S260598

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	) No. S_____
Plaintiff and Respondent,	) No. B295998
	)
vs.	)
	) Los Angeles
VINCE E. LEWIS,	) Superior Court
	) No. TA117431
Defendant and Appellant.	)
	)

APPELLANT'S PETITION FOR REVIEW

From a Decision of the Court of Appeal,
Second Appellate District, Division 1
on Appeal from the Superior Court of the State of California
in and for the County of Los Angeles
The Honorable Ricardo R. Ocampo, Judge

ROBERT D. BACON
State Bar No. 73297
484 Lake Park Avenue, PMB 110
Oakland, California 94610
Telephone (510) 834-6219
E-mail: bacon2254@aol.com

Attorney for Appellant

TABLE OF CONTENTS

* * * * *

TABLE OF AUTHORITIES

CASES

STATUTES AND COURT RULES

OTHER AUTHORITIES

* * * * *

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	) No. S_____
Plaintiff and Respondent,	) No. B295998
	)
vs.	)
	) Los Angeles
VINCE E. LEWIS,	) Superior Court
	) No. TA117431
Defendant and Appellant.	)
	)

APPELLANT'S PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Vince E. Lewis[1/] respectfully petitions this Court to review the decision of the Court of Appeal, Second District, Division One, affirming the summary denial of his petition for resentencing under Penal Code section 1170.95[2/] (enacted by Senate Bill 1437 of 2018 (Stats. 2018, ch. 1015); hereafter sometimes "SB 1437") and his accompanying request for appointment of counsel. The opinion of the Court of Appeal was published on January 6, 2020, and appears at 43 Cal.App.5th 1128. The slip opinion is

1. Erroneously identified in the slip opinion of the Court of Appeal as Vincent E. Lewis.

2. Unexplained section references are to the Penal Code.

appended to this petition and is cited herein as "Op." There was no petition for rehearing.

ISSUES PRESENTED FOR REVIEW

When a defendant's jury has been instructed on natural and probable consequences and he seeks relief under section 1170.95, can the superior court summarily deny his petition without appointing counsel because his petition does not analyze the record of conviction or point to any new evidence he seeks to introduce?

Does an appellate finding that an erroneous instruction on natural and probable consequences was harmless because of "strong" evidence of direct aiding and abetting allow the superior court to summarily deny a defendant's Penal Code section 1170.95 petition without appointing counsel?

NECESSITY FOR REVIEW

In a published opinion broadly applicable to a large number of pending and impending cases, the Court of Appeal places a high burden on defendants seeking appointment of counsel to litigate petitions for resentencing under section 1170.95. The rule it adopts is inconsistent with both the letter and the spirit of the statute. This petition presents "important question[s] of law" within the meaning of Rule 8.500(b)(1).

While the Court of Appeal relies on its prior holding that instructional error at Mr. Lewis' trial was harmless, it writes much more broadly. It authorizes use of the "record of conviction,"

including an opinion affirming a conviction on appeal, to justify denying counsel at the threshold of *any* section 1170.95 case. Superior courts are likely to take the Court of Appeal opinion as authority to substitute the introductory *statements of facts* in appellate opinions – invariably written in the light most favorable to the prosecution – in lieu of the section 1170.95 requirement of a prima facie case, which requires viewing the facts in the light most favorable to the defendant.

Section 1170.95 contemplates the assistance of counsel and, where appropriate, the presentation of new evidence that by definition will not be part of the record of conviction nor mentioned in the prior appellate opinion. The Court of Appeal invites superior courts to broadly shut the door to this entire well-considered statutory proceeding based on nothing but a record made in litigation of different issues long before SB 1437 was enacted.

The Court of Appeal believes that policy reasons related to the conservation of judicial resources justify a broad rule allowing summary denial of section 1170.95 petitions from unrepresented defendants. (Op. 12.) While the statute is not indifferent to these policy considerations, it is written to confer a more broadly applicable right to counsel and a correspondingly narrower authority to summarily deny petitions. The statute recognizes that in a broad range of cases, appointment of counsel cannot be assumed to be futile.

The Court of Appeal's attempt to conserve superior court resources, even if superficially attractive, creates a new and unnecessary inefficiency that burdens the Courts of Appeal.

Cases such as this one arrive in the Courts of Appeal with a record consisting of nothing but a printed form petition on which an unrepresented defendant has checked boxes, and a summary order. The Court of Appeal, and appellate counsel, must divine what the case is about without the source of information they are accustomed to and entitled to: a record developed in the superior court. The Court of Appeal in this case even expected Mr. Lewis' appellate counsel to proffer new evidence, never presented to the superior court. (Op. 13, fn. 9.) Significant policy reasons weigh against the interpretation the Court of Appeal has given this statute.

Appeals from summary denials of section 1170.95 petitions, without the appointment of counsel and without development of a record, are reaching the Courts of Appeal in substantial numbers. While many are resolved in unpublished opinions, the present petition is at least the third one currently pending in this Court following a *published* opinion in an appeal from a summary denial. (*People v. Verdugo*, No. S260493; *People v. Cornelius*, No. S260410.)

The combination of the breadth of the Court of Appeal holding, its likely wide applicability, and its inconsistency with the governing statute calls for a grant of review.

STATEMENT OF THE CASE

The facts and the course of proceedings are stated at Op. 2-5 and AOB 6-9. To summarize: Vince Lewis was tried along with Mirian [*sic*] Herrera and Ariana Coronel for the murder of Darsy

Noriega. The evidence showed that Ms. Herrera fired the shots that killed Ms. Noriega. The case against Mr. Lewis, who was in a car nearby, went to the jury on theories of direct aiding and abetting, natural and probable consequences, and an uncharged conspiracy to commit assault that also depended on natural-and-probable-consequences reasoning (see *People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356–1357). (B241236 2 CT 504-509.)[3/] Premeditation was the only theory of first-degree murder on which the jury was instructed. (B241236 2 CT 513.) The jury convicted Mr. Lewis of first-degree murder, and rejected a personal weapon use allegation. (B241236 2 CT 552.) He was sentenced to 25 years to life. (B241236 3 CT 649.)

The Court of Appeal affirmed. The jury had been instructed on natural and probable consequences in a manner subsequently held invalid in *People v. Chiu* (2014) 59 Cal.4th 155. The Court of Appeal, resolving a fact-intensive dispute between the parties about the trial evidence, held that this instructional error was harmless, based on what it perceived as the strength of the evidence that Mr. Lewis was a direct aider and abetter. (*People v. Lewis* (July 14, 2014) 2014 Cal.App.Unpub. LEXIS 4923 at pp. *28-*30 [No. B241236].)[4/]

---

3. The Court of Appeal took judicial notice of the record on Mr. Lewis' appeal from his conviction, No. B241236. That record is cited herein with the prefix "B241236."

4. But see *People v. Mil* (2012) 53 Cal.4th 400, 417, quoting *Neder v. United States* (1999) 527 U.S. 1, 19 (the existence of

(continued...)

Mr. Lewis filed a petition for resentencing in the superior court pursuant to section 1170.95, enacted by SB 1437. (CT 1-3.) He requested counsel, but none was appointed. No order to show cause was issued to the prosecution. The superior court denied the petition in a minute order referring to the opinion of the Court of Appeal affirming the conviction. (CT 4-5.)[5/] In the decision now under review, the Court of Appeal affirms the denial of the section 1170.95 petition in a published opinion.

* * * * *

---

4. (...continued)
"evidence that could rationally lead to a *contrary* finding" establishes prejudice) (emphasis added).

The Court of Appeal's 2014 analysis is difficult to square with *Chapman v. California* (1967) 386 U.S. 18. (See ARB 20-25 in the present appeal, and Mr. Lewis' petitions for review (No. S220153, filed August 22, 2014) and certiorari (No. 14-7363, filed November 28, 2014) in the prior appeal.) Review was recently granted on what appears to be a similar question. *In re Lopez*, No. S258912 (review granted Jan. 15, 2020).

5. A few months later, the superior court judge sua sponte recognized that he had erred by denying the petition summarily without appointment of counsel, and asked for the case back from the Court of Appeal so that he could proceed in the manner prescribed by section 1170.95. (5/22/19 RT 2-3.) The Court of Appeal did not address this request in its opinion or otherwise. For reasons stated in this petition *passim*, the superior court judge was correct and the Court of Appeal should have granted his request.

ARGUMENT

The Court of Appeal interprets the right to counsel in section 1170.95 too narrowly to fulfill the purpose of the statute

A. *Introduction*

SB 1437 narrowed the felony-murder rule and eliminated natural and probable consequences liability for murder retrospectively, not merely prospectively. It enacted section 1170.95 to give defendants whose convictions are already final an opportunity to claim the benefit of the change in the substantive law. It provided them with the assistance of counsel to do so, and did not limit them to the evidence presented at trial.

Inconsistently with the letter and the spirit of section 1170.95, the Court of Appeal demands that an unrepresented and presumably incarcerated defendant must do far more than merely make a prima facie allegation that he "falls within the provisions of" section 1170.95 (§ 1170.95, subd. (c).) He must obtain and analyze the record of conviction and proffer new evidence without the assistance of counsel in order to qualify for appointment of counsel and avoid summary dismissal of his section 1170.95 petition. The Judicial Council sought amendments to SB 1437 to expand the authority of superior courts to summarily deny petitions in this manner without providing the defendant with the assistance of counsel, but the Legislature enacted the bill without the requested amendments.

The Court of Appeal also holds, in an overly expansive application of collateral estoppel, that a prior appellate resolution

of a contested question of adjudicative fact, as contrasted with a jury verdict or a decision on a question of law, may bar a defendant from receiving the assistance of appointed counsel to litigate a section 1170.95 petition.

The issues in this petition turn largely on the text of subdivision (c) of section 1170.95, which reads in full: "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 [*sic*] 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."

B. *The Court of Appeal places a heavier burden on an unrepresented defendant, prior to appointment of counsel, than the text or purpose of section 1170.95 will permit*

The contours of the first prima facie showing, the one that entitles the defendant to appointed counsel and forbids summary dismissal of an uncounseled petition, are in need of review by this Court. By *any* interpretation of the statutory language consistent with the statute's purpose, Mr. Lewis surmounted this first step and was entitled to appointment of counsel.

A petition can be denied without appointment of counsel if any of the necessary information about the case is missing from the petition and cannot readily be ascertained. (§ 1170.95, subd. (b)(2).) One reasonable interpretation is that this authorization to deny an uncounseled petition is exclusive, and an uncounseled petition cannot be denied for any other reason.

The first two sentences of subdivision (c) provide: "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 first sentence of subdivision (c) may simply be declarative of the procedure for implementing the limited gatekeeping function set forth by subdivision (b)(2), without importing any greater authority to deny petitions beyond that conferred by subdivision (b)(2). (But see *People v. Verdugo* (2020) 44 Cal.App.5th 320, 328-329 [rejecting this interpretation], petn. for review filed, No. S260493.)

The second sentence of subdivision (c), conferring the mandatory right to counsel by use of the word "shall," is not explicitly made contingent on the outcome of the inquiry contemplated by the first sentence. However, a broader interpretation of the power to deny uncounseled petitions might treat the first two sentences of subdivision (c) as chronological steps, with the appointment of counsel to occur only if and after a prima facie case has been found under the first sentence. (E.g., Op. 13-15.)

If so, then what does it mean to plead a prima facie case that one "falls within the provisions of this section"? This prima facie case is to be distinguished from the *second* and apparently more substantial prima facie case, set forth in different terms in the last sentence of subdivision (c): "a prima facie showing that he or she is entitled to relief." (See Op. 15, fn. 10.) The latter prima facie case need not be pled until the defendant has the assistance of counsel. Because the Legislature used materially different language for the two prima facie showings, it must be presumed that the required showings are different. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.)

In determining whether a litigant has stated a prima facie case for these or any other propositions, a court must take the factual allegations as true, setting aside the possibility of contradiction. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857.) This is an issue of pleading, not of proof. For purposes of a prima facie showing, a court must "draw 'every legitimate favorable inference'" from the evidence of the party tasked with the showing. (*Cuevas-Martinez v. Sun Salt Sand, Inc.* (2019) 35 Cal.App.5th 1109, 1117; accord, e.g., *Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1075.) "Normally . . . a 'prima facie showing' connotes an evidentiary showing that is made without regard to credibility. . . . This is particularly true when [as here] the prima facie showing merely triggers an evidentiary hearing, at which any necessary credibility determinations can still be made." (*People v. Johnson* (2015) 242 Cal.App.4th 1155, 1163.)

"Prima facie evidence . . . may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences." (*Evans v. Paye* (1995) 32 Cal.App.4th 265, 280, fn. 13, and authorities there cited.) "Evidence supporting a reasonable inference may establish a prima facie case." (*Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 781; accord, *People v. Weaver* (2001) 26 Cal.4th 876, 931.) This is so even if there could be other inferences as well. (*Reaugh v. Cudahy Packing Co.* (1922) 189 Cal. 335, 339.) "[T]he court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact." (*Aguilar, supra,* 25 Cal.4th at p. 856.) The court must determine what any evidence or inference *could* show or imply to a reasonable trier of fact; "[i]n so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Ibid*.)

There may be cases different from this one in which a court could reasonably hold that the defendant cannot establish a prima facie case that he falls within the provisions of section 1170.95, for example, those who were not convicted of murder, or whose juries were not instructed on either felony murder or natural and probable consequences. (Op. 11; e.g., *People v. Cornelius* (2020) 44 Cal.App.5th 54, petn. for review filed, No. S260410.) For such a defendant, even his prima facie case – the *factual* case most favorable to him, without considering the

possibility of factual contradiction – would still rule out as a matter of *law* the possibility that he could be entitled to relief, regardless of whatever new facts counsel was able to discover and present. Prima facie cases are about facts, not the law. (See, e.g., Evid. Code, § 602.) In such a case, policy reasons of judicial economy (Op. 11) might outweigh the patently non-existent benefit of appointment of counsel. (See, e.g., *People v. Shipman* (1965) 62 Cal.2d 226, 232, relied on in *Cornelius*.)

To make the same point another way, in some cases other than this one, *procedural* facts, for instance, the text of the jury instructions, might foreclose any possibility that new *adjudicative* facts would entitle the defendant to relief. By contrast, in this case the jury *was* instructed on the natural and probable consequences theory, because the evidence supported such an instruction. No procedural facts or principles of law rule out the possibility that Mr. Lewis could prevail. The issue is joined on adjudicative facts now, and it was joined on adjudicative facts on the prior appeal in 2014. Therefore this is the type of case in which the defendant is entitled to the assistance of counsel and to the further proceedings – including fact development proceedings – envisioned by subdivisions (c) through (g).

But even when the question is one of law, summary denial without appointment of counsel may sometimes be inappropriate, so review should be granted to disapprove the Court of Appeal decision broadly permitting summary denial without counsel. For instance, the rationale of the Court of Appeal would justify summary denial of a petition brought by a defendant convicted of

attempted murder, not murder. (See Op. 11.) But the question whether defendants convicted of attempted murder are entitled to the benefit of SB 1437 has divided the Courts of Appeal and has been granted review by this Court. (Cf. *People v. Larios* (2019) 42 Cal.App.5th 956, petn. for review filed, No. S259983, and *People v. Medrano* (2019) 42 Cal.App.5th 1001, petn. for review filed, No. S259948, with *People v. Lopez* (2019) 38 Cal.App.5th 1087, review granted, No. S258175.) The Court should disapprove a rule that would require a defendant to navigate a substantial and contested question of law such as this without the assistance of counsel.

By analogy, if a person is caught on surveillance video committing a robbery, is identified by eyewitnesses, is found with the stolen property a block away, and confesses, we would not dream of saying he is so obviously guilty that he does not need either counsel or a trial. We do not rule out the possibility that the defendant, with the assistance of counsel, may be able to marshal facts that create a reasonable doubt as to one or more of the statutory elements of robbery.

In sum, while the Court of Appeal decision conferring expansive authority to deny petitions without appointing counsel might allow for the quick disposition of petitions where the trial record shows indisputably the defendant was the actual killer or was not convicted of murder, it also carries the grave risk that petitions from unrepresented litigants will be erroneously dismissed even when the factual and/or legal inquiry necessary to

assess whether the defendant is eligible for a hearing is disputed and complex.

C. *The Court of Appeal authorizes use of the record of conviction in a manner inconsistent with the purpose of section 1170.95 and fundamentally unfair to unrepresented defendants*

Review should be granted to forbid the use of the record of conviction to resolve contested questions of fact against an unrepresented litigant without prior notice, thereby denying him the right to counsel and the right to contest those factual questions. The concept of a "record of conviction" is a poor fit for the first step of the section 1170.95 analysis, for many reasons.

First, section 1170.95 refers to the record of conviction *only* in subdivision (d)(3), addressing the evidentiary portion of the proceedings, not in connection with the preliminary steps at issue here. By contrast, the first sentence of subdivision (c) specifically states the superior court's authority at that initial stage is to review "the *petition*." [Emphasis added.] It says nothing about the superior court reviewing matters outside the petition at that point, prior to the appointment of counsel. The Legislature's choice to refer to the record of conviction only at the latter step, not the earlier one, must be respected. (*Briggs, supra*, 19 Cal.4th at p. 1117.)

Second and more broadly, the Court of Appeal's interpretation of the first step in subdivision (c) is particularly inappropriate for a non-adversary proceeding involving an unrepresented litigant. Initially, the Court of Appeal expects a defendant,

without the assistance of counsel, to know that he must navigate the record of conviction, to which he may not have physical access in prison. Nothing in the statute or the form petition instructs the defendant that an exegesis of the record of conviction is part of his initial pleading burden. Nothing instructs the defendant that he must plead the facts that explain *why* he can no longer be convicted of murder, before he will be permitted the assistance an attorney to investigate and marshal those facts.

In implementing Proposition 47, this Court and the Courts of Appeal have recognized that if decisional law imposes new prerequisites for relief not reasonably foreseeable to an unrepresented defendant reading the statute and the form petition, those defendants are entitled to a fair opportunity to meet the new prerequisites. The appropriate remedy in the superior court is a denial without prejudice or denial with leave to amend. The appropriate remedy on appeal is a remand for further proceedings. (See *People v. Page* (2017) 3 Cal.5th 1175, 1189-1190; *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909; *People v. Perkins* (2016) 244 Cal.App.4th 129, 141-142.)

Mr. Lewis has been denied this opportunity. The Court of Appeal permits the superior court to seek out and rely upon the record of conviction or other documentary evidence sua sponte and make inferences of adjudicative fact adverse to the defendant, as the court erroneously did here (CT 4-5). The Court of Appeal permits the superior court to do this without giving notice to the defendant and without giving him any opportunity to see the documents the court is relying on, to amend or supplement

the petition to allay the court's concerns, or otherwise to respond (with or without counsel). (See, e.g., *People v. Ramirez* (2019) 41 Cal.App.5th 923, 928-930 [superior court erred by summarily denying section 1170.95 petition based on selective review of record of conviction, overlooking relevant portion favorable to the defendant].)

Even more troubling, the Court of Appeal faults Mr. Lewis for not proffering any *new evidence* in his initial petition, and faults his appellate counsel for not proffering new evidence, never presented to the superior court, for the first time on appeal. (Op. 13 & fn. 9.) The text of the statute makes clear that the presentation of new evidence only follows the appointment of counsel and the issuance of an order to show cause. (§ 1170.95, subd. (d)(3).) This considered, and manifestly reasonable, legislative choice must also be respected. Moreover, unrepresented defendants are not on notice that the statute *sub silentio* imposes this additional burden on them at the pleading stage. Whatever the merits of a rule that unrepresented defendants *may* proffer new evidence at the first stage and have it considered, the Court of Appeal decision effectively creates a very different and untenable rule: that an unrepresented defendant *must* proffer new evidence at this stage or have his petition summarily denied.

The suggestion that summary denial, followed by appointment of *appellate* counsel, is a satisfactory substitute for appointment of counsel to litigate in the superior court, is even more unworkable. Requiring appellate counsel to proffer new evidence to the Court of Appeal, never presented to the superior court, is

inconsistent with the well-established principle that the authority to take new evidence for the first time on appeal "should be exercised sparingly" and only in "exceptional circumstances." (*In re Zeth H.* (2003) 31 Cal.4th 396, 405.)

"[E]ven the most rudimentary of due process procedures [requires] notice and opportunity to be heard . . . to anyone directly affected by [an] official's action." (*Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1108.) "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Mr. Lewis was not given this opportunity, and the Court of Appeal does not address this constitutional deficiency in its holding.

Section 1170.95 addresses these concerns by requiring the appointment of counsel and an opportunity for briefing once the defendant has met the low initial threshold imposed by subdivision (a) and the first sentence of subdivision (c). Mr. Lewis' petition made the prima facie allegations necessary to pass the first prima facie hurdle under section 1170.95 and obtain counsel. The superior court was not permitted to judge the truthfulness of those allegations without appointing counsel and soliciting briefing from the parties.

Third, the defendant need only establish a prima facie case at this stage in order to institute a proceeding in which the prosecution has a new burden of proof beyond a reasonable doubt on a potentially enlarged factual record, beyond the record of

conviction. (§ 1170.95, subd. (d)(3).) The Court of Appeal approves resort to the record of conviction at this preliminary step by analogy to cases interpreting the resentencing provisions of Propositions 36 and 47. (Op. 9-10, referring to, e.g., *People v. Washington* (2018) 23 Cal.App.5th 948, 955 [§ 1170.18; Proposition 47]; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341 [§ 1170.126; Proposition 36].) The analogy fails, and this Court should grant review to disapprove it. Neither of those statutes establishes a threshold showing for appointment of counsel, prior to consideration of the merits. Unlike section 1170.95, neither of those statutes specifically directs consideration of the record of conviction only at a *later* stage of the process. The plain text of section 1170.95 defeats the analogy the Court of Appeal relies on. (See also *Verdugo*, *supra*, 44 Cal.App.5th at pp. 330-331 [prior drafts of SB 1437, but not the version that was enacted, contemplated a single-stage process like Propositions 36 and 47].)

Fourth, the Court of Appeal opinion is written expansively. It, like the superior court's minute order, refers to the Court of Appeal's prior holding on an appellate issue in this case, albeit one not controlling on Mr. Lewis' section 1170.95 petition. (Op. 11-12; CT 4-5; see section D, *infra*.) But the opinion of the Court of Appeal is written far more broadly than this and superior courts are likely to rely on the introductory statements of *facts* in appellate opinions – written in the light most favorable to the prosecution (see, e.g., *People v. Banks* (2015) 61 Cal.4th 788, 795) – to defeat the very different statutory requirement of a prima facie case, which is to be viewed in the light most favorable to the

defendant. At least one Court of Appeal has already taken this next, and patently erroneous, step. (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 333-336.)

Fifth and finally, the reasoning of the Court of Appeal is inconsistent with *People v. Franklin* (2016) 63 Cal.4th 261, 280, which holds that "[a] court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." For present purposes, appellate opinions are not comparable to the documents there listed.

The Court of Appeal cites *People v. Woodell* (1998) 17 Cal.4th 448, 454-455, for the proposition that the record of conviction includes an appellate opinion. (Op. 8, fn. 7.) That begs the relevant question: whether the record of conviction, interpreted so broadly, may be appropriately relied on at the threshold to shut the courthouse door to a section 1170.95 petition. In *Woodell*, "the ultimate question [was], of what crime was the defendant *convicted*." (17 Cal.4th at p. 459 [emphasis original].) Under section 1170.95, however, the ultimate question is whether, given the change in the law, the defendant *should have been* convicted of the crime for which he was actually convicted. *Woodell* indicates that reliance on a prior appellate opinion is inappropriate "if the opinion refers to facts in a fashion indicating the evidence was disputed and the factual issue unresolved." (*Id.* at p. 460.) That is precisely what the opinion on Mr. Lewis' appeal showed

as to the question whether he might have been convicted on a natural and probable consequences theory.

Review should be granted to disapprove the widespread use of the record of conviction, broadly defined, to deny defendants the assistance of counsel for the purpose of seeking section 1170.95 relief.

D. *Collateral estoppel does not bar a section 1170.95 petition that presents a different question than the appeal from the conviction, to be judged by a different standard*

The Court of Appeal errs by holding that Mr. Lewis' section 1170.95 petition was barred by collateral estoppel based on his prior appeal from his conviction. (Op. 12.) The Court of Appeal improvidently invokes collateral estoppel against Mr. Lewis in a situation governed by a different legal standard than his prior appeal, and in order to prevent a proceeding designed to allow creation of a different factual record than the one on which the Court of Appeal made its prior decision. Review should be granted to make clear that neither collateral estoppel nor law of the case justifies the use of the record of conviction in the expansive manner discussed in the preceding section C.

The first requirement for collateral estoppel is that "the issue to be precluded must be identical to that decided in the prior proceeding." (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.) Here it is not.

Mr. Lewis' jury was instructed in the alternative that he could be convicted of first-degree murder on a natural and proba-

ble consequences theory. While his appeal was pending, *People v. Chiu* (2014) 59 Cal.4th 155, held that a first-degree conviction on this theory is improper. In a proceeding that did not apply a prima facie case standard and did not entertain the possibility of an enhanced evidentiary record, the Court of Appeal found the instructional error harmless. (2014 Cal.App.Unpub. LEXIS 4923 at pp. *28-*30.)

In 2014, the Court of Appeal was applying the prejudice standard of *Chapman v. California* (1967) 386 U.S. 18. In applying the *Chapman* standard, "[t]he question is whether, *on the whole record* . . . the error . . . [is] harmless beyond a reasonable doubt." (*Rose v. Clark* (1986) 478 U.S. 570, 583 [internal quotation marks omitted, emphasis added].) On the present petition, by contrast, the superior court is testing for a prima facie case, examining not the whole record but only the evidence favorable to Mr. Lewis, without considering the possibility of contradiction. This is a standard significantly more favorable to Mr. Lewis than the one applied on the 2014 appeal. Collateral estoppel may not be invoked against a litigant in a proceeding in which the standard of review or proof is more favorable to him than in the prior proceeding. (*Lucas v. Los Angeles* (1996) 47 Cal.App.4th 277, 286-290; *In re Nathaniel P.* (1989) 211 Cal.App.3d 660, 668, 670; Restatement 2d of Judgments, § 28(4); 7 Witkin, California Procedure (5th ed. 2019) Judgment § 440.)

Under section 1170.95, subdivision (a), Mr. Lewis' prima facie case is that the information "allowed the prosecution to proceed under . . . the natural and probable consequences doc-

trine"; that he was convicted of murder; and that he could not now be convicted under the amended law. Subdivision (a) does not require, as part of the initial pleading burden, that the previous verdict have been based upon the natural and probable consequences rule.

The Court of Appeal's holding on the first appeal plainly did not address the first two elements of the prima facie case set forth in subdivision (a). As to the third, his liability under the amended statute, Mr. Lewis' prima facie case is set forth in section C, pages 3-4, of his supplemental letter brief in No. B241236, dated June 9, 2014, also attached as an appendix to his reply brief in the present appeal, No. B295998. In summary, evidence that the jury could reasonably have credited showed that Mr. Lewis' co-defendants intended to beat, not kill, the victim, making him culpable only on the now-forbidden natural and probable consequences theory. More ambiguous and more hypothetical evidence would support a conclusion that she was at risk of being killed, potentially exposing him to liability as a direct aider and abetter had the jury been properly instructed, but that is not part of Mr. Lewis' prima facie case. The factual inferences favorable to the prosecution set forth in the 2014 opinion (2014 Cal.App.Unpub. LEXIS 4923 at pp. *29-*30) are not Mr. Lewis' prima facie case on the question now at issue.

It would be particularly inappropriate to invoke collateral estoppel to shut the courthouse door and prevent a proceeding designed precisely to create a *different* factual record than the one on which the Court of Appeal made its prior decision. A fortiori,

preclusion cannot be extended to prevent the proffer of new evidence in a proceeding where such a proffer is specifically authorized by statute.

For all these reasons, the section 1170.95 petition is not barred by collateral estoppel.[6/]

E. *The Legislature declined the Judicial Council's request to amend the bill to allow summary denials of petitions on the merits without appointment of counsel*

During legislative consideration of SB 1437, the Judicial Council proposed a number of amendments to the bill to allay various concerns related to judicial economy and the effective administration of the courts. Most of the proposed amendments were accepted, and put the bill into the final form in which it was enacted. But, significantly for the present issue, one was not.

---

6. The Court of Appeal does not rely on the doctrine of law of the case, but it also is inapplicable and so is not an alternate ground for affirmance, or for denial of review.

"As here relevant, the law of the case doctrine is subject to an important limitation: it . . . 'does not embrace the facts themselves . . .'" (*People v. Barragan* (2004) 32 Cal.4th 236, 246 [internal citation omitted].)

"[T]he law-of-the-case doctrine governs only the *principles of law* laid down by an appellate court, as applicable to a retrial of fact, and it controls the outcome on retrial only to the extent the evidence is substantially the same. The doctrine does not limit the new evidence a party may introduce on retrial. Thus, it does not preclude the presentation of *new evidence* on suppression issues when an appellate court reverses a conviction and sets the cause at large for a new trial." (*People v. Boyer* (2006) 38 Cal.4th 412, 442 [emphasis original], citing *Barragan*, 32 Cal.4th at pp. 246-247.)

On August 28, 2018, the Judicial Council wrote a letter to the bill's author, Senator Nancy Skinner, expressing its support for the bill but requesting it be amended to allow a superior court to summarily deny a petition it deemed meritless, without appointing counsel. This amendment was not accepted, and the Assembly and Senate passed the bill without so amending it. The Counsel sent a similar letter to Governor Brown requesting the same thing, but Governor Brown signed the bill as it was presented to him. (See Mr. Lewis' Request for Judicial Notice, being filed this day.)

"Successive drafts of a pending bill may be helpful to interpret a statute if its meaning is unclear." (*Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 927; see also *Kelly v. Methodist Hospital* (2000) 22 Cal.4th 1108, 1116 [relying on rejection of proposed amendment to interpret statute].)

The Legislature thus did not accede to the Judicial Council's request to give superior courts the power to do what the Court of Appeal authorizes here.

F. *Section 1170.95 is a remedial statute that should be construed broadly; the Court of Appeal does not do so*

Remedial statutes are to be liberally construed to extend the remedy broadly in order to promote the public policy animating the statute. (*People v. Barrajas* (1998) 62 Cal.App.4th 926, 930; *Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987, 1003.) This is such a statute. Review should be granted because the substantial barrier the Court of Appeal erects to the availability

of counsel to implement the statute is inconsistent with this well-established rule of statutory construction.

The Legislature adopted uncodified findings explaining its remedial purpose with unusual clarity: "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. [¶] 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. [¶] Except as stated in subdivision (e) of Section 189 of the Penal Code [relating to first degree felony murder], 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." (Stats. 2018, ch. 1015, § 1, subd. (e), (f) & (g).) The previous year, the Legislature had adopted a resolution making more detailed findings setting forth the need for the reforms subsequently adopted in SB 1437. (Sen. Conc. Res. No. 48, Stats. 2017 (2017-2018 Reg. Sess.), res. ch. 175.) The Legislature underscored its remedial purpose when it provided in section 1170.95 for retroactive application of these changes to defendants whose convictions were already final when the statute was enacted.

The construction the Court of Appeal gives to this statute unnecessarily frustrates those broad legislative objectives, so it runs afoul of the requirement of liberal construction of remedial statutes.

* * * * *

CONCLUSION

Review should be granted. The decisions of the Court of Appeal and the superior court should be reversed. The superior court should be directed to appoint counsel for Mr. Lewis and thereafter to proceed in the manner prescribed by section 1170.95.

Respectfully submitted February 11, 2020.

/s/ *Robert D. Bacon*
ROBERT D. BACON
Attorney for Appellant

CERTIFICATE OF PETITION LENGTH
(Rule 8.504(d)(1))

This petition contains **6703** words.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ *Robert D. Bacon*
ROBERT D. BACON

DECLARATION OF SERVICE BY MAIL & E-MAIL

I am over the age of 18 years and not a party to this case. My business address is: PMB 110, 484 Lake Park Avenue, Oakland, California 94610; bacon2254@aol.com.

On February 11, 2020, I served **APPELLANT'S PETITION FOR REVIEW** by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing the envelope in the U.S. Mail at Oakland, California, with postage fully prepaid. There is delivery service by U.S. Mail at each of the places so addressed, and there is regular communication by mail between the place of mailing and each of the places so addressed.

Clerk of the Superior Court
[ATTN: Hon. Ricardo Ocampo]
200 W. Compton Blvd.
Compton, CA 90220

Mr. Vince Lewis
AL6235 A2-102
Kern Valley State Prison
P.O. Box 5101
Delano, California 93216

On the same day, I also served the same document on each of the persons named below by attaching a PDF copy to an E-mail addressed as indicated:
Idan Ivri, counsel for respondent: DocketingLAAWT@doj.ca.gov & idan.ivri@doj.ca.gov .
The District Attorney: truefiling@da.lacounty.gov
The California Appellate Project: capdocs@lacap.com.
Jennifer Cheng, Mr. Lewis' trial attorney: jcheng@apd.lacounty.gov

On the same day, I served the same document on the Clerk of the Second District Court of Appeal by filing it with the California Supreme Court using the TrueFiling utility.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on February 11, 2020, at Oakland, California.
/s/ Robert D. Bacon

File 1/6/20

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VINCENT E. LEWIS, Defendant and Appellant.	B295998 (Los Angeles County Super. Ct. No. TA117431)

APPEAL from an order of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Robert Bacon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Amanda V. Lopez and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Vincent E. Lewis of first degree premeditated murder in 2012, and we affirmed the conviction in 2014. (*People v. Lewis* (July 14, 2014, B241236) [nonpub. opn.] (*Lewis*).)[1] In January 2019, defendant filed a petition for resentencing under Penal Code[2] section 1170.95 and requested the appointment of counsel. The trial court, relying on our prior decision in *Lewis*, found that defendant was ineligible for relief and denied the petition without appointing counsel or holding a hearing. Defendant appealed. For the reasons set forth below, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and two codefendants were tried for the murder of a fellow gang member. One of the codefendants allegedly fired the shots that killed the victim. The People prosecuted the case against defendant on three alternative first degree murder theories: direct aiding and abetting; aiding and abetting under the natural and probable consequences doctrine;[3] and conspiracy. The prosecutor argued to the jurors that the evidence could

[1] We have granted the Attorney General's request to take judicial notice of our 2014 opinion in *Lewis*, and defendant's request to take judicial notice of the record that was before us in the prior appeal (case No. B241236).

[2] Subsequent statutory references are to the Penal Code.

[3] Under the natural and probable consequences doctrine, a " 'person who knowingly aids and abets criminal conduct is guilty of not only the intended crime . . . but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime.' " (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

support a verdict under each murder theory and that they did not have to agree on the same theory to return a guilty verdict. The court instructed the jury on each of the prosecution's theories. The jury convicted defendant of first degree premeditated murder in a general verdict and made no findings that indicate which murder theory it relied upon. The court sentenced defendant to 25 years to life.

In his direct appeal, defendant asserted that the court erred by instructing the jury that it could find him guilty of premeditated first degree murder based on the natural and probable consequences doctrine. The argument had merit. While his appeal was pending, our Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), which held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Id.* at pp. 158–159.)[4] The error, the court stated, requires reversal unless the reviewing court concludes "beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu*, *supra*, 59 Cal.4th at p. 167; see also *In re Martinez* (2017) 3 Cal.5th 1216, 1218.) Although we agreed with defendant that it was error to give the natural and probable consequences instruction, we held that the

[4] *Chiu*'s rationale was extended in *People v. Rivera* (2015) 234 Cal.App.4th 1350 to preclude liability for first degree premeditated murder based on a conspiracy theory. (*Id.* at pp. 1356–1357; see *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1102 (*Lopez*), review granted Nov. 13, 2019, S258175.)

error was harmless "beyond a reasonable doubt" based on "strong evidence" that defendant "directly aided and abetted [the perpetrator] in the premeditated murder of [the victim]." (*Lewis*, *supra*, B241236 at p. 19.) We rejected defendant's other arguments and affirmed the judgment. (*Id.* at p. 20.)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437), which, among other changes, amended section 188 to eliminate liability for murder under the natural and probable consequences doctrine. (*Lopez*, *supra*, 38 Cal.App.5th at pp. 1092–1093.) The legislation also added section 1170.95, which establishes a procedure for vacating murder convictions that were based upon the natural and probable consequences doctrine and resentencing those who were so convicted. (Stats. 2018, ch. 1015, § 4, pp. 6675-6677.)

On January 7, 2019, defendant filed a petition in the superior court for resentencing under section 1170.95. In accordance with the statute, defendant identified the superior court's case number and the year of his conviction and stated that he had been "convicted of [first or second] degree murder pursuant to . . . the natural and probable consequences doctrine." Defendant further stated that, because of the changes made by Senate Bill No. 1437, he "could not now be convicted" because he "was not the actual killer" and "did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree." Defendant also requested the court to appoint counsel for him.

On February 4, 2019, the trial court denied the petition without appointing counsel for defendant or holding a hearing. The court concluded that defendant was not eligible for resentencing because, based on our opinion in *Lewis*, he "would still be found guilty with a valid theory of first degree murder."

Defendant contends that the court erred by "going behind [the] allegations" in his petition and relying on our prior opinion to determine that he failed to make a prima facie showing of eligibility under Senate Bill No. 1437. For the reasons given below, we disagree.

DISCUSSION

A. *Senate Bill No. 1437 and Section 1170.95*

Senate Bill No. 1437 was enacted "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." (Stats. 2018, ch. 1015, § 1(f), p. 6674; see *People v. Martinez* (2019) 31 Cal.App.5th 719, 723.)[5] The legislation accomplished this in part by amending section 188 to require that, when the felony murder rule does not apply, a principal in the crime of murder shall act with malice aforethought, and that "[m]alice shall not be imputed to a person based solely

[5] Although *Chiu* abrogated the use of the natural and probable consequences doctrine to prove first degree premeditated murder, the doctrine was still applicable to second degree murder. (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

on his or her participation in a crime." (Stats. 2018, ch. 1015, § 2, p. 6675; *In re R.G.* (2019) 35 Cal.App.5th 141, 144.)[6] As a result, the natural and probable consequences doctrine can no longer be used to support a murder conviction. (*Lopez*, *supra*, 38 Cal.App.5th at p. 1103 & fn. 9; Stats. 2018, ch. 1015, § 1(f), p. 6674.) The change did not, however, alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily "know and share the murderous intent of the actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; see *Chiu*, *supra*, 59 Cal.4th at p. 167 [a direct aider and abettor "acts with the mens rea required for first degree murder"].) One who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law.

Senate Bill No. 1437 also added section 1170.95, which permits a person convicted of murder under a natural and probable consequences theory to petition the court to have the murder conviction vacated and to be resentenced. (§ 1170.95, subds. (a) & (e); Stats. 2018, ch. 1015, § 4, pp. 6675-6677). Thus, section 1170.95 subdivision (a) provides that a person convicted of felony murder or murder under a natural and probable consequences theory may petition the trial court to have his or her murder conviction vacated or be resentenced on

[6] The new law also amended section 189 by adding a requirement to the felony-murder rule that a defendant who was not the actual killer or a direct aider and abettor must have been a "major participant" in the underlying felony who acted with reckless indifference to human life. (Stats. 2018, ch. 1015, § 3, p. 6675.) This aspect of the new law is not relevant here.

any remaining counts if the following conditions are met: (1) A charging document 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 or second degree murder following a trial or an accepted plea; and (3) The petitioner could "not be convicted of first or second degree murder because of changes to Section[s] 188 or 189" made by Senate Bill No. 1437. (§ 1170.95, subd. (a).)

Under section 1170.95, subdivision (b), the petition must include: a declaration from the petitioner that he or she is eligible for relief under the statute, the superior court's case number and year of conviction, and a statement as to whether the petitioner requests appointment of counsel. (§ 1170.95, subd. (b)(1).) If any of the required information is missing and cannot "readily [be] ascertained by the court, the court may deny the petition without prejudice to the filing of another petition." (§ 1170.95, subd. (b)(2).)

Section 1170.95, subdivision (c) sets forth the trial court's responsibilities upon the filing of a complete petition: "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. . . . 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." (§ 1170.95, subd. (c).)

If the court issues an order to show cause, it shall hold a hearing to determine whether to vacate the murder conviction. (§ 1170.95, subd. (d).) At that hearing, the prosecution has the burden of proving beyond a reasonable doubt that the petitioner is ineligible for resentencing. (§ 1170.95, subd. (d)(3).) The prosecutor and petitioner "may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (*Ibid.*)[7] Thus, "relief must be denied if the People establish, either based on the record of conviction or through new or additional evidence, that the defendant personally acted with malice." (*Lopez*, *supra*, 38 Cal.App.5th at p. 1114.)

If the court vacates the murder conviction, the court shall resentence the petitioner on any remaining counts or, if the defendant was not separately charged with the target offense that supported the prosecution's reliance on the natural and probable consequences doctrine (or the underlying felony in the case of felony-murder), "the petitioner's [murder] conviction shall be redesignated as the target offense or underlying felony for resentencing purposes." (§ 1170.95, subd. (e).)

B. *Defendant Failed to Make a Prima Facie Showing That He Falls Within the Provisions of Section 1170.95*

Under section 1170.95, subdivision (c), the court was required to review defendant's petition and determine whether he made a prima facie showing that he "falls within the

[7] The record of conviction includes a reviewing court's opinion. (*People v. Woodell* (1998) 17 Cal.4th 448, 454–455; Couzens et al., Sentencing Cal. Crimes (The Rutter Group 2019) ¶ 23:51(J)(2), p. 23-156.)

provisions of" the statute; that is, that he could not be convicted of first or second degree murder under the law as amended by Senate Bill No. 1437. (§ 1170.95, subds. (a)(3) & (c).) Because one can be convicted of murder even after the amendments if he or she directly aided and abetted the perpetrator of the murder, defendant was required to make a prima facie showing that he was not such a direct aider and abettor.

"A prima facie showing is one that is sufficient to support the position of the party in question." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) Here, defendant stated in his petition the statutory elements for relief and averred, in essence, that he did not kill the victim or aid or abet the perpetrator of the murder with the intent to kill. Defendant contends that the court could look no further than his petition in evaluating his prima facie showing and the court therefore erred when it considered our opinion in his direct appeal. The Attorney General, by contrast, contends that the court could, and properly did, consider the record of defendant's conviction, including our prior opinion, in evaluating the sufficiency of the petition. We agree with the Attorney General.

Although no published decision has addressed the question whether the trial court can consider the record of conviction in evaluating the petitioner's initial prima facie showing under section 1170.95, subdivision (c), in analogous situations trial courts are permitted to consider their own files and the record of conviction in evaluating a petitioner's prima facie showing of eligibility for relief. Under section 1170.18, enacted by Proposition 47, for example, a person convicted of certain felonies that the Legislature subsequently redefined as misdemeanors may petition the court to recall his or her sentence and have

the felony conviction reclassified as a misdemeanor. (See § 1170.18; *People v. Page* (2017) 3 Cal.5th 1175, 1179.) The court undertakes an " 'initial screening' " of the petition to determine whether it states " 'a *prima facie* basis for relief.' " (*People v. Washington* (2018) 23 Cal.App.5th 948, 953.) In evaluating the petition at that stage, the court is permitted to examine the petition "as well as the record of conviction." (*Id.* at p. 955.)

Similarly, under the Three Strikes Reform Act of 2012, known as Proposition 36, an inmate serving a third strike sentence may petition to be resentenced if, among other criteria, his or her sentence is for a crime that is not a serious or violent felony. (§ 1170.126, subd. (e).) The petitioner's initial burden is to establish "a prima facie case for eligibility for recall of the third strike sentence." (*People v. Thomas* (2019) 39 Cal.App.5th 930, 935.) The trial court can determine whether the petitioner met that burden based in part on the record of the petitioner's conviction. (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1341.) And in habeas corpus proceedings, the court may summarily deny a petition based upon facts in its file that refute the allegations in the petition. (*In re Serrano* (1995) 10 Cal.4th 447, 456.)

Allowing the trial court to consider its file and the record of conviction is also sound policy. As a respected commentator has explained: "It would be a gross misuse of judicial resources to require the issuance of an order to show cause or even appointment of counsel based solely on the allegations of the petition, which frequently are erroneous, when even a cursory review of the court file would show as a matter of law that the petitioner is not eligible for relief. For example, if the petition contains sufficient summary allegations that would entitle the petitioner to relief, but a review of the court file shows the petitioner was convicted of murder without instruction or argument based on the felony murder rule or [the natural and probable consequences doctrine], . . . it would be entirely appropriate to summarily deny the petition based on petitioner's failure to establish even a prima facie basis of eligibility for resentencing." (Couzens et al., Sentencing Cal. Crimes, *supra*, ¶ 23:51(H)(1), pp. 23-150 to 23-151.) We agree with this view and, accordingly, conclude that the court did not err by considering our opinion in defendant's direct appeal in evaluating his petition.

In our prior opinion, we agreed with defendant that the trial court erred in instructing the jury on the natural and probable consequences doctrine. (*Lewis*, *supra*, B241236 at p. 19.) We explained that we were required to reverse the judgment " 'unless there is a basis in the record to find that the verdict was based on a valid ground.' " (*Ibid.*, quoting *Chiu*, *supra*, 59 Cal.4th at p. 167.) The only " 'valid ground' " available to the jury was the prosecution's alternative theory that defendant acted as a direct aider and abettor. We concluded that the evidence that defendant "directly aided and abetted

[the perpetrator] in the premeditated murder . . . is so strong" that the instructional error was harmless "beyond a reasonable doubt." (*Lewis*, *supra*, B241236 at p. 19) Stated differently, we held that the record established that the jury found defendant guilty beyond a reasonable doubt on the theory that he directly aided and abetted the perpetrator of the murder. The issue whether defendant acted as a direct aider and abetter has thus been litigated and finally decided against defendant. (See generally 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Defenses, § 208, pp. 683–684 [collateral estoppel applies in criminal cases].) This finding directly refutes defendant's conclusory and unsupported statement in his petition that he did not directly aid and abet the killer, and therefore justifies the summary denial of his petition based on the authorities and policy discussed above. (Cf. *People v. Karis* (1988) 46 Cal.3d 612, 656 [conclusory allegations in habeas petition "made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing"].)

Defendant points out that section 1170.95, subdivision (d)(3) permits the parties at the hearing on an order to show cause to "offer new or additional evidence," as well as rely on the record of conviction.[8] In light of this

[8] Section 1170.95, subdivision (d)(3) provides: "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.

possibility, he contends that neither the trial court nor this court "can categorically state at this point, beyond a reasonable doubt, that any such evidence will not entitle [him] to resentencing." Even if we assume, without deciding, that section 1170.95 permits a petitioner to present evidence from outside the record to contradict a fact established by the record of conviction, defendant did not include or refer to such evidence in his petition.[9] The court, therefore, did not err in determining that defendant failed to make a prima facie showing that he "falls within the provisions" of the statute.

C. *Defendant Was Not Entitled to Appointed Counsel*

Defendant argues that the court erred by denying his request to appoint counsel for him. We disagree.

The provision for the appointment of counsel is set forth in the second sentence of section 1170.95, subdivision (c), and does not, when viewed in isolation, indicate when that duty arises. When interpreting statutory language, however, we do not " 'examine that language in isolation, but in the context of the statutory framework as a whole.' " (*Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 724.) When the statutory framework is, overall, chronological, courts will construe the timing of particular acts in relation to other acts according

The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens."

[9] Nor has defendant suggested the existence of such evidence in his briefs on appeal.

to their location within the statute; that is, actions described in the statute occur in the order they appear in the text. (See, e.g, *KB Home Greater Los Angeles, Inc. v. Superior Court* (2014) 223 Cal.App.4th 1471, 1477 [sequential structure of statutory scheme supports interpretation that acts required by the statutes occur in the same sequence]; *Milwaukee Police Association v. Flynn* (7th Cir. 2017) 863 F.3d 636, 643–644 [statute's chronological structure supports interpretation that statutory acts occur in the order they appear in the text].)

Under section 1170.95 the petitioner may file a petition to be resentenced under subdivision (a); the court determines whether the petition is complete under subdivision (b); the petitioner's prima facie showing of "fall[ing] within the provisions" of the statute, appointment of counsel, briefing, the prima facie showing of entitlement to relief, and the setting of an order to show cause are provided for in subdivision (c); the hearing on the order to show cause is addressed in subdivision (d); and the resentencing of the petitioner is addressed in the statute's concluding subdivision, subdivision (g). The statute is thus organized chronologically from its first subdivision to its last.

Given the overall structure of the statute, we construe the requirement to appoint counsel as arising in accordance with the sequence of actions described in section 1170.95 subdivision (c); that is, after the court determines that the petitioner has made a prima facie showing that petitioner "falls within the provisions" of the statute, and before the submission of written briefs and the court's determination whether petitioner has made "a prima facie showing that he or she is entitled to relief."

(§ 1170.95, subd. (c).)[10] In sum, the trial court's duty to appoint counsel does not arise unless and until the court makes the threshold determination that petitioner "falls within the provisions" of the statute. Because the trial court denied defendant's petition based upon his failure to make a prima facie showing that the statute applies to his murder conviction, defendant was not entitled to the appointment of counsel.

[10] It is not clear from the text of subdivision (c) what, if any, substantive differences exist between the "prima facie showing that the petitioner falls within the provisions of [section 1170.95]," which is referred to in the first sentence of subdivision (c), and the "prima facie showing that [the petitioner] is entitled to relief," referred to in the last sentence of the subdivision. We need not decide this issue because the court properly concluded that defendant was neither within the provisions of the statute, nor entitled to relief, as a matter of law based on the record of conviction.

DISPOSITION

The court's February 4, 2019 order denying defendant's petition for resentencing is affirmed.

CERTIFIED FOR PUBLICATION.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.