DO NOT DISTRIBUTE OUTSIDE CRIMINAL DEFENSE COMMUNITY. This analysis of S.B. 775 is intended to assist criminal defense practitioners (both trial and appellate). Because it includes candid assessments of various issues posed by the new legislation and discusses strategic and tactical choices faced by defense attorneys in pursuing relief, it should be distributed only to criminal defense counsel.

S.B. 775 –EXPANDED OPPORTUNITIES FOR CHALLENGING MURDER, ATTEMPTED MURDER, AND MANSLAUGHTER CONVICTIONS UNDER S.B. 1437

Preliminary Cheat Sheet and Advice

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S.B. 775 Overview -- Amendments of S.B. 1437 & Pen. Code, § 1170.95.

Senate Bill 775: Stats. 2021, c. 551 (signed by Governor & chaptered, Oct. 5, 2021), eff. Jan. 1, 2022.

- **Expands § 1170.95 to include *attempted murder and manslaughter*.** "The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial in which the petitioner could have been convicted of murder or attempted murder." Amended § 1170.95(a)(2).
    - The applicability of § 1170.95 to attempted murder is already before the California Supreme Court in *People v. Lopez* S258175. There are numerous grant-and-hold cases trailing *Lopez*.
    - All prior appellate opinions have found that 1170.95 does *not* provide a remedy for a defendant who accepted a manslaughter plea in order to avoid a murder conviction. The California Supreme Court has not granted review on that issues (so many affirmances of § 1170.95 denials have already become final).

- **Clarifies § 1170.95's application to any "*other* theory under which malice is imputed."** The legislation adds the italicized phrase

to the statute's eligibility subdivision: "A person convicted of felony murder or murder under the natural and probable consequences doctrine *or other theory under which malice is imputed to a person based solely on that person's participation in a crime* … may file a petition…." Amended § 1170.95(a) (emphasis added); see also § 1170.95(a)(1).

- Under the "provocative act" doctrine, a defendant may be deemed guilty of murder for a killing committed by a third-party as a consequence of the defendant's "provocative act" (e.g., participation in a gun battle). See generally *People v. Gonzalez* (2012) 54 Cal.4th 643. Several opinions have held that S.B. 1437's substantive homicide revisions and § 1170.95 do not provide any basis for challenging a murder conviction tried on a provocative act theory. E.g., *People v. Lee* (2020) 49 Cal.App.5th 254 (granted & held, S262459); *People v. Johnson* (2020) 57 Cal.App.5th 257; *People v. Swanson* (2020) 57 Cal.App.5th 604 (granted & held, S266262); *People v. Marcella* (2021) 67 Cal.App.5th 854 [282 Cal.Rptr.3d 551].[1] S.B. 775's language referring broadly to any "other theory" which imputes malice appears to re-open the question of the continued viability of the "provocative act" theory of murder.
- However, there is likely to be continued debate whether S.B. 775's insertion of the new language in § 1170.95(a) concerning any theory "imputing" malice actually abrogates the provocative act doctrine. The adverse appellate opinions took the position that the provocative act doctrine does *not* "impute" malice but requires a finding that the defendant personally harbored malice. See, e.g., *Marcella*, *supra*; 252 Cal.Rptr.3d at 560-562.
- In sum, the amendment may put the question of the legitimacy of the provocative act theory back "in play." However, in contrast to S.B. 775's very explicit inclusion of attempted murder and manslaughter, the new legislation's applicability to provocative act murder is not clear-cut.

[1] Note that the grant-and-holds in *Lee* and *Swanson* are behind *People v. Lewis* (2021) 11 Cal.5th 952, the recently-decided case on the prima facie case standard. The Supreme Court has *not* granted review on the provocative act question.

- **Codifies *Lewis* holding re prima facie review and appointment of counsel.** Confirms that a facially-sufficient petition that recites the criteria for relief (listed in § 1170.95(a)(1)-(3)) requires appointment of counsel. Amended § 1170.95(b)(3).
    - As stated in S.B. 775's uncodified declaration of findings and intent, this provision codifies *People v. Lewis* (2021) 11 Cal.5th 952, 961-970, which was decided while the bill was pending before the Legislature. Consequently, this provision does not represent a change beyond *Lewis*'s clarification of the prima facie standard.
    - There were numerous grant-and-holds behind *Lewis,* and the Supreme Court is still in the process of transferring those cases back to the appellate courts for reconsideration in light of *Lewis*.

- **Clarifies that, in an evidentiary hearing under § 1170.95(d)(3), the trial court independently applies the reasonable doubt standard and explicitly repudiates the "substantial evidence" standard some courts have applied.** "A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing." Amended § 1170.95(d)(3).
    - The § 1170.95(d)(3) burden of proof question – i.e., independent application of the reasonable doubt standard vs. "substantial evidence" review – is before the California Supreme Court in *People v. Duke*, S265309, and a number of grant-and-hold cases. (However, there have been relatively few First District appeals presenting this issue.).

- **Clarifies evidentiary rules at a § 1170.95(d)(3) hearing.** As originally enacted, the final sentence of § 1170.95(d)(3) provided simply: "The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." While the revised statute continues the provision that either the prosecutor or the petitioner may "offer new or additional evidence," revised subdivision (d)(3) now provides much more specific admissibility rules:
    - "*The admission of evidence in the hearing shall be governed by the Evidence Code, except that the court may consider evidence previously admitted at any prior hearing or trial* that is

admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed." (Emphasis added)
    - Note that, by omitting the original statute's more general allowance of the option of reliance on the "record of conviction," the revised provision essentially limits such consideration to *trial evidence.*
  - "The court may also *consider the procedural history of the case recited in any prior appellate opinion*." (Emphasis added)
    - Note that by limiting consideration of any prior appellate opinion to "procedural history," the revised statute appears to implicitly preclude consideration of a prior appellate opinion's *factual summary.*
  - "However, hearsay evidence that was admitted in a preliminary hearing pursuant to [Pen. Code, § 872] shall be excluded from the hearing as hearsay, unless the evidence is admissible pursuant to another exception to the hearsay rule."
    - By its reference to Pen. Code, § 872, this provision effectively excludes consideration of Prop. 115 hearsay introduced at a preliminary hearing.
  - The prosecutor and the petitioner may also offer new or additional evidence.

- **Authorization to raise S.B. 1437 claims on direct appeals from convictions.**
  - "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 [citation]." Amended § 1170.95(g) (emphasis added).
  - Although it is included in revised § 1170.95, this provision actually applies to *"direct appeals" from underlying criminal cases*. Its apparent intent is to abrogate *Gentile* and the earlier appellate opinions which refused to accord *Estrada* retroactivity to cases which were not final as of Jan. 1, 2019, the effective date of S.B. 1437. *People v. Gentile* (2020) 10 Cal.5th 830; see also, e.g. *People v. Martinez* (2019) 31 Cal.App.5th 719; *People v. Anthony* (2019) 32 Cal.App.5th 1102.
    Gentile and the earlier cases held that the § 1170.95 procedure represented the exclusive means to challenge a conviction under

S.B. 1437's substantive revisions of the homicide statutes, even for cases not yet final on direct review. Amended § 1170.95(g) effectively abrogates that holding to allow someone "whose conviction is not final" to raise such challenges "on direct appeal."

Preliminary Comments on Appellate Strategies.

- **Implications for pending § 1170.95 appeals.** As a preliminary matter, S.B. 775's amendments to § 1170.95 procedures and standards should apply to *currently pending § 1170.95 appeals*. It's true that most of the various amendments in § 1170.95 procedures do not literally come within the *Estrada* rule (*In re Estrada* (1965) 63 Cal.2d 740) because they do not represent substantive changes in the scope of criminal liability or the degree of punishment. Instead, they amend the procedures and standards governing an existing statutory remedy for challenging previous convictions. Nonetheless, other well-established principles support the application of those revised standards on pending § 1170.95 appeals. "[W]hen statutes are remedial or procedural, courts consistently apply them in cases pending, including cases pending on appeal, when the statutes become effective, even though the underlying facts predate their effective dates." *City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469,1484. Since S.B. 775 amends a remedial statute, § 1170.95, those amendments should be applicable on pending § 1170.95 appeals.
    - Attorneys with § 1170.95 appeals affected by S.B. 775's revisions should act now. There is no need to wait until the Jan. 1, 2022, effective date. In similar situations regarding newly-enacted legislation, appellate courts have commonly allowed briefing on the import of such provisions during the interval between the Governor's signature of a bill and its effective date. See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [Court of Appeal elected to decide a claim involving an amended sentencing statute prior to the effective date]. Depending on the specific new provision at issue and the current stage of the appeal, the appropriate step may be a supplemental brief, a motion for summary reversal/remand, or a California Supreme Court petition (or related motion or application).
    - **Remand vs. appeal dismissal and new § 1170.95 petition.** We are aware that there has been some discussion of the option of dismissal of a pending § 1170.95 appeal and filing of a new §

1170.95 petition as potentially providing a faster route back to the superior court for consideration of the petition under the S.B. 775 revision. We do not intend to posit a "one size fits all" approach. However, there are potential pitfalls to any strategy which would require filing an amended petition. First, some lower courts might believe, rightly or wrongly, that the filing of a new petition could implicate the bars on "successive" post-conviction petitions. Second, there is the practical question of who would prepare and file the new petition and whether the superior court would automatically appoint counsel. In light of those reservations, we believe that, in most instances, the better course would be to pursue relief in the pending § 1170.95 appeal*, but to take steps to obtain an* <u>*expedited*</u> *remand*, such as through a summary reversal motion or an *Awad* stay and remand, as discussed below.

    - However*, if the § 1170.95 appeal is no longer pending*, the most appropriate procedure *would* be to file a new § 1170.95 petition in superior court. (For instance, because the Supreme Court has *not* granted review on the applicability of § 1170.95 to manslaughter, the Court has denied many such petitions, so those appeals are no longer pending.)

- <u>Pre-opinion cases.</u> Where the opening brief has already been filed, the mechanism for bringing new legislation to the appellate court's attention would ordinarily be a supplemental brief. However, in situations *where the entitlement to remand appears especially clear – such as the applicability of § 1170.95 to attempted murder and voluntary manslaughter – counsel should* consider mechanisms to obtain a remand on a more expedited basis than the usual sequence of appellate briefing.
    - <u>Summary Reversal/Remand</u>. In lieu of a conventional opening brief or supplemental brief, counsel should consider filing a Motion for Summary Reversal and Remand. See *People v. Geitner* (1982) 139 Cal.App.3d 252; *People v. Browning* (1978) 79 Cal.App.3d 320. The motion would argue that full briefing and argument is unnecessary due to the clarity of the necessity for a remand. Specifically, the motion should request a remand with directions to the superior court to issue an order to show cause and to appoint counsel on the § 1170.95 petition.

- Note that the Attorney General's Office contests the continuing viability of the summary reversal procedure recognized in *Geitner* and *Browning* on the ground that summary reversal deprives respondent of the opportunity to brief an issue and to present oral argument. **In any summary reversal motion based on SB 775, be sure to explicitly request the Court to: (a) afford respondent an opportunity to file a response on the merits; and (b) to afford the parties an opportunity to request or waive oral argument** before issuing a final decision.
- Sample summary reversal motions are available from FDAP on request**.** Contact J. Bradley O'Connell, jboc@fdap.org.
- Please note: *Summary reversal does not appear to be a viable option in 1st District Div. 1.* That division has recently denied a summary reversal motion on an appeal from the dismissal of a § 1170.95 petition challenging a voluntary manslaughter conviction. Consequently, counsel should consider alternative means of pursuing expedited relief in 1st District., Div. 1 appeals such as an *Awad* stay/remand (discussed below) or a motion for expedited briefing and calendar preference.

- *Awad* Stay/Remand. A recent order by a 1st District panel (also Div. 1 but a different case) suggests an alternative mechanism to obtain a remand on an expedited basis. On its own motion, the Court of Appeal stayed a pending § 1170.95 appeal and ordered a limited remand for the superior court to reconsider the petition in view of S.B. 775's clarification of the evidentiary rules for § 1170.95 hearings. *People v. Pickett*, A161446 (Oct. 19, 2021, order). See generally *People v. Awad* (2015) 238 Cal.App.4th 214, 223-225 (outlining stay and limited remand procedure). Counsel may consider a motion for an *Awad* stay and limited remand in lieu of a summary reversal motion. Moreover, even if counsel moves for summary reversal, the

motion can also include an *Awad* stay-and-remand as an alternative means of expediting a remand to superior court to consider the impact of S.B. 775.

- Issue considerations. Seeking an expedited remand – through either summary reversal or an *Awad* stay and remand – is especially appropriate where S.B. 775's revisions appear dispositive of the appeal and should not require extensive briefing. Cases in which the only issue is the applicability of § 1170.95 to attempted murder or manslaughter would be prime candidates for such relief. However, if the appeal also poses other issues or if the S.B. 775 issues are more subtle and will require more extensive briefing, the matter will not lend itself to summary reversal or other streamlined remand procedures. For example, here a § 1170.95 appeal includes *both murder and attempted murder convictions,* it will likely be necessary to proceed through a conventional supplemental brief.
- Post-opinion cases.
  - Counsel can raise the S.B. 775 issue in a rehearing petition if there is still time to do so.
  - If it is too late to seek rehearing, counsel should file a petition for review *or seek to add to an already-filed petition for review*. If the Supreme Court has already granted and held the case pending resolution of some different issue, counsel should file an application requesting the Court to expand the review-grant to include the S.B. 775 issue. (In prior situations involving new legislation, the Supreme Court has allowed counsel to seek expansion of the grounds for review through these means.)
  - In all these scenarios, counsel should ask the Supreme Court to *grant review and to transfer the case to the Court of Appeal for consideration of the S.B. 775 issue.*

- **Burden of proof at § 1170.95(d)(3) hearing.** S.B. 775 decisively resolves the burden of proof question now pending before the Supreme Court in *People v. Duke*, S265309. Per amended § 1170.95(d)(3), a finding that there is "substantial evidence" on which a defendant *could* be convicted under a valid theory is *not* sufficient to sustain the

prosecutor's burden in a § 1170.95(d)(3) hearing of proving the defendant's guilt beyond a reasonable doubt. The § 1170.95(d)(3) amendment appears to codify the majority view that the judge conducting a § 1170.95(d)(3) hearing sits as finder of fact and independently applies the reasonable doubt standard (just as in a bench trial).

- Pre-opinion cases. As with cases affected by the inclusion of attempted murder and manslaughter, counsel should seek to raise this issue in the Court of Appeal and to seek a remand for application of the correct standard. However, in many cases, this issue may require somewhat more extensive discussion than with S.B. 775's inclusion of attempted murder and manslaughter. In particular, it may be necessary to address questions of whether a lower court's apparent application of an incorrect standard is reversible per se or susceptible to harmless error review. Consequently, this issue may be somewhat less susceptible to a summary reversal/remand motion, and it may be preferable to proceed through a more conventional supplemental brief.
- Post-opinion cases. Depending on the precise stage of the case, counsel should seek rehearing or Supreme Court transfer to the Court of Appeal for consideration of this issue via rehearing petition, a petition for review, or a motion to supplement an already-filed petition for review.

- **Implications of the authorization to raise S.B. 1437 challenges in direct appeals.**
  - **Why it's important.** There have been some comments and questions expressing uncertainty or confusion about the notion of litigating these issues in a direct appeal rather than through a § 1170.95 proceeding. *In most cases, the opportunity to raise S.B. 1437's substantive homicide changes in a direct appeal will provide a better prospect for obtaining relief than a § 1170.95 petition*. The reason is that, as with any other instructional error concerning submission of an invalid alternative legal theory (NPC) or omission of elements of an offense (reckless indifference and major participant prerequisites for felony murder), *the error will be subject to Chapman review.*
    - The focus will be on prior jury's verdict rather than a judge's own weighing of the evidence. Thus, if the evidence on an omitted element (i.e., reckless indifference and major

participant as prerequisites for felony murder) was disputed or susceptible to conflicting inferences such that a reasonable juror could harbor a reasonable doubt, the error should require reversal and a new trial. *Neder v. United States* (1999) 527 U.S. 1, 19. Similarly, cases tried in part on an NPC theory will require the enhanced form of *Chapman* review for "alternative theory" error. See *People v. Aledamat* (2019) 7 Cal.5th 1; *People v. Chiu* (2014) 59 Cal.4th 155.

- In *most* cases, the opportunity for *Chapman* review should make direct appeal a more promising remedy than § 1170.95. But S.B. 775 does not preclude seeking § 1170.95 relief rather than raising the issue on direct appeal. If showing the defendant's entitlement to relief will require new evidence, then § 1170.95 will be a better vehicle. That may be especially so in plea cases where there was no prior development of the factual record.
    - However, for jurisdictional reasons, the § 1170.95 petition likely would need to wait until conclusion of the appeal. See *People v. Burhop* (2021) 65 Cal.App.5th 808 (no jurisdiction to hear § 1170.95 petition during pendency of appeal arising from same case). Alternatively, counsel could move to stay the appeal to allow a § 1170.95 petition to proceed. See *People v. Awad,* 238 Cal.App.4th at 215.

- **Still pending direct appeals.** The new provision clearly applies to cases which weretried before S.B. 1437, but are still not final on direct appeal. Attorneys with pending appeals from murder, attempted murder, or voluntary manslaughter appeals should seek to raise the issue in the Court of Appeal through a supplemental brief or a rehearing petition (if the appellate court still has jurisdiction) or in the Supreme Court through a petition for review or a supplement to or motion to expand an already-filed petition for review.
- **Possible implications for application to cases not final on appeal on Jan. 1, 2019.** As noted earlier, the evident intent of § 1170.95(g) authorization to raise S.B. 1437 claims on "direct appeal" is to abrogate the holdings of *People v. Gentile* (2020) 10 Cal.5th 830, and other cases which refused to apply *Estrada* retroactivity to S.B. 1437's substantive amendment of the

homicide statutes, Pen. Code §§ 188 and 189. The legislative history of S.B. 775 reflects that intent. An Assembly Public Safety Committee report specifically refers to *Gentile*'s holding that § 1170.95 represented "the exclusive remedy for retroactive SB 1437 relief on nonfinal judgments." The report explains: "This bill would provide that where a conviction is not final, it may be challenged on SB 1437 grounds on direct appeal from that conviction."[2] Thus, the Legislature has confirmed that the *Gentile* construction was erroneous, and defendants whose appeals were not final on S.B. 1437's retroactive date *were* entitled to raise those claims on their then-pending direct appeals.

- **Potential relief for defendants who were denied the opportunity for review on appeal.** Unfortunately, due to those now-abrogated holdings, many defendants whose direct appeals were still pending on Jan. 1, 2019 (S.B. 1437's effective date) have become final over the interim. This raises the question of whether there is some way to extend the benefits of S.B. 775 to that cohort of defendants whose cases became final during the interval between the effective dates of S.B. 1437 and S.B. 775.
  - This is a difficult issue and will require greater consideration and analysis than we are able to provide in this very preliminary summary of S.B. 775. We will offer only a few preliminary and tentative comments.
  - Statutory construction and legislative intent. Ultimately, the paramount objective of statutory construction is to determine and give effect to legislative intent. As noted above, here the Legislature's apparent intent is to abrogate the holdings of the cases that previously refused to consider S.B. 1437 challenges on then-pending direct appeals. Yet, in the interim, the majority of those defendants' convictions have become final and their appeals are no longer pending. Consequently, carrying out that legislative intent should require extending the availability of direct appellate review not only to relatively few defendants whose pre-S.B. 1437 cases are still pending on direct appeal as of Jan. 1, 2022,

[2] Assem. Com. Pub. Safety, Rept. on SB 775, as amended July 6, 2021 (July 12, 2021) {hearing date: July 13, 2021}, p. 11, § 9. https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB775# {reviewed, Oct. 19, 2021}

but also to the larger cohort of defendants whose cases were not yet final on Jan. 1, 2019.

- Mechanism for seeking relief. Even assuming that the legislative intent argument is viable, there remains the question of how to pursue relief for such defendants, since their appeals are no longer pending. The ideal remedy would be to restore the opportunity to raise the claim on direct appeal *by reinstating the appeal itself*. Consequently, one option would be to file *a motion to recall the remittitur* based on the intervening legislation. The legislation itself would provide the legal cause for recall of the remittitur because it establishes that the appellate courts previously misconstrued S.B. 1437 in refusing to entertain such claims on then-pending appeals.
    - There is precedent supporting the propriety of the remedy of *recall of the remittitur where an intervening legal development has effectively abrogated a prior line of authorities which had precluded relief at the time of a defendant's original appeal***.** See *People v. Mutch* (1971) 4 Cal.3d 389. In *People v. Daniels* (1969) 71 Cal.2d 1119, the California Supreme Court determined that its own prior precedents had long misconstrued the crime of kidnap-for-robbery and had allowed convictions on facts not coming within that statute. In *Mutch*, the Court held that the remedy of recall of the remittitur was available to a defendant whose direct appeal had been decided under the precedents subsequently overruled in *Daniels*. The Court characterized the scenario as an exception to the general rule that recall of the remittitur will not lie to correct an "error of law." The recall remedy was still available, "because the error is of such dimensions as to entitle the defendant to a writ of habeas corpus. The remedy of recall of the remittitur may then be deemed an adjunct to the writ…." *Mutch,* 4 Cal.3d at 396-397.
    - Here, the Legislature has indicated that *Gentile* and other California precedents previously misconstrued § 1170.95 as barring defendants whose convictions were not final as of Jan. 1, 2019, from raising S.B.

1437 challenges in their then-pending appeals. As in *Mutch*, recalling the remittitur would reinstate the defendant's right to appellate review, which had been erroneously blocked by the now-abrogated precedents.

- Recognition of the recall remedy here would also parallel other situations in which court actions mistakenly deprived a defendant of his right to direct appeal. E.g. *In re Vallery* (1992) 3 Cal.App.4th 1125; *In re Fierro* (1985) 169 Cal.App.3d 543 (each recalling remittitur where "institutional failures" and "oversight" concerning transmission and consideration of indigency affidavit for appointment of counsel had resulted in dismissal of appeal).
- Potential obstacle to recall of the remittitur – *Harris.* In seeking recall of the remittitur on the basis of this provision of S.B. 775, it will be essential to distinguish *People v. Harris* (2018) 22 Cal.App.5th 657. The *Harris* court refused to recall the remittitur in order to allow the defendant to obtain the benefit of new legislation which gave sentencing courts discretion to strike previously-mandatory firearm enhancements, where the defendant's conviction had become final prior to enactment of the new legislation. The crucial distinction is that *Harris concerned legislation which unquestionably changed existing law, while S.B. 775 represents a legislative correction of judicial decisions (Gentile, etc.) that had misconstrued recently-enacted remedial legislation (S.B. 1437).* [3]

[3] Indeed, in refusing to recall the remittitur, the *Harris* court distinguished *People v. Mutch* "as an example of a case *not* involving application of new law. [Citations.]" *Harris*, 22 Cal.App.5th at 661 (emphasis in original). The two Supreme Court opinions cited in *Harris* on that point each described *Mutch* as "a decision in which we gave effect to a statutory rule that the courts had theretofore misconstrued." *People v. Guerra* (1984) 39 Cal.3d 385, 399 fn. 13; *Woosley v. State of California* (1992) 3 Cal.4th 758, 794. Thus, an argument that S.B. 775's direct appeal provision gives "effect to a statutory rule that the courts had theretofore misconstrued" could potentially support recall of

- Thus, the availability of the remedy of recall of the remittitur ultimately turns on the substantive question of the legislative intent underlying S.B. 775 – which, in turn, concerns the true legislative intent of S.B. 1437. It will be crucial to argue that S.B. 775 represents a clarification of the original intent of S.B. 1437. Thus, amended § 1170.95(g) does *not* represent a true change in statutory law but a correction of erroneous judicial decisions, such as *Gentile*. Those decisions misconstrued § 1170.95 as the exclusive mechanism for seeking relief based on S.B. 1437's substantive change in the homicide statutes (Pen. Code §§ 188, 189) and erroneously barred defendants whose convictions were not yet final (as of Jan. 1, 2019) from raising those arguments in their then-pending appeals. Consequently, recall of the remittitur is necessary to give effect to the Legislature's intent that defendants whose convictions were not yet final on Jan. 1, 2019, were and are entitled to raise the substantive homicide changes on direct appeal and to receive the benefit of *Chapman* prejudice review, rather than be left to § 1170.95 as their only remedy.
    - As that distinction reflects, this line of argument and the potential remedy of the recall of the remittitur appear to apply *only to defendants whose convictions became final between Jan. 1, 2019, and Jan. 1, 2022.*
    - There does not appear to be any basis for pursuing that remedy or any other potential means of obtaining *Chapman* review (e.g., habeas) for cases that

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the remittitur under *Mutch*. That line of argument could provide a basis for distinguishing *Harris* and other cases refusing to recall a remittitur based on a *change* in the law.

became final on direct appeal prior to Jan. 1, 2019.

- Also note that (in contrast to other issues potentially impacted by aspects of S.B. 775), the current status of a § 1170.95 petition or a § 1170.95 appeal does *not* appear relevant to efforts to obtain the benefits of § 1170.95(g)'s provision for review of S.B. 1437 claims on direct appeal. Even if, as suggested here, recall of the remittitur may be available for defendants who were denied the opportunity for review of those issues in their prior appeals, that question will turn on the timing of the finality of the direct appeal from the criminal conviction *not* on the timing of any § 1170.95 appeal.

- Because § 1170.95(g) is phrased in terms of the right to raise S.B. 1437's substantive homicide changes "on direct appeal," we are suggesting recall of the remittitur as a potential remedy to obtain that review through reinstatement of the appeal. However, to keep alternative options open, counsel could style the document as a Motion to Recall the Remittitur or, in the Alternative, Petition for Writ of Habeas Corpus. Nonetheless, even if presented through a habeas petition, the potential availability of relief in the form of *Chapman* review will still likely depend on whether § 1170.95(g) is viewed as a change in statutory law or instead as a clarification of S.B. 1437 and a correction of judicial decisions (*Gentile*, etc.) which misconstrued that earlier legislation.
- <u>Important caveat</u>: This entire memorandum represents a very preliminary analysis of S.B. 775 and the options for appellate attorneys. That is especially true of the potential applicability of 1170.95(g)'s "direct appeal" provision to cases that have become final since Jan. 1, 2019, and possible remedies for defendants in that cohort.