concerning interpretation of the § 1170.95(d)(3) standard for relief. Unfortunately, that remedy of resentencing on the "target" offense, rather than retrial of the murder charge, may undermine the argument that the § 1170.95(d)(3) standard is comparable to *Chapman* harmless error review. The apparent bar on retrial of the murder charge suggests that the trial court is either sitting as an indepednent fact-finder or is reviewing for sufficiency of evidence (what we have described as the "intermediate" and "terrible" interpretations respectively), rather than as a reviewing court assessing the effect of instructional error.

We are aware of at least one instance in which a superior court has balked at the redesignation remedy prescribed in the statute. Instead, that court apparently reduced a first-degree felony-murder verdict to second-degree murder. Focusing just on the amended homicide statutes, it is possible to imagine scenarios where a defendant could be guilty of a lesser homicide offense under the amended homicide statutes. For instance, "reckless disregard for human life" is viewed as a somewhat higher, more culpable mental state than the "conscious disregard" required for implied malice. Cf. *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285. Consequently, at least in theory, a defendant who fell just short of the "reckless disregard" now required for first-degree felony-murder might, nonetheless, be deemed guilty of second-degree murder (though this is an exceedingly subtle distinction). Similarly, a defendant tried on a natural and probable consequences theory who did not personally act with malice aforethought might, nonetheless, have acted with the gross negligence required for involuntary manslaughter.

Nonetheless, though in theory a defendant could be guilty of a lesser homicide offense, the statutory language plainly prescribes resentencing to the target or predicate offense for the NPC or felony-murder theory. § 1170.95(d)(3) & (e). The appellate opinion in *People v. Ramirez*. (2019) 41 Cal.App.5th 923, appears to require that statutorily-prescribed remedy as well.

K. Appellate review of § 1170.95 denials.

Several of the "first wave" of § 1170.95 appeals have been from summary denials in cases where the defendant appeared plainly ineligible, such as where jury findings indicated he was convicted as the actual killer, rather than as an aider-abettor. Appellate attorneys have submitted *Wende* briefs in those cases. For the most part, the appellate courts have simply reviewed the complete record as on any other *Wende* review and have not questioned the applicability of that procedure.

In one case, however, Division One of the First District has recently solicited supplemental briefing on whether *Wende* applies on an appeal from the denial of a § 1170.95 petition "for failure to make a prima facie showing" of his entitlement to relief. The appellate court's briefing directive cited *People*

v. Serrano (2012) 211 Cal.App.4th 496, 503. The *Serrano* opinion declined to conduct *Wende* review on an appeal from the denial of a post-judgment motion to vacate a conviction based on deficient immigration advisements under § 1016.5.

The request for supplemental briefing on *Wende*'s application to § 1170.95 is troubling. However, it is one of several recent instances in which courts have questioned *Wende*'s application outside the context of a defendant's "first appeal as a matter of right" from a criminal conviction. There has not yet been an opinion on the issue in the pending First District case.

APPENDIX

S.B. 1437 – Stats. 2018, c. 1015

Senate Bill No. 1437

CHAPTER 1015

An act to amend Sections 188 and 189 of, and to add Section 1170.95 to, the Penal Code, relating to murder.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1437, Skinner. Accomplice liability for felony murder.

Existing law defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought. Existing law defines malice for this purpose as either express or implied and defines those terms.

This bill would require a principal in a crime to act with malice aforethought to be convicted of murder except when the person was a participant in the perpetration or attempted perpetration of a specified felony in which a death occurred and the person was the actual killer, 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, or the person was a major participant in the underlying felony and acted with reckless indifference to human life.

Existing law defines first degree murder, in part, as all murder that is committed in the perpetration of, or attempt to perpetrate, specified felonies, including arson, rape, carjacking, robbery, burglary, mayhem, and kidnapping. Existing law, as enacted by Proposition 7, approved by the voters at the November 7, 1978, statewide general election, prescribes a penalty for that crime of death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life. Existing law defines 2nd degree murder as all murder that is not in the first degree and imposes a penalty of imprisonment in the state prison for a term of 15 years to life.

This bill would prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or 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, or the person was a major participant in the underlying felony and acted with reckless indifference to human life, unless the victim was a peace officer who was killed in the course of performing his or her duties where the defendant knew or should reasonably have known the victim was a peace officer engaged in the performance of his or her duties.

This bill would provide a means of vacating the conviction and resentencing a defendant when a complaint, information, or indictment was filed against the defendant that allowed the prosecution to proceed under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, the defendant was sentenced for first degree or 2nd degree murder or accepted a plea offer in lieu of a trial at which the defendant could be convicted for first degree or 2nd degree murder, and the defendant could not be charged with murder after the enactment of this bill. By requiring the participation of district attorneys and public defenders in the resentencing process, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

The people of the State of California do enact as follows:

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.

SEC. 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.

SEC. 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, 288, 288a, or 289, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

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

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

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

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

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

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

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

(1) The person was the actual killer.

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

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

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

SEC. 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.

SEC. 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.

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