MEMORANDUM

TO: COUNSEL ON CASES AFFECTED BY SB 775

FROM: OSPD

SUBJECT: APPELLATE STRATEGIES FOR TAKING ADVANTAGE OF THE NEW LAW

DATE: OCTOBER 18, 2021

CC: CCAP, ADI, FDAP, SDAP, CAP-LA

On October 5, 2021, Governor Newsom signed SB 775, which makes significant amendments to Penal Code section 1170.95 that will affect both cases involving resentencing petitions and cases involving direct appellate challenges to murder and attempted murder convictions.

This is a memo arising out of a discussion among the OSPD, the appellate projects, and panel attorneys involved in some of the California Supreme Court cases on SB 1437 that offers some considerations moving forward.

Remember that all cases are unique. Please consult with your assisting project if you have questions about the best way to proceed.

THE BASICS

SB 775 makes the following important changes to litigation regarding an alleged accomplice's liability for murder, attempted murder and manslaughter.

1. Defendants who were convicted of attempted murder as aiders and abettors may apply for resentencing relief if they could have been prosecuted for attempted murder under a natural and probable consequences ("NPC"), or other imputed malice theory. (§ 1170.95(a).)
2. Defendants who were convicted of manslaughter may apply for resentencing relief if they could have been prosecuted for murder under a felony murder, natural and probable consequences ("NPC"), or other imputed malice theory. (This will generally apply to aiders and abettors who accepted a manslaughter plea to avoid a murder prosecution.) (§ 1170.95(a).)
3. The amendment adds the phrase "or other theory under which malice is imputed to a person based solely on that person's participation in a crime" to the eligibility subdivision, § 1170.95(a) and § 1170.95(a)(1). Through that amendment, the legislation effectively authorizes defendants prosecuted on

imputed malice theories *other than NPC murder and felony murder* to petition for relief. One common imputed malice theory other than NPC is uncharged conspiracy liability (i.e., the defendant is alleged to have been guilty of murder because he joined a conspiracy to commit some crime other than murder and one of his co-conspirators committed murder), or – less frequently – where the theory is aiding and abetting a "provocative act." (§ 1170.95(a)(1).)

4. The statute clarifies that the court must determine whether the defendant could **presently** be convicted of murder or attempted murder, eliminating the backward-looking substantial evidence arguments, and overruling *People v. Duke* (2020) 55 Cal.App.5th 113. (§ 1170.95(a)(3).)
5. Upon receiving a petition, the court must appoint counsel, codifying the holding in *People v. Lewis* (2021) 11 Cal.5th 952. (§ 1170.95(b)(3).)
6. The trial court must provide a complete statement of reasons for denying the petition at the prima facie stage. (§ 1170.95(c).)
7. The Evidence Code applies at the hearing under 1170.95(d)(3), except that the court may consider evidence previously admitted at any prior hearing or trial that is admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. However, hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of Section 872 shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule. (§ 1170.95(d)(3).)
8. In regard to prior appellate opinions, the court may *only* rely on the recitations regarding the procedural history of the case – *not* the version of the facts recited by the prior appellate court. (This effectively overrules the suggestion in *Lewis* that the facts stated in a prior opinion should be credited.) (§ 1170.95(d)(3).)
9. A prior finding of substantial evidence to support the conviction does not preclude relief. (§ 1170.95(d)(3).)
10. A person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge the validity of that conviction on direct appeal based on the 2018 changes to Penal Code sections 188 and 189. (§ 1170.95(g).)
11. The possible parole term to be imposed after resentencing is two years rather than three. (§ 1170.95(h).)

STRATEGIC CONSIDERATIONS

Everyone who thinks their client should benefit from the new law wants to obtain relief as quickly as possible. Following are a list of suggested strategies to do so, depending on the procedural posture of the case. This memo does not purport to set out all the legal issues potentially raised by SB 775. Instead, it attempts to provide guidance regarding the procedural tools at counsel's disposal so their clients may take advantage of the new law.

1. **YOU HAVE NOT YET FILED A BRIEF IN YOUR DIRECT APPEAL OF A MURDER, ATTEMPTED MURDER OR MANSLAUGHTER CONVICTION THAT WOULD BE INVALID UNDER THE CURRENT VERSIONS OF PENAL CODE SECTIONS 188 AND 189 AND DO NOT BELIEVE YOU CAN PUT OFF FILING UNTIL AFTER JANUARY 1, 2022.**

   Argue that your client's conviction must be reversed for instructional error. SB 775 creates a change in the law similar to that described in *Chiu* and is expressly available to cases not yet final on appeal. YOU DO NOT NEED TO FILE AN 1170.95 PETITION TO OBTAIN THE BENEFITS OF SB 775. Just argue that the change is the law is now effective to your client by legislative fiat.

2. **YOU HAVE FILED A PETITION FOR REVIEW THAT HAS NOT BEEN GRANTED OR DENIED.**

   File a supplemental letter asking the Supreme Court to grant review on an additional issue created by the change in the law and ask that the matter be transferred to the Court of Appeal for consideration of the new issue. (See Cal. Rules of Ct., rules 8.500(b)(4) and 8.528(d).) You can also ask, in the alternative, that the petition be explicitly denied WITHOUT PREJUDICE to filing a new 1170.95 petition to raise the new issues.

3. **YOU HAVE FILED A PETITION FOR REVIEW THAT HAS BEEN GRANTED AND HELD BEHIND *LOPEZ* (no 1170.95 relief for attempted murder convictions).**

   Since it is now clear under SB 775 that SB 1437 applies to both murder and attempted murder convictions, counsel can ask that, in light of the new legislation which is set to become effective 01/01/2022, the matter be remanded to the Court of Appeal for briefing and consideration in light of the new law. (Rule 8.528(d).)

   As clarified by SB 775, it appears that SB 1437 precludes any form of attempted murder -- premeditated or unpremeditated -- that is predicated on the NPC doctrine. As applied to the crime of attempted murder, premeditation is a sentencing allegation (Pen. Code § 664, subd. (a)), not a higher degree of attempted murder. (*People v. Favor* (2012) 54 Cal.4th 868, 876-877.) Since, under SB 1437 (as clarified by SB 775) the NPC doctrine cannot be used to obtain an attempted-murder conviction, there can be no NPC-based attempted murder convictions to which to apply a premeditation allegation under Penal Code section 664, subdivision (a). In *People v. Lopez* S258175, the California Supreme Court is considering whether SB 1437 applies to attempted murder and is reconsidering its holding in *Favor* that NPC instructions in premeditated-attempted-murder cases need not include premeditation as part of the target offense. And the Supreme Court has asked for supplemental briefing on the impact of SB 775 on those questions. SB 775 resolves both those questions favorably to the defense:

SB 1437 applies to attempted murder, so the NPC doctrine can't be used at all in instructing juries in attempted murder cases.

4. THE SUPREME COURT HAS DENIED REVIEW IN YOUR CASE BUT THE TIME FOR PETITIONING FOR CERTIORARI (90 DAYS) HAS NOT YET EXPIRED.

Under *In re Estrada* (1965) 63 Cal.2d 740, ameliorative changes in the law are presumptively retroactive to cases that are not yet final on appeal. (*People v. Esquivel* (2021) 11 Cal.5th 671, 673.) As revised by SB 775, Penal Code section 1170.95(g) expressly provides that "[a] person convicted of murder, attempted murder, or manslaughter whose conviction is not final may challenge on direct appeal the validity of that conviction based on the changes made to Sections 188 and 189 by Senate Bill 1437 (Chapter 1015 of the Statutes of 2018)." At a minimum, this provision makes clear that defendants whose convictions of murder, attempted murder or manslaughter may have been predicated on a theory of culpability no longer allowed by SB 1437 are entitled to challenge their convictions on direct appeal (i.e., as opposed to having to pursue relief pursuant to Penal Code section 1170.95), if their judgments are not yet final as of the effective date of SB 775 (01/01/2022). (This provision expressly overrules the holding in *People v. Gentile* (2020) 10 Cal.5th 830, 851-859, that eligible defendants who have already been sentenced must pursue relief via section 1170.95.)

A criminal judgment becomes retroactive for purposes of *Estrada* as of the denial of a petition for certiorari or the passing of the deadline for seeking certiorari (90 days after the denial of review by the California Supreme Court). (*People v. Vieira* (2005) 35 Cal.4th 264, 305-306.) So, if the Supreme Court has denied your client's petition for review and 90 days will have passed since that denial by the time SB 775 becomes effective on 01/01/2022, your client can keep his or her judgment from becoming final by filing a petition for cert within that 90-day window (i.e., as long as you raised a federal constitutional claim on appeal, which need not be tied to your 1170.95 claim). You can also request an extension of time to file a cert petition from the United States Supreme Court. Counsel are encouraged to consult with the staff attorney buddy at the individual project as to whether petitioning for certiorari is within, or can (with an expansion request) be included within, the scope of counsel's appointment." A petition for rehearing from a denial of review is not possible because a denial is final upon filing. (Rule 8.532(b)(2)(A).)

These are cases in which, depending on your client's issues, you may need to file a new 1170.95 petition to obtain relief made available by SB 775.

You can also move to recall the remittitur, which in many cases issues the day after the Supreme Court denies review. (Rule 8.272(c)(2).) The request to recall the remittitur should present supplemental briefing on the new law. A quick

LEXIS search shows this is not an uncommon procedure, so don't be timid about trying it.

5. THE SUPREME COURT HAS DENIED REVIEW IN YOUR CASE AND THE TIME FOR PETITIONING FOR CERTIORARI HAS EXPIRED.

If your client's case is in this posture, then the judgment is final. Of course, these defendants at least have the option of seeking relief from the trial court pursuant to a petition under section 1170.95 (as modified). However, SB 775 makes clear that it is not a further modification of homicide law, but simply a clarification of what the Legislature intended in modifying homicide law pursuant to SB 1437. (See Stats. 2021, Ch. 551, § 1(a).) And this would appear to support an argument that defendants whose judgments are now final but were not yet final as of the effective date of SB 1437 (01/01/2019) also should have been allowed to challenge their convictions on direct appeal. (See *Carter v. Cal. Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922 ["A statute that merely clarifies, rather than changes, existing law is properly applied to transactions predating its enactment."]; see also *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 471-472 ["If the amendment merely clarifie[s] existing law, no question of retroactivity is presented" because "the amendment would not have changed anything."].) The fact that SB 775 clarifies rather than changes SB 1437 for these purposes strongly suggests a legislative intent that defendants whose cases were not yet final on direct appeal as of the effective date of SB 1437 (01/01/2019) should have been allowed to challenge their convictions for attempted murder or manslaughter pursuant to SB 1437 on direct appeal, and that they should be allowed to do so now, via a petition for writ of habeas corpus or motion to recall the remittitur. Clients whose judgments were final as of the effective date of SB 1437 (01/01/2019) are probably limited to seeking relief pursuant to section 1170.95 (as modified).

A habeas petition, if successful, would get your client a new trial by jury. A motion to recall the remittitur, if successful, would reopen your appeal, and if the appeal is successful, the remedy would be a new trial. An 1170.95 petition would get your client a hearing at which the trial court acts as the trier of fact. It is not clear yet whether one process would be faster than the other, although section 1170.95 has some statutory deadlines and habeas corpus does not. That said, many 1170.95 petitions take months to resolve after the initial briefing, and both parties have been able to get extensions of time from the statutory deadlines. Another consideration may be the appointment of counsel. A habeas petitioner does not get counsel appointed until an OSC issues, while the 1170.95 petitioner receives counsel upon the filing of a facially valid petition.

Counsel with clients whose cases are in this posture are encouraged to consult with the staff attorney buddy at the individual project to discuss how best to advise their clients.

6. THE COURT OF APPEAL HAS AFFIRMED THE DENIAL OF RELIEF BUT YOU HAVE NOT YET PETITIONED FOR REVIEW.

If you are within 30 days of the decision, consider filing a petition for rehearing (even a belated one, with a request to file it late) raising the new issue based on the change in the law. Otherwise, file a petition for review asking for a grant and transfer in light of the new law. No petitions for review filed between now and January 1, 2022, are likely to be decided by the Supreme Court before that date.

7. BRIEFING IS COMPLETED IN YOUR 1170.95 DIRECT APPEAL.

a. Attempted murder, petition denied at prima facie stage because court believed law did not apply.

b. Manslaughter, petition denied at prima facie stage because court believed law did not apply.

You can ask for the case to be remanded to the trial court with ***authorization*** to file an amended petition (you want the express authorization if you can to avoid a possible successive petition bar[1]). Point out that the prior conflict that led your client to lose has been resolved in your client's favor by a change in the law. You can also point out that by the time the case gets remanded, the new version of section 1170.95 will be effective.

c. **Murder plus either attempted murder or manslaughter, petition denied at prima facie stage because court believed law didn't apply.**

You can tell client they need to finish the appeal of the challenge to the murder conviction first and then file a new 1170.95 petition raising the attempted murder or manslaughter claim. This might not be a great option because your initial appeal may result in an opinion stating the facts in a way that would undermine your attempted murder or manslaughter petition. You will need to plot this one out. If you think your murder claim is a slam dunk and the facts are quite favorable, finishing that appeal first may not be a problem

If you are worried about the fallout of splitting the murder claim from the new attempted murder or manslaughter claim, you can ask for *Awad* stay (*People v. Awad* (2015) 238 Cal.App.4th 215, 218 [limited remand to allow trial court to address new issue]), citing SB 775, and help the client file an amended 1170.95 petition in trial court (or work with trial counsel to get that done).

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[1] Note, however, that the Attorney General has yet to assert the successive petition bar in any case that has come to our attention, and no appellate opinion has acknowledged the availability of this bar in 1170.95 proceedings.

Once the new petition is adjudicated, if you lost, you can move to consolidate the new appeal with the previous murder appeal.

8. YOU HAVE NOT YET FILED A BRIEF IN YOUR 1170.95 DIRECT APPEAL BUT DO NOT BELIEVE YOU CAN PUT OFF FILING UNTIL AFTER JANUARY 1, 2022.

Request the relief you believe you would be entitled to under the new law. Your case cannot become final before January 1, 2022, so retroactivity will not be a consideration. Cite the following: In *People v. Garcia* (2018) 28 Cal.App.5th 961, 973, the court remanded the matter for application of a just-enacted ameliorative law under very similar circumstances. Although the new law would not become effective for another two months, the *Garcia* court remanded the matter because, in view of the finality timeline, it was "highly unlikely" the case could possibly become final before that date.

Don't forget that there are amendments relevant to both prima facie denials and (d)(3) denials. Be sure to look for every issue that can benefit your client.

9. YOU HAVE ARGUED YOUR 1170.95 DIRECT APPEAL BUT NO OPINION HAS ISSUED.

Ask that the court vacate submission of the case (Rules of Court, Rule 8.256(e)) and seek permission to file a supplemental brief raising any issues related to the new law. Your case cannot become final before January 1, 2022, so retroactivity will not be a consideration. Cite the following: In *People v. Garcia* (2018) 28 Cal.App.5th 961, 973, the court remanded the matter for application of a just-enacted ameliorative law under very similar circumstances. Although the new law would not become effective for another two months, the *Garcia* court remanded the matter because, in view of the finality timeline, it was "highly unlikely" the case could possibly become final before that date.

10. BRIEFING IS COMPLETED IN YOUR DIRECT APPEAL OF A MURDER OR ATTEMPTED MURDER CONVICTION THAT WOULD BE INVALID UNDER THE CURRENT VERSIONS OF PENAL CODE SECTIONS 188 AND 189.

Seek permission to file a supplemental brief and raise the issues created by SB 775. Cite the following: In *People v. Garcia* (2018) 28 Cal.App.5th 961, 973, the court remanded the matter for application of a just-enacted ameliorative law under very similar circumstances. Although the new law would not become effective for another two months, the *Garcia* court remanded the matter because, in view of the finality timeline, it was "highly unlikely" the case could possibly become final before that date.

In a direct appeal of the actual murder or attempted murder conviction, you would use SB 775 to argue instructional error similar to that alleged under *Chiu* and

would ask for a full reversal if the prosecution cannot prove beyond a reasonable doubt that jurors relied on a valid theory of liability. You would not be asking for a remand to file an 1170.95 petition.

You should not just wait until you get an adverse opinion on direct appeal and then file an 1170.95 petition to obtain the benefits of SB 775. If you can get the benefits of the new law on direct appeal, the court has to force the prosecutor to prove that instruction on an invalid theory, or failing to fully instruct on the major participant / reckless indifference elements, is harmless beyond a reasonable doubt. Also, your remedy is a new trial. Using 1170.95, you NEVER get a new trial. When you get a client a new trial, DAs frequently offer favorable pleas, new evidence can be developed with the assistance of counsel, and key witnesses can become unavailable or change their testimony. Your client also gets the benefit of a jury, which is almost always more favorable than a court trial. (After a jury trial, an appeal can raise instructional error and jury selection error, as two examples, that are not issues available after a court trial.)

NEGOTIATIONS WITH THE AG

As to all these procedural postures, you always have the option of reaching out to the individual AG on your case and asking that they agree to a joint request for summary reversal. See this explanation:

> This court has the power to entertain a motion for reversal in an appropriate case. (*Landberg v. Landberg* (1972) 24 Cal.App.3d 742, 746 [101 Cal.Rptr. 335]; *Melancon v. Walt Disney Productions* (1954) 127 Cal.App.2d 213, 215 [273 P.2d 560].) The power has apparently thus far been exercised only in civil cases. However, as it is derived from the inherent powers of the court, it applies equally to criminal appeals.
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> In the present case, the motion for summary reversal should be granted. As the court observed in *Melancon v. Walt Disney Productions, supra*, 127 Cal.App.2d at page 215: "A reversal will effectuate two wholesome results, namely: (1) a just determination of the cause pending before this court, the Supreme Court having ruled on the question by which ruling we are bound; and (2) a speedy determination of the appeal. It is evident that were the motion to be denied and briefs be required no useful purpose would be served since the ultimate result would be the same. (See *Tarpley v. Epperson* 125 Tex. 63 [79 S.W.2d 1081, 1082[1]].) [para.] Such ruling will not result in a technical disposition of the appeal. On the contrary it saves both parties time and expense, as the same determination is reached without their being put to the expense of filing additional briefs which, of course, would entail additional attorneys' fees and costs of printing."

(*People v. Browning* (1978) 79 Cal.App.3d 320, 323-324.) This process also is mentioned in Code of Civil Procedure section 128, subdivision (a)(8), which allows a stipulation to reverse the judgment if certain conditions are met:

> An appellate court shall not reverse or vacate a duly entered judgment upon an agreement or stipulation of the parties unless the court finds both of the following:
>
> (A) There is no reasonable possibility that the interests of nonparties or the public will be adversely affected by the reversal.
>
> (B) The reasons of the parties for requesting reversal outweigh the erosion of public trust that may result from the nullification of a judgment and the risk that the availability of stipulated reversal will reduce the incentive for pretrial settlement.

WHY SHOULDN'T I JUST ABANDON MY CLIENT'S APPEAL AND TELL HIM TO FILE A NEW 1170.95 PETITION?

The main reason not to dismiss a petition is that the "successive petition" bar has not been tested yet. This is a common procedural bar used in habeas corpus practice and at some point, prosecutors and trial judges could start to invoke it, although we are not aware of any case in which it has been invoked so far. You also do not want to invite any kind of waiver or forfeiture rulings. If you dismiss now, it's not because you think your petition is meritless. You believe it has merit; you are just concerned that the new law may not apply. If you REALLY want to just start with a fresh petition, don't dismiss until you get a ruling that the dismissal is without prejudice to filing a new petition under the new version of 1170.95.

WHY CAN'T I JUST FILE A NEW 1170.95 PETITION WITHOUT DISMISSING THE PENDING APPEAL OR REQUESTING A STAY?

One court has now held, and none has disagreed, that a pending proceeding in another court precludes 1170.95 jurisdiction. (*People v. Burhop* (2021) 65 Cal.App.5th 808, 813.)