No. S260598

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

VINCE E. LEWIS,
Defendant and Appellant.

Second Appellate District, Division One, Case No. B295998
Los Angeles County Superior Court, Case No. TA117431
The Honorable Ricardo R. Ocampo, Judge

RESPONDENT'S ANSWER TO BRIEFS OF AMICI CURIAE

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INTRODUCTION

People v. Lewis (2020) 43 Cal.App.5th 1128 (*Lewis II*), and numerous cases following it, determined that Penal Code section 1170.95, subdivision (c), contains a two-step prima facie analysis.[1] Both steps involve the court's review of the petitioner's record of conviction to ascertain whether he or she is ineligible for relief as a matter of law. Step one constitutes a sua sponte screening of the petition before the court is required to appoint counsel for the petitioner. If the record of conviction does not show that the petitioner is ineligible as a matter of law, then step two begins and counsel is appointed to brief that question.

The amicus curiae briefs of the American Civil Liberties Union (ACLU), California Attorneys for Criminal Justice (CACJ), and the Justice Collaborative Institute (JCI), accept that courts may review the record of conviction, but claim *Lewis II* was wrongly decided because such review is permitted only after the appointment of counsel. The amicus curiae brief by the California District Attorneys' Association (CDAA) supports respondent's position that *Lewis II* was correctly decided, but goes further by arguing that summary denial is permitted if the petitioner "could" be convicted on a theory of liability that survives Senate Bill 1437.

The positions of the ACLU, CACJ, and JCI should be rejected. On constitutional grounds, they are contrary to this Court's jurisprudence governing collateral attacks on criminal

[1] All further statutory citations are to the Penal Code.

convictions, as well as the unanimous views of the courts of appeal with respect to this statute; moreover, amici's positions would lead to absurd results. On statutory grounds, amici's positions are contrary to the overwhelming weight of authority and the tenets of statutory interpretation. CDAA's position, on the other hand, is correct insofar as it acknowledges that section 1170.95 petitions may be summarily denied, but it incorrectly expands the reasoning of *Lewis II* and its progeny. For the reasons explained in respondent's Answer Brief, this Court should adopt the analysis of *Lewis II*.

ARGUMENT

I. SECTION 1170.95 PETITIONERS HAVE NO FEDERAL OR STATE CONSTITUTIONAL RIGHT TO COUNSEL DURING THE PRIMA FACIE STAGES OF SUBDIVISION (C)

The ACLU and CACJ contend that all section 1170.95 petitioners who file a properly pleaded petition are, without more, entitled to the appointment of counsel under the Sixth and Fourteenth Amendments of the federal Constitution, and under the California Constitution. (ACLU 13-15, 17-28; CACJ 13-18.) These arguments are contrary to unanimous, well-reasoned authority interpreting this statute and similar statutes.

A. The prima facie steps of section 1170.95, subdivision (c), are not a critical stage of trial for purposes of the Sixth Amendment right to counsel

As explained in the Answer Brief, the prima facie process laid out in section 1170.95, subdivision (c), is not akin to either a criminal trial or a plenary resentencing, and thus does not constitute a "critical stage[]" of trial for purposes of the right to

counsel under state or federal constitutional law. (ABM 56-59.) Rather, the statute represents an act of lenity. (*People v. Howard* (2020) 50 Cal.App.5th 727, 735; *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156.) *Howard* and *Anthony* are consistent with this Court's holding that Sixth Amendment rights do not apply to collateral resentencing actions where the denial of a petition "does not increase the petitioner's sentence; it simply leaves the original sentence intact." (*People v. Perez* (2018) 4 Cal.5th 1055, 1064 [holding that there is no Sixth Amendment right to a jury trial in section 1170.126 Three Strikes resentencing].)

In addition to *Howard* and *Anthony*, new authority construing section 1170.95 reconfirms the same principle. (*People v. Falcon* (2020) 57 Cal.App.5th 272 [271 Cal.Rptr.3d 264, 269].) In *Falcon*, the trial court denied a section 1170.95 petition without appointing counsel. On appeal, *Falcon* affirmed the denial because the petitioner had pleaded no contest to murder under the sole theory that he was a direct aider and abettor with actual malice. (*Id.* at pp. 266-267.) This process did not implicate the petitioner's constitutional rights to counsel:

> Appellant also contends denial of appointment of counsel violates his federal and state constitutional rights. We are not persuaded. A sentence modification is not a criminal trial; it is an act of lenity. (See *Dillon v. United States* (2010) 560 U.S. 817, 826–828, 130 S.Ct. 2683, 177 L.Ed.2d 271 [no Sixth Amendment right to a jury trial in statutory proceeding to modify a sentence because the statute constituted an act of lenity].) When a state need not provide a given right under the federal constitution, "it follows that the erroneous denial of that right does not implicate the federal Constitution."

> (*People v. Epps* (2001) 25 Cal.4th 19, 29 [parallel citation].) Here we find section 1170.95 is an act of lenity. If the trial court acted erroneously in declining to appoint counsel, that error does not constitute a violation of appellant's constitutional rights.

(*Falcon*, *supra*, 271 Cal.Rptr.3d at p. 269.)

Another recent decision, *People v. Frazier* (2020) 55 Cal.App.5th 858 [269 Cal.Rptr.3d 806], reached the same conclusion in a slightly different context. *Frazier* considered whether defendants have a constitutional right to counsel following a recommendation for resentencing by the Secretary of the Department of Corrections and Rehabilitation under section 1170, subdivision (d)(1). *Frazier* held they do not. "[T]he Sixth Amendment right to counsel at critical stages of a criminal proceeding through sentencing does not apply to postjudgment collateral challenges [citations], including statutory petitions seeking a more ameliorative sentence [citations], at least prior to the actual recall of sentence." (*Frazier*, *supra*, 269 Cal.Rptr.3d at pp. 812-813.) As examples of collateral proceedings featuring an initial prima facie review that takes place without counsel, *Frazier* cited *Perez* on section 1170.126 Three Strikes resentencing and *Howard* on section 1170.95 resentencing. (*Frazier*, *supra*, 269 Cal.Rptr.3d at p. 812.)[2] *Frazier* also pointed

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[2] *Frazier* recognized that under section 1170.95, subdivision (c), there is a *statutory* right to counsel "upon the court's finding the petitioner has made a *prima facie showing* that he or she is entitled to relief," and favorably cited *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted Mar. 18,

(continued…)

to *People v. Rouse* (2016) 245 Cal.App.4th 292, which held that any constitutional guarantee of counsel in section 1170.18 felony-to-misdemeanor resentencing occurs, at the earliest, after the prima facie inquiry has been satisfied. (*Id*. at pp. 298-300.)

The California Constitution, Article I, section 15, provides a right to counsel in criminal cases that extends even more broadly than the federal Sixth Amendment right, but the state constitution is not implicated here. (*Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1003-1004.) The state constitutional right defines a critical stage of trial, where counsel must be appointed, as one "in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Id*. at pp. 1004-1005.) But a proceeding initiated by a defendant who has already been convicted and sentenced, in which the court must simply determine whether the record of conviction shows that he or she is eligible for relief, is not a proceeding that subjects an "accused" to potential prejudice. The petitioner is not accused of anything. Accordingly, as *Falcon* noted, the state constitutional right to counsel does not apply.

Even the sole Court of Appeal decision that disagreed with *Lewis II* as to its statutory interpretation of section 1170.95,

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2020, S260493, a case that agreed with and expanded upon *Lewis II*. (*Frazier*, *supra*, 269 Cal.Rptr.3d at p. 813, italics added.)

subdivision (c)—an issue addressed in Argument II below—also expressly *disagreed* with the claim that the statute's prima facie review process is a critical stage for constitutional purposes. *People v. Cooper* (2020) 54 Cal.App.5th 106, review granted Nov. 10, 2020, S264684, held as a matter of statutory interpretation that subdivision (c) guarantees counsel for all petitioners. (*Id.* at pp. 108-109.) Yet the *Cooper* court later decided *People v. Daniel* (2020) 57 Cal.App.5th 666 [271 Cal.Rptr.3d 591], where it considered the defendant's claim that this right to counsel in a section 1170.95 proceeding was also guaranteed by the Sixth Amendment. *Daniel* held that "at best," such a right may attach in such a collateral action only "*after* an order to show cause issues," and denial of counsel before that time "was not 'analogous to' . . . 'the total deprivation of the right to counsel at trial.'" (*Daniel*, *supra*, 271 Cal.Rptr.3d at pp. 598-599, quoting *People v. Lightsey* (2012) 54 Cal.4th 668, 699, italics in *Daniel*.)

The ACLU nominally recognizes the difference between a criminal trial and the section 1170.95 process, but relies on *Griffin v. Illinois* (1956) 351 U.S. 12, for the proposition that when a state creates any process to vacate or reverse a conviction, it must not discriminate on the basis of a defendant's financial status. (ACLU 14-15, citing *Griffin*, *supra*, 351 U.S. at p. 18.) *Griffin*, however, addressed discrimination in burdening defendants with the costs of pursuing ordinary appellate review from a conviction, which is "an integral part of the . . . trial system for *finally adjudicating* the guilt or innocence of a defendant." (*Griffin*, *supra*, 351 U.S. at p. 18, italics added.) In

contrast, a section 1170.95 petition is a collateral action. During the prima facie stages of that process at least, the petitioner has already had his or her guilt finally adjudicated following a fair trial and appeal with representation by counsel. It is permissible in collateral proceedings for the state to withhold appointed counsel until after the petitioner has at least made a prima facie showing why relief should be granted—not simply an averment that he or she is entitled to it. (*People v. Shipman* (1965) 62 Cal.2d 226, 232 [appointment of counsel is not required on habeas corpus or coram nobis merely based on the filing of a petition].)

Extending *Griffin* and construing section 1170.95 as the ACLU proposes would also lead to absurd results. Any defendant, convicted of any crime, may file a facially adequate section 1170.95 petition averring that he or she is eligible, triggering the prima facie process under subdivision (c). However, such a defendant has not yet demonstrated his or her *potential* (i.e., prima facie) eligibility for relief under the guidelines of the statute, much less convinced a court that relief is actually merited. Characterizing this preliminary stage of the process as a critical stage of trial would suggest that the Legislature intended to render the criminal convictions of all defendants in California presumptively non-final, or at least that any defendant can *make* his or her conviction non-final merely by filing a petition that triggers a new "critical stage" of trial. This would upend the definition of finality and render it largely meaningless. The Legislature's statement of intent regarding

Senate Bill 1437 belies such an understanding, as it focuses narrowly on reforming liability and punishment for murder only for defendants who were not the actual killers, did not have intent to kill, and were not major participants acting with reckless indifference in a felony leading to the killing. (Stats. 2018, ch. 1015, § 1.) Because the ACLU's statutory interpretation leads to an absurd application of constitutional law that the Legislature could not have intended, it is disfavored. (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

The ACLU also claims that the prima facie review process of section 1170.95, subdivision (c), is a critical stage because the stakes are high, the issue is inherently complicated, and petitioners may be incapable of understanding or even obtaining their records of conviction without representation. (ACLU 21-22 & fn. 5.) This argument misses the point. As explained in the Answer Brief, the prima facie showing does not require petitioners to understand or even obtain a copy of their records. They may freely aver their eligibility, and the court will obtain and examine the appropriate records at step one of the prima facie process, drawing all inferences in their favor. (See ABM 39.) If the court denies the petition at that point, then the petitioner may appeal, as appellant did here.

The ACLU and CACJ compare section 1170.95, subdivision (c), to the probation revocation proceedings discussed in *Mempa v. Rhay* (1967) 389 U.S. 128, where the Supreme Court held counsel must be provided. (ACLU 22-23 & CACJ 14.) But a proceeding like the one in *Mempa* differs from section 1170.95 in

that the former is a part of the original "criminal proceeding." (*Mempa*, *supra*, 389 U.S. at p. 134.) The defendant's original punishment for the crime in *Mempa*—either incarceration or probation—remained in question at the time of the revocation hearing, as did other potential appellate issues. (*Id*. at pp. 135-136.) No such concerns apply here. A section 1170.95 petitioner attempting to establish a prima facie case for relief has already been validly convicted and benefited from his or her constitutional right to counsel during the trial, sentencing, and appellate process. All that remains is the petitioner's collateral claim that he or she qualifies for retroactive leniency. Until the court compares that claim to the record, there is no independent basis to believe the petitioner's claims are colorable, let alone meritorious.

The ACLU also relies on *People v. Rodriguez* (1998) 17 Cal.4th 253, as appellant did in his Opening Brief, and which respondent distinguished in the Answer Brief. (ACLU 24-25; ABM 62.) *Rodriguez* concerned the defendant's right to counsel in a hearing on remand following the reviewing court's holding that there was a sentencing *error*. (*Rodriguez*, *supra*, 17 Cal.4th at pp. 258-259.) In contrast, at the prima facie stages of section 1170.95, there has been no finding of error as to the conviction or the sentence. Indeed, new authority has confirmed that these proceedings are not the proper forum even to *raise* claims of error stemming from the underlying conviction, let alone to consider possible remedies. (*People v. Allison* (2020) 55 Cal.App.5th 449, 461 ["We do not believe it is reasonable to interpret section

1170.95 as allowing for . . . challenges based on attacks on prior factual findings"].) The absence of any indication that an error or injustice has occurred in this context distinguishes *Rodriguez*.

B. Petitioners have no due process right to counsel during the prima facie steps of section 1170.95, subdivision (c)

Alternatively, the ACLU and CACJ claim counsel must be appointed for all petitioners based on principles of due process, relying on authority governing the right to counsel at sentencing and arraignment. (ACLU 25-28, citing *Townsend v. Burke* (1948) 334 U.S. 736 and *Hamilton v. State of Alabama* (1961) 368 U.S. 52; see CACJ 14.) As discussed in the Answer Brief, these analogies are unpersuasive because unlike an arraignment or sentencing hearing, a section 1170.95 proceeding is initiated *by* a petitioner and does not constitute legal action *against* him or her. (ABM 59-60.) A due process right to counsel does not attach in section 1170.95 proceedings at least until after the court has compared the petitioner's claims to the record of conviction and determined that the record does not preclude resentencing as a matter of law.

Indeed, no court has recognized a due process right to counsel in collateral resentencing proceedings without at least first establishing a valid prima facie claim. (*Frazier*, *supra*, 269 Cal.Rptr.3d at p. 812 [rejecting claim of immediate due process right to counsel under section 1170, subdivision (d)]; *Rouse*, *supra*, 245 Cal.App.4th at p. 300 [due process right to counsel in section 1170.18 proceeding applies only after prima facie stage is satisfied]; *Shipman*, *supra*, 62 Cal.2d at p. 232 [no due process or

equal protection right to counsel on habeas review or coram nobis until a prima facie case has been made].) As in the Sixth Amendment context discussed above, extending such a due process right to any section 1170.95 petitioner who files a facially adequate petition, no matter how frivolous, would effectively provide a constitutional guarantee of counsel to all incarcerated people in California at all times to engage in such litigation. In *Shipman*, this Court long ago rejected such an expansive theory, based on both due process and equal protection principles, in the context of habeas corpus and coram nobis. The same reasoning applies here:

> Although the United States Supreme Court has not held that due process or equal protection requires appointment of counsel to present collateral attacks on convictions, it has held that counsel must be appointed to represent the defendant on his first appeal as of right. . . .
>
> A state may, however, adopt reasonable standards to govern the right to counsel in coram nobis proceedings. These standards may preclude absolute equality to the indigent, but . . . absolute equality is not required; only 'invidious discrimination' denies equal protection. [Citation.] . . . In habeas corpus cases we require a convicted defendant to allege with particularity the facts upon which he would have a final judgment overturned and to disclose fully his reasons for any delay in the presentation of those facts. [Citation.] We then examine his allegations in the light of any matter of record pertaining to his case [citation] to determine whether a hearing should be ordered. We recognize that these rules, applicable as well to petitions for coram nobis, place indigent petitioners in a less advantageous position than those with funds to retain counsel and employ investigators. It bears emphasis, however, that the ordinary processes of trial and appeal are presumed

> to result in valid adjudications. *Unless we make the filing of adequately detailed factual allegations stating a prima facie case a condition to appointing counsel, there would be no alternative but to require the state to appoint counsel for every prisoner who asserts that there may be some possible ground for challenging his conviction.* Neither the United States Constitution nor the California Constitution compels that alternative.
> . . .
>
> When, however, an indigent petitioner has stated facts sufficient to satisfy the court that a hearing is required, his claim can no longer be treated as frivolous and he is entitled to have counsel appointed to represent him.

(*Shipman*, *supra*, 62 Cal.2d at p. 232, italics added; see also *In re Clark* (1993) 5 Cal.4th 750, 779-780 [appointment of counsel on habeas review is triggered by petitioner's satisfaction of prima facie standard]; see also *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [right to appointed counsel extends to the first appeal only].)

The ACLU and CACJ recognize these historical limits on due process claims for appointed counsel in collateral proceedings, but contend that section 1170.95 litigation merits a different rule. They argue that the Legislature has never before retroactively reclassified culpability as it did in section 1170.95 (ACLU 15-17), and that the issues attendant to that reclassification are particularly complex (ACLU 21; CACJ 16-17). But concerns of fairness and complexity apply equally, or even more so, on habeas corpus and coram nobis as they do here.

For example, habeas corpus provides an "all-purpose" remedy to challenge the merits of a conviction, including claims of fundamental unfairness and injustice. (*People v. Gallardo*

(2000) 77 Cal.App.4th 971, 981.) Coram nobis, similarly, is a procedure to fully vacate a conviction due to error. (*People v. Kim* (2009) 45 Cal.4th 1078, 1096.) Section 1170.95 petitioners, in contrast, may not even allege that their convictions were based on error or that they were wrongly convicted. (*Allison*, *supra*, 55 Cal.App.5th at p. 461.) Instead, the only issue is whether the theory underlying a petitioner's conviction, while valid at the time of trial, qualifies for reclassification now. Moreover, claims on habeas review or coram nobis—which may involve almost any aspect of criminal law—can be just as complex as those presented under section 1170.95. Thus, if withholding counsel until a petitioner makes a prima facie case is constitutionally proper in habeas or coram nobis actions, then the same is true for section 1170.95 proceedings.[3]

Nor is there a relevant difference for due process purposes between the prima facie steps in section 1170.95 and those in California's other recent resentencing statutes. (See CACJ 16 [claiming section 1170.95 is vastly "more complex" than section 1170.18 felony-to-misdemeanor resentencing or section 1170.126

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[3] The ACLU implies that counsel may be able to obtain "extra-record evidence [that] may also be relevant to the prima facie determination," but does not explain how this is permitted by the statute. (ACLU 28.) In short, it is not. The presentation of new evidence is contemplated during the evidentiary hearing in section 1170.95, subdivision (d)(3), after issuance of an order to show cause, but the court may not engage in factfinding regarding the conviction during the prima facie process and must draw all factual inferences in the petitioner's favor. (*People v. Drayton* (2020) 47 Cal.App.5th 965, 982.)

Three Strikes resentencing].) While some section 1170.95 petitions may present more complicated issues than some section 1170.126 or 1170.18 petitions, that does not justify uniformly appointing counsel for all petitioners. Indeed, the two-step prima facie process outlined in *Verdugo* is well-suited to exploring cases with complex records, where counsel may assist in analyzing the record at step two. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330, fn. 9.) All factual inferences are made in the petitioner's favor at both steps, but if a petitioner is ineligible as a matter of law, then there is no argument he or she can make to prove the contrary. Many such cases will be extremely simple, not complex. (*People v. Tarkington* (2020) 49 Cal.App.5th 892, 908-910, review granted Aug. 12, 2020, S263219.)

Finally, contrary to CACJ's claim, the fact that this Court granted review to address these questions does not necessarily mean that the issues to be decided by trial courts in section 1170.95 proceedings are likely to be complex. (CACJ 16.) This Court's grant of review simply indicates that an important question of law, or a conflict in authority, is at stake. (Cal. Rules of Court, rule 8.500(b).)

II. THERE IS NO STATUTORY REQUIREMENT IN SECTION 1170.95, SUBDIVISION (C), THAT COUNSEL BE APPOINTED FOR EVERY FACIALLY ADEQUATE PETITION

CACJ and JCI argue that the statutory language and legislative history of section 1170.95, subdivision (c), indicate that the Legislature intended for counsel to be appointed for every facially adequate (i.e., properly pleaded) petition. (CACJ 10-11; JCI 16-18, 25-37; see also ACLU 17.) These arguments

have been rejected by nearly unanimous authority, including numerous opinions issued after the Answer Brief was filed in this case. This Court should reject them as well.

A. The numerous decisions supporting *Lewis II* were correctly decided; the outlying authority that CACJ and JCI rely upon is unpersuasive

The Answer Brief explained at length why the statutory text and legislative history of section 1170.95 compel the conclusion that the statute sets out a two-part prima facie analysis, with the potential for summary denial at step one and the appointment of counsel at step two. (ABM 26-35.) When the Answer Brief was filed, the appellate authority in support of *Lewis II* was unanimous. (See ABM 22-23, 40-45.) Since then, the number of published opinions adopting that position has grown even further. The Courts of Appeal, having accepted the *Lewis II* framework, have largely moved to adjudicating various subsidiary questions, such as deciding which types of convictions indicate ineligibility as a matter of law and which do not.[4]

For example, one set of decisions uniformly adopts *Lewis II* but features differing views as to whether a conviction for special

[4] Many of the cases that have relied on *Lewis II* in interpreting the procedural framework of section 1170.95 have involved denial of a petition before the appointment of counsel (i.e., at step one). (See *Falcon*, *supra*, 271 Cal.Rptr.3d at p. 269.) Others have involved denials after the appointment of counsel (i.e., at step two). (See *People v. Nguyen* (2020) 53 Cal.App.5th 1154.) All of them involve questions of whether the petitioner's record of conviction indicates his or her ineligibility for relief as a matter of law before issuance of an order to show cause.

circumstance felony murder under section 190.2, subdivision (a)(17), obtained before *People v. Banks* (2015) 61 Cal.4th 788, renders a petitioner ineligible for relief as a matter of law.[5] Another group of decisions fully embracing *Lewis II* has established that a murder conviction necessarily based on implied malice precludes section 1170.95 relief.[6] Still other courts have explained how to apply *Lewis II* when the original conviction was obtained by a guilty or no contest plea.[7] These new developments build on the authority already discussed in the Answer Brief applying the *Lewis II* framework to deny petitions based on convictions for manslaughter or attempted murder. (ABM 43-44.)

Only two published opinions, *Cooper* and *Daniel*, both authored by the same court, have disagreed with the statutory interpretation of *Lewis II* and its progeny. (*Cooper*, *supra*, 54

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[5] *People v. Torres* (2020) 46 Cal.App.5th 1168, review granted June 24, 2020, S262011; *People v. Gomez* (2020) 52 Cal.App.5th 1, review granted Oct. 14, 2020, S264033; *People v Galvan* (2020) 52 Cal.App.5th 1134, review granted Oct. 14, 2020, S264284; *People v. Murillo* (2020) 54 Cal.App.5th 160, review granted Nov. 18, 2020, S264978; *People v. York* (2020) 54 Cal.App.5th 250, review granted Nov. 18, 2020, S264954; *Allison*, *supra*, 55 Cal.App.5th at p. 449; *People v. Nunez* (2020) 57 Cal.App.5th 78 [271 Cal.Rptr.3d 191]; *People v. Jones* (2020) 56 Cal.App.5th 474 [270 Cal.Rptr.3d 362].

[6] *People v. Roldan* (2020) 56 Cal.App.5th 997; *People v. Swanson* (2020) 57 Cal.App.5th 604.

[7] *Nguyen*, *supra*, 53 Cal.App.5th at p. 1154; *People v. Perez* (2020) 54 Cal.App.5th 896; *Falcon*, *supra*, 271 Cal.Rptr.3d 264.

Cal.App.5th at p. 118; *Daniel*, *supra*, 271 Cal.Rptr.3d at p. 597.)[8] The dissent in *Tarkington*, *supra*, 49 Cal.App.5th at pp. 911-927 (dis. opn. of Lavin, J.) also disagreed with *Lewis II*, although its views were specifically rejected by the *Tarkington* majority, whose position was discussed in the Answer Brief. (See ABM 27, 31, 35, 38-39, 48-52, 58-59, 61-62.) JCI relies extensively on *Cooper* and the *Tarkington* dissent as support for its theory that *Lewis II*'s statutory interpretation was incorrect. (JCI 16, 27-37; see also CACJ 19.) The views expressed there are unpersuasive.

When interpreting a statute, the primary goal is to effectuate the legislative intent based on the text. (See *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) The statutory text is an especially important indication of legislative purpose and is typically the most reliable indicator of purpose. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) The judiciary's role is to "simply ascertain and declare what is in terms or in substance contained in the statute, not to insert what has been omitted or omit what has been included." (*People v. Massicot* (2002) 97 Cal.App.4th 920, 925.) To this end, "[i]nterpretations that lead to absurd results or render words

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[8] *Cooper* did not decide whether the right to counsel in the statute, as *Cooper* described it, was merely statutory or was grounded in the petitioner's constitutional rights. (*Cooper*, *supra*, 54 Cal.App.5th at p. 123.) However, as noted above, the same court in *Daniel* later held that the issue is purely statutory and there is no constitutional right to counsel during the prima facie process. (*Daniel*, *supra*, 271 Cal.Rptr.3d at pp. 597-599.)

surplusage are to be avoided." (*Loeun*, *supra*, 17 Cal.4th at p. 9, citation and quotation marks omitted.)

Cooper held that the right to counsel under section 1170.95, subdivision (c), attaches immediately upon the filing of a facially sufficient petition that alleges entitlement to relief. (*Cooper*, *supra*, 54 Cal.App.5th at pp. 108-109.) To reach this conclusion, *Cooper* dismissed the first sentence of that subdivision as merely "a topic sentence summarizing the trial court's task before issuing an order to show cause . . . ." (*Cooper*, *supra*, 54 Cal.App.5th at p. 118.) The first sentence states that 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." (§ 1170.95, subd. (c).) But according to *Cooper*, only the *subsequent* sentences in subdivision (c) "specify the procedure in undertaking that task" of prima facie review. (*Cooper*, *supra*, 54 Cal.App.5th at p. 118; see also *Tarkington*, *supra*, 49 Cal.App.5th at p. 917 (dis. opn. of Lavin, J.); JCI 31-32.)

By setting aside the first sentence of section 1170.95, subdivision (c), *Cooper* held that the true first step courts must take within that subdivision is to appoint counsel for petitioners as set forth in the second sentence. If so, then there remains only a single prima facie test, set forth in the last sentence of subdivision (c), which asks whether the petitioner has made "a prima facie showing that he or she is entitled to relief . . . ." (§ 1170.95, subd. (c).) This approach means that all petitioners who file a properly pleaded petition are entitled to counsel, no matter

how clearly false their claims are when compared to the undisputed record. (*Cooper*, *supra*, 54 Cal.App.5th at p. 118.)

Cooper's analysis is faulty for several reasons. Most importantly, *Cooper* was wrong to characterize the first statement in section 1170.95, subdivision (c), as merely a "topic sentence." Courts are not permitted to disregard portions of a statute—even if doing so would render a statute more efficient or fair—and *Cooper*'s holding that the first sentence of subdivision (c) is merely descriptive does just that. (*Massicot*, *supra*, 97 Cal.App.4th at p. 925 [courts are not permitted to add or subtract provisions in a statute].) If courts had such authority, it would radically reshape the longstanding, broadly accepted principles of statutory interpretation. "'It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage.'" (*Hernandez v. Department of Motor Vehicles* (2020) 49 Cal.App.5th 928, 935-936, quoting *Tuolomne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1038-1039; see also *Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 204 [same].)

To bolster its holding that the first sentence of section 1170.95, subdivision (c), may be disregarded, *Cooper* minimized the importance of its location at the beginning of that subdivision. While *Cooper* agreed with *Lewis II* that "the subdivisions of section 1170.95 generally proceed chronologically vis-a-vis each other," it disagreed that this means "*every single*

sentence of subdivision (c)" does so. (*Cooper*, *supra*, 54 Cal.App.5th at p. 118, italics original; see also *Tarkington*, *supra*, 49 Cal.App.5th at p. 920 (dis. opn. of Lavin, J.); JCI 31-32.) For example, *Cooper* pointed to subdivision (b)(1), where the statute first describes the court where the petition must be filed, before listing what claims it must contain. Because "the petition's contents come before the petition's filing and service," *Cooper* deduced that subdivision (b)(1), and thus the statute as a whole, is not written in purely chronological order. Thus, it held, the first sentence of subdivision (c) also need not be read strictly in that manner. (*Cooper*, *supra*, 54 Cal.App.5th at p. 118; see also *Tarkington*, *supra*, 49 Cal.App.5th at p. 918, fn. 6 (dis. opn. of Lavin, J.); JCI 32-33.)

But the premise of that argument is incorrect. Section 1170.95, subdivision (b)(1), is indeed chronological if read logically, from the perspective of the court receiving the petition. The first contact between the petition and the justice system occurs when the petition is filed, not when it is written. After it is filed in the appropriate court, *then* that court must examine its contents for pleading deficiencies under subdivisions (b)(1) and (b)(2).[9] Thus, nothing in subdivision (b) suggests the statute was written non-chronologically.[10]

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[9] JCI also points to the statement in section 1170.95, subdivision (b)(1), referring to the availability of the judge to "resentence" the petitioner, and claims the statute cannot be read in chronological order because resentencing occurs only after the proceedings in subdivision (c). (JCI 33.) However, subdivision (b)(1) is indeed chronological in that it identifies the judge who

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Furthermore, if a facially sufficient petition gives rise to a requirement for appointment of counsel, then it is precisely in section 1170.95, subdivision (b), where the statute would most reasonably state it. As noted, that subdivision defines the pleading requirements of a petition and the court's duties upon its initial receipt. (§ 1170.95, subd. (b)(2).) Instead, the Legislature placed the appointment of counsel requirement in subdivision (c). *Cooper* overlooks that fact.

Next, *Cooper* held that there cannot be two prima facie steps because, under *Lewis II* and its progeny, there is no substantive difference between them. Although step one asks whether the

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(…continued)

will consider the petition throughout the entire process, *including* the ultimate resentencing, if the petitioner qualifies. Neither amici nor the parties construe the statute to mean that the judge who considers prima facie eligibility is a different person from the one who later imposes a new sentence. The same is true of subdivision (f), which JCI similarly claims is non-chronological. (JCI 34.) That provision states that the statute does not abrogate any other rights available to the petitioner. (§ 1170.95, subd. (f).) Chronologically, it is logical to place this provision after the subdivisions defining the petition process in order to illustrate that, *having filed such a petition described above*, the petitioner has not thereby waived any other rights.

[10] Similarly, *Cooper* held that subdivision (c) is internally non-chronological because the sentence providing for extensions of time comes after the sentence explaining what briefs may be filed. (*Cooper*, *supra*, 54 Cal.App.5th at p. 118.) However, it is difficult to imagine how these sentences could have been written in a more chronological way. The nature of the parties' briefing and deadlines must be outlined before explaining that extensions of time may be granted for such briefing. Otherwise, it would be unclear what the purpose of the extensions would be.

petitioner "falls within the provisions of this section," and step two asks whether he is "entitled to relief," *Cooper* held that the statute uses these concepts interchangeably. (*Cooper*, *supra*, 54 Cal.App.5th at pp. 119-120; see also JCI 30-31, 34-35.) Respondent agrees that the two prima facie tests ask the same substantive legal question, i.e., whether the record of conviction shows as a matter of law that the petitioner is ineligible for relief. But that does not mean they are procedurally identical.

The two prima facie determinations may be distinct in time and manner of presentation even if the legal question they pose is the same. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 902 [use of disparate language renders the two prima facie steps "distinct"].) Step one poses the question of ineligibility as a matter of law in terms of a sua sponte screening analysis, whereas step two permits the parties to brief that question. This distinction has practical effect because, at step two, "the prosecutor may be able to identify additional material from the record of conviction not accessible to, or reviewed by, the court during its first prima facie determination (for example, jury instructions) that establish the petitioner is not eligible for relief. In a reply, the petitioner, represented by counsel, may rebut the prosecutor's claim of ineligibility." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330, fn. 9.)

Cooper also held that the 60-day deadline for the prosecutor's responsive brief in section 1170.95, subdivision (c), is incompatible with a two-step process. It reasoned that a sua sponte examination of the petition would have to occur within the same 60-day period in which the prosecutor is separately

considering the same question on his or her own deadline, making them unduly overlap, which would be a waste of judicial resources. (*Cooper*, *supra*, 54 Cal.App.5th at pp. 121-122; see also JCI 17-18, 26.) But as *Tarkington* explained, "[i]t is reasonable to infer that the Legislature simply intended to ensure that the petition is evaluated, from start to finish, in an expeditious fashion . . . [and] running the briefing period from the date of the petition's filing ensures that this is so . . . ." (*Tarkington*, *supra*, 49 Cal.App.5th at p. 904, fn. 9.) In other words, the court can easily conduct the sua sponte step one analysis without the prosecutor running afoul of the 60-day deadline, or the court may grant the prosecutor an extension of time.

Cooper disagreed with *Tarkington*'s interpretation of the 60-day deadline, stating that the most efficient way to implement a two-step prima facie process, if that had been the Legislature's intent, would have been to provide separate deadlines for each step. (*Cooper*, *supra*, 54 Cal.App.5th at p. 121 & fn. 8.) That may be true, but courts are not in a position to second-guess the Legislature's intent in that manner. The proper question is how best to effectuate the Legislature's intent based on the plain language in the statute, not how to reform the statute to obtain more efficient results. *Cooper*'s assumptions about legislative intent and the 60-day deadline led it to effectively delete the first sentence from subdivision (c). Conversely, *Tarkington*'s interpretation correctly pointed out that there is a plausible explanation for the 60-day deadline while giving meaning to all language in the statute. The task is to remain as closely tied to

the text as reasonably possible. (*Murphy*, *supra*, 40 Cal.4th at p. 1103.) *Tarkington* properly followed that approach.

Cooper also held that the two-step interpretation is untenable because the prosecution's responsive brief is mandatory, suggesting the court may not dismiss the petition before receiving that brief. (§ 1170.95, subd. (c) ["[t]he prosecutor shall file and serve a response"]; *Cooper*, *supra*, 54 Cal.App.5th at p. 122.) But this interpretation again ignores the first sentence of subdivision (c), which also uses mandatory language regarding the *court's* authority to conduct the step one review, stating it "*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." (§ 1170.95, subd. (c), italics added.) Because the first sentence may not be ignored, and because the statute should be read chronologically, the court's mandatory duty to conduct the sua sponte analysis comes before and may obviate the prosecutor's duty to respond.

JCI makes the related argument that counsel must be appointed for every facially adequate petition because section 1170.95, subdivision (b)(1), requires the petitioner to serve the petition on trial defense counsel and the prosecutor. JCI contends this means "the Legislature intended to involve counsel in litigating eligibility at the earliest possible state." (JCI 17-18.) But the service requirement in subdivision (b) is separate from the question of when counsel is appointed under subdivision (c). As a matter of common sense, it may be prudent to notify trial counsel that a petition has been filed in the event their

involvement will be helpful in those cases that do proceed to step two, or to an evidentiary hearing under subdivision (d)(3). But that does not tie the service provision to the appointment of counsel provision. The mere fact that a person must be served with a legal document does not necessarily require him or her to act. And even in cases where counsel is later appointed under subdivision (c), and does then have a duty to act, that person will not necessarily be the same attorney who represented the petitioner at trial and was previously served under subdivision (b). Therefore, there is no basis to assume any legislative intent regarding the appointment of counsel based on the service provision.[11] If the statute can be reasonably construed without jumping to conclusions unstated in the text, then it should be so construed. (*Murphy*, *supra*, 40 Cal.4th at p. 1103.)

Finally, turning to the legislative history of section 1170.95, *Cooper* stated that the statute was amended over time to place more responsibilities upon the prosecutor and fewer upon the court, which suggests that the Legislature did not ultimately intend there to be a step one sua sponte screening. (*Cooper*, *supra*, 54 Cal.App.5th at p. 122; see also *Tarkington*, *supra*, 49

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[11] JCI also claims that because the petition itself may convey the request for counsel, this shows that appointment of counsel is part of the "absolute earliest stage" in the process. (JCI 17.) However, the fact that the request for counsel may be made in the petition is fully compatible with *Lewis II*, as the court will refer to that request immediately after it determines that the petition has satisfied the step one screening, without needing to inquire further of the petitioner.

Cal.App.5th at p. 917 (dis. opn. of Lavin, J.); JCI 27-29, 35-36.)[12] But that characterization ignores that the first sentence of subdivision (c), which describes the step one review, was added to the statute in the *final* version of the bill. Before that, in the May 25 version of Senate Bill 1437, the proposed language required the court to automatically alert counsel for the parties upon receipt of the petition and to allow briefing regardless of whether the petition was plainly meritless. (Sen. Bill. No. 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, § 6.)[13] That version of the bill had no step one showing. The final version added the first sentence of subdivision (c), creating the two-step prima facie review process. (*Verdugo*, *supra*, 44 Cal.App.5th at p.

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[12] For example, the original, February 16, 2018, version of Senate Bill 1437 required the court to obtain the relevant documents from the record of conviction upon receiving the petition, whereas the May 25 version eliminated this duty and made the prosecutor's response mandatory, and the final version set the deadline for the prosecutor's response to run from the petition's filing date. (*Cooper*, *supra*, 54 Cal.App.5th at p. 122.)

[13] The May 25 version stated that "*Upon receipt of the petition*, the court *shall* provide notice to the attorney who represented the petitioner in the superior court . . . and to the district attorney . . . . The notice shall inform those parties that a petition had been filed pursuant to this section and that a response from both parties as to whether the petitioner is entitled to relief is required to be filed within 60 days. (Sen. Bill. No. 1437 (2017-2018 Reg. Sess.) as amended May 25, 2018, § 6, italics added.) It then directed that "[i]f the court finds that there is sufficient evidence that the petitioner falls within the provisions of this section, the court shall hold a resentencing hearing. . . ." (*Ibid*.)

331.)[14] *Cooper* fails to persuasively explain why the Legislature added what *Cooper* characterizes as a meaningless topic sentence to the final bill.

B. JCI's anecdotal descriptions of the legislative process are inadequate to demonstrate the intent of the Legislature as a whole

In addition to relying on *Cooper*, JCI also offers an interpretation of the legislative history of Senate Bill 1437 based on the recollections and informal actions of bill author Senator Nancy Skinner, JCI policy director Kate Chatfield, and others. Based largely on anecdotes, JCI purports to describe what the Legislature as a whole knew or intended when it enacted section 1170.95. (See JCI 12-15, 20-23, 25-26, 34-36.) These recollections, however, are inadequate to demonstrate legislative intent.

For example, regarding the risk of frivolous litigation, JCI claims that although the Legislature knew some individuals would file meritless petitions, it "anticipated" this would "not necessarily [be] as a result of any knowing falsehood" by a

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[14] The final version also retained the other prima facie analysis contemplated in the May 25 version (requiring both parties to address "whether the petitioner is entitled to relief") but made it the second step of the process—the last sentence of subdivision (c). (Compare § 1170.95, subd. (c) ["If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause"] with Sen. Bill. No. 1437, *supra*, as amended May 25, 2018, § 6 [subdivisions (c) and (d) stating the court shall require "a response from both parties as to whether the petitioner is entitled to relief" and hold a resentencing hearing if there is sufficient evidence to that effect].)

petitioner, but merely due to good faith "misapprehension of the law or facts." (JCI 14.) JCI also cites a tweet by a legislator rebuking attorneys who began charging fees to prepare petitions, implying this proves the entire Legislature's "unambiguous intent to have counsel appointed for petitioners at the outset of proceedings." (JCI 15.) Next, JCI assumes the Legislature intended for all petitioners to have appointed counsel because, at the time Senate Bill 1437 was being debated, there was another bill pending which would have ended cash bail. According to JCI, this proves the Legislature must have intended to provide counsel to all section 1170.95 petitioners as a parallel method to remedy wealth disparities in the criminal justice system. (JCI 20.) Also, when describing the bill amendment process, JCI dismisses any attempt to ascribe meaning to the order of the statutory text because, simply, "[t]hat's how the sausage was made." (JCI 35.) And as to the two separate sentences discussing the prima facie standard of subdivision (c), JCI posits that "[n]one of the stakeholders discussed the issue during the legislative process." (JCI 36.)

Such speculative and anecdotal observations do not shed light on legislative intent in any relevant way. "'The statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation.'" (*Tarkington*, *supra*, 49 Cal.App.5th at p. 904.) The legislative process necessarily involves synthesis of, and compromise among, competing views

and interests; that is why a law's plain text is the chief guide as to its meaning, and any resort to legislative history "must shed light on the collegial view of the Legislature as a whole." (*Ibid*.) JCI's evidence falls far short of countering the overwhelming weight of authority cogently interpreting 1170.95, subdivision (c), to permit courts to deny a resentencing petition before the appointment of counsel where the record shows that relief is precluded as a matter of law.[15]

JCI contends that the Legislature understood there would be costs associated with Senate Bill 1437, including the cost of providing appointed counsel for all. (JCI 24.) However, the materials JCI cites do not even discuss the idea of appointing counsel for all petitioners, much less state that such appointments are required. Rather, they say the costs of the

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[15] JCI points out that the Judicial Council sent a letter to Senator Skinner requesting that section 1170.95's language be amended to permit summary dismissals, and that the requested change was not made. (JCI 27-28.) But as *Tarkington* correctly observed, a letter from an outside party does not constitute legislative history, nor does the Legislature's inaction indicate that it disagreed with the points in the letter. There is no evidence the entire Legislature even considered the letter and, assuming it did, the Legislature could have concluded that the changes were unnecessary because the statute already allowed for summary dismissals. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 905-906 & fn. 11.) The fact that the letter was also sent to the Governor after Senate Bill 1437 was enacted does not change the analysis; the letter cannot reasonably be construed as a retroactive indicator of legislative intent or an executive report to the Governor's office about the content of the new law. (*Id*. at pp. 906-907.)

petition process are "unknown" and generally refer to them as expenses to "litigate petitions for resentencing." (Sen. Approp. Com., Rep. on Sen. Bill. No. 1437 (2017-2018 Reg. Sess.) May 14, 2018, p. 1; Sen. Approp. Com., Rep. on Sen. Bill. No. 1437 (2017-2018 Reg. Sess.) May 25, 2018 [Addendum], p. 1.) The costs that these reports discuss could reasonably be construed as referring to court time and resources expended even when a petition is summarily dismissed. They could also refer to costs incurred in cases where a petition rightly proceeds to the point of appointed counsel, or to an evidentiary hearing. Nothing in these legislative materials contradicts *Lewis II*'s interpretation of the law.

Finally, if *Lewis II* (decided on January 6, 2020) and its progeny misunderstood the statute, the Legislature could have corrected this error by amending the law over the past year. However, neither amici nor *Cooper* point to any effort by the Legislature to do so. When "a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1161, internal quotation marks omitted.)

III. THERE IS NO STRONG POLICY REASON TO CONSTRUE SECTION 1170.95 AS REQUIRING THAT COUNSEL BE APPOINTED FOR ALL PETITIONERS

JCI and CACJ raise various policy rationales supporting their view of why section 1170.95 should require the appointment of counsel for all petitioners. As explained in the Answer Brief,

however, *Lewis II*'s construction of the statute is fully consistent with the policy goals of Senate Bill 1437. (ABM 38-40.) In any event, JCI's and CACJ's arguments are unpersuasive.

JCI argues that incarcerated people who may seek section 1170.95 relief include those who are indigent or have limited English comprehension, intellectual disabilities, or mental health issues. (JCI 18; see also CACJ 19 ["refusing to appoint counsel risks denying [relief] . . . to defendants who . . . lack the literacy in legal vernacular and reasoning to express it"].) Respondent recognizes the challenges that unrepresented, incarcerated defendants face in litigating their claims. But *Lewis II*'s interpretation of section 1170.95 does not impose any burdens on petitioners that are made more difficult due to their personal characteristics. As explained in the Answer Brief, the denial of a petition at step one of the prima facie process may occur only if the legal nature of the conviction indicates that the petitioner is ineligible as a matter of law. (ABM 38-39.) At both steps one and two, all factual inferences are made in favor of the petitioner and the court may not engage in any factfinding contrary to the petitioner's claims. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329; *Tarkington*, *supra*, 49 Cal.App.5th at p. 909; *Drayton*, *supra*, 47 Cal.App.5th at p. 982.) Therefore, the record of conviction will either support summary denial of the petition or it will not, and this question will never depend on the petitioner's ability to explain or support his or her claims. All that is required is an averment of eligibility, which the court then compares to the record.

Additionally, JCI and CACJ claim it is counterintuitive and wasteful to guarantee counsel on appellate review of section 1170.95 petitions while permitting summary dismissals at the trial level without counsel. (JCI 28-29; CACJ 18-19.) JCI claims "appellate counsel and courts are doing the work that was not done in the trial courts below." (JCI 29.) This argument is misleading, and *Frazier* properly rejected the same claim in the context of section 1170, subdivision (d). In collateral resentencing litigation, the mere fact that a petitioner is guaranteed counsel on appeal does not mean he or she was entitled to counsel in the prima facie phase of the case below. (*Frazier*, *supra*, 269 Cal.Rptr.3d at pp. 812-813.)

Frazier's rejection of this claim makes sense. The denial of a section 1170.95 petition is an appealable order (§ 1237, subd. (b)), and defendants have the right to appointed counsel on appeal. (*People v. Serrano* (2012) 211 Cal.App.4th 496, 499-500; *People v. Kelly* (2006) 40 Cal.4th 106, 117.) Therefore, even when a post-conviction resentencing proceeding (or a phase thereof) does not require the appointment of counsel, the petitioner may seek review with the help of appointed counsel if the petition is denied. (See *People v. Perkins* (2016) 244 Cal.App.4th 129, 135, 139, fn. 4 [section 1170.18 does not guarantee counsel at the prima facie stage, but counsel was appointed on appeal from the denial of a petition].) There is no reason to believe the appointment of counsel for all petitioners would create a more equitable or efficient process. When a petition is dismissed because the conviction is statutorily excluded, "[i]t is unclear how

appointed counsel could have assisted [the petitioner] in any meaningful way," and amici provide no answer to that question. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 910.) In the minority of cases where a court errs, the error will be reversed on appeal. (See *People v. Offley, et al.* (2020) 48 Cal.App.5th 588, 598.) And where it is unclear or arguable whether a particular type of conviction qualifies for resentencing, that question will be adjudicated on appeal as well, where petitioners are provided counsel. (See, *supra*, footnote 5.) The appointment of counsel for all petitioners at the trial court level would only add inefficiency by lengthening the process for a vast number of plainly meritless petitions without giving good-faith petitioners an appreciable benefit.

Next, JCI attempts to distinguish section 1170.95 from other collateral resentencing schemes where summary denials are permitted because it claims section 1170.95 presents uniquely complicated statutory questions. (JCI 37-39.)[16] This argument mirrors the claim CACJ made on constitutional grounds (see

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[16] Both Three Strikes resentencing under section 1170.126 and felony-to-misdemeanor resentencing under section 1170.18 include a prima facie stage where petitions may be summarily denied. (See *Perkins*, *supra*, 244 Cal.App.4th at pp. 135, 139, fn. 4 [affirming denial of section 1170.18 petition filed by self-represented defendant with observation that "we do not agree every offender is entitled to assistance of counsel in preparing a petition for resentencing"]; *People v. Frierson* (2017) 4 Cal.5th 225, 234 [section 1170.126 resentencing requires petitioners' to satisfy initial burden of establishing eligibility]; *People v. Johnson* (2016) 244 Cal.App.4th 384, 387 [affirming summary denial of section 1170.126 petition].)

CACJ 16), and is equally meritless. For example, JCI claims that in many cases, multiple theories of liability will have been presented at trial or in advance of a guilty plea, and it will be unclear which theory applied. JCI also argues there may be "hearsay objections" raised to certain items in the record of conviction. (JCI 37-39.) Similarly, CACJ claims that the records of conviction in some very old cases may be incomplete or inaccurate. (CACJ 11-12.) And CACJ argues that reliance on appellate opinions (i.e., from the review of the initial conviction) may be unreliable because such opinions "are necessarily skewed towards the prosecution" with an eye to upholding a conviction that may no longer be proper in light of Senate Bill 1437. (CACJ 12.)

All of these arguments ignore existing authority in accord with *Lewis II* that addresses the stated concerns. If at least one theory of liability that has been eliminated by Senate Bill 1437 was offered at trial or before a guilty plea, and it is impossible to determine from the record that a still-valid theory supports the conviction, then the court should appoint counsel. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329; *Tarkington*, *supra*, 49 Cal.App.5th at p. 909.)[17] Hearsay objections would be

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[17] If it remains impossible after the appointment of counsel to determine as a matter of law that the theory of liability underlying the conviction remains valid, then an order to show cause should issue. (*Drayton*, *supra*, 47 Cal.App.5th at p. 982.) The parties may then proceed to the evidentiary hearing under section 1170.95, subdivision (d)(3). CACJ claims the *Lewis II* interpretation "flies in the face" of the evidentiary hearing

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unwarranted because the record of conviction is not being considered at that stage for the weight of the evidence; it is only considered for the purpose of shedding light on the legal nature of the conviction. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 333, citing *People v. Woodell* (1998) 17 Cal.4th 448, 456.) If the conviction is based on a guilty plea, the court considers the record only to determine the prosecution's theory that led to the plea, or the factual basis for the plea to which the defendant stipulated. (*Perez*, *supra*, 54 Cal.App.5th at pp. 904-906.) The same is true if the relevant part of the record is a prior appellate opinion. The court may not rely on the statement of facts or the appellate court's conclusions that substantial evidence supports the murder conviction, or any particular theory of liability for it.[18] Rather, the opinion may only be considered to ascertain the theory of

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(…continued)

requirement, because there the parties may present new evidence and the prosecution bears the burden of proof beyond a reasonable doubt. (CACJ 12-13.) CACJ is incorrect. Screening petitions that are meritless as a matter of law does not impinge on petitioners' rights at the evidentiary hearing, where the court's task is to weigh the merits of petitions that *are* potentially meritorious.

[18] In *People v. Garcia* (2020) 57 Cal.App.5th 100 [271 Cal.Rptr.3d 206], the court went beyond *Lewis II* and *Verdugo*, and rejected respondent's concession that an order to show cause was required because the record did not prove the petitioner's ineligibility as a matter of law. The court instead held that substantial evidence is the proper standard to consider whether a petitioner has satisfied the prima facie requirements of section 1170.95, subdivision (c). (*Garcia*, *supra*, 271 Cal.Rptr.3d at pp. 216-218.) Respondent does not endorse that view.

liability that the jury actually based its guilty verdict upon. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329-330, 333.)[19]

The fact that *some* section 1170.95 petitions involve convictions where the theory of liability cannot be determined as a matter of law, or where the court requires the assistance of counsel to carefully examine the record before making that determination, does not support JCI's or CACJ's points. Such petitions should indeed proceed past step one. But, as JCI recognizes, many other petitions do not involve such issues. (JCI 39 ["To be sure, there will be cases where the facts are unassailable, the petitioner is clearly not entitled to relief, and a judge will be able to determine that quickly with a review of undisputed documents"]; *Verdugo*, *supra*, 44 Cal.App.5th at p. 330.) This category of obviously meritless petitions is precisely why the two-step prima facie process, followed by an evidentiary hearing, makes sense. JCI and CACJ wrongly begin with the assumption that any initial screening is beyond the capacity of trial courts and then, reasoning backward, they wrongly conclude that the Legislature must have intended for the immediate

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[19] *Woodell*, on which *Verdugo* relied, observed that where the ultimate question in considering a resentencing petition is the nature of the defendant's crime, an appellate opinion may be examined for the non-hearsay purpose of determining the basis of the conviction. Stated differently, "the appellate opinion itself, representing the action of a court, clearly comes within the exception to the hearsay rule for official records." It is "a judicial statement and can help determine the nature of the crime of which the defendant had been convicted." (*Woodell*, *supra*, 17 Cal.4th at p. 459.)

appointment of counsel as a prophylactic measure. (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 908-910.) But absent clear language in the statute requiring courts to appoint counsel for all petitioners, there is no basis to doubt the ability of trial courts to summarily dismiss those petitions that obviously lack merit as a matter of law.

CACJ also points to cases, including some unpublished decisions, where trial courts erred in denying petitions without appointing counsel, claiming that "[e]xamples of trial court mistakes in this area abound." (CACJ 19-20.) But CACJ fails to show that the courts at issue actually followed the proper framework established by *Lewis II*, or that appointing counsel would have prevented the error. It makes little sense for CACJ to attack *Lewis II* by citing cases *that did not follow it*. For example, CACJ relies on *People v. Caldwell* (Apr. 1, 2020, B298006) [2020 WL 1547370, nonpub. opn.], where the trial court considered a petition in March 2019—nearly a year before *Lewis II* was decided—and improperly made a factual finding to support its decision that the petitioner was ineligible without appointing counsel. (*Id.* at *1.) That decision, which was properly reversed under the *Lewis II* framework, obviously does not support CACJ's argument that *Lewis II* was wrongly decided. Had counsel been appointed in *Caldwell*, it is quite likely the court would have made the very same error, since it believed it could weigh facts and evidence to deny a petition. That occurred long before *Verdugo* and *Drayton* were decided, meaning defense counsel

would have had no published authority to convince the court otherwise.

People v. Logoleo (Feb. 24, 2020, G057658) [2020 WL 878808, nonpub. opn.], which CACJ characterizes as a particularly "chilling" example of injustice, also does not suggest *Lewis II* was wrongly decided. (CACJ 21.) The petitioner there pleaded guilty to breaking into the home of an elderly couple in 1998 and standing by while his accomplice beat the 81-year-old husband to death. (*Logoleo*, *supra*, 2020 WL 878808, at *1.) In 2019, before *Lewis II* was decided, the trial court summarily denied the petitioner's section 1170.95 petition by mistakenly holding that he was not convicted under a theory affected by Senate Bill 1437. On appeal in 2020, the reviewing court applied *Lewis II* and the denial was reversed. (*Id*. at *4-5.) Perhaps an attorney, had one been appointed, could have corrected the trial court by pointing out that the petitioner may have been convicted under a felony murder theory. (See *id*. at *4.) But that fact was discovered on appeal in any event, *Lewis II* was correctly applied, and no injustice resulted. The fact that appellate courts must sometimes correct ordinary trial court errors does not support the vast expansion of the appointment of counsel that CACJ argues for, especially when the error occurred before the seminal appellate decision interpreting a new statute. The only aspect of *Logoleo* that can be fairly characterized as "chilling" are the facts of the crime itself.

CACJ also relies on the reversals in *Offley*, *supra*, 48 Cal.App.5th 588, *Torres*, *supra*, 46 Cal.App.5th at p. 1168, and

Cooper, *supra*, 54 Cal.App.5th at p. 106, in arguing against the *Lewis II* framework. But these cases do not support the argument. (See ABM 40-49.) In *Offley*, as discussed in the Answer Brief, the trial court believed that a firearm enhancement made the petitioner ineligible because it showed he was the actual killer; on appeal, the reviewing court examined the jury instructions and explained why the enhancement did not compel that conclusion, and thus reversed the judgment. (*Offley*, *supra*, 48 Cal.App.5th at p. 598.) No injustice occurred. As to *Torres*, there is a conflict in the Courts of Appeal regarding whether a pre-*Banks* felony murder special circumstance renders a petitioner ineligible for relief, but the appointment of counsel in such cases would have no bearing on that question. The *Torres* conflict of authority does not undermine the *Lewis II* framework because the courts on *both sides* have followed *Lewis II*. (See, *supra*, footnote 5.)[20]

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[20] In addition to *Torres*, CACJ cites the unpublished cases *People v. Jefferson* (May 4, 2020, B296822) [2020 WL 2121663, nonpub. opn.], and *People v. McCraw* (Apr. 24, 2020) [2020 WL 1969381, nonpub. opn.], ostensibly to demonstrate that the trial courts in those cases erred when considering felony murder special circumstance convictions. That is incorrect given the weight of authority noted in footnote 5, but in any event it has no bearing on the issue of appointed counsel. Even if counsel had been immediately appointed in these cases, the result very likely would have been the same. The overwhelming weight of authority has concluded that section 1170.95 relief is unavailable in such cases as a matter of law. (*Gomez*, *supra*, 52 Cal.App.5th at p. 14; *Galvan*, *supra*, 52 Cal.App.5th at p. 1137; *Murillo*, *supra*, 54 Cal.App.5th at p. 168; *Allison*, *supra*, 55 Cal.App.5th at pp. 458-462; *Nunez*, *supra*, 271 Cal.Rptr.3d at pp. 199-205; *Jones*, (continued…)

Nor does *Cooper* aid CACJ's argument that the appointment of counsel is necessary to ensure equitable results. The trial court's denial of the petition there predated *Lewis II*, and even if counsel had been appointed, it is likely the same alleged prejudicial error would have been addressed on appeal. *Cooper* was based on a petition stemming from a no contest plea. The trial court dismissed the petition in February 2019 (see *Cooper*, *supra*, 54 Cal.App.5th at p. 110), long before *Lewis II* was decided, let alone the first cases applying *Lewis II* to guilty and no contest pleas. (See *Nguyen*, *supra*, 53 Cal.App.5th at p. 1154; *Perez*, *supra*, 54 Cal.App.5th at p. 896.) The trial court in *Cooper* focused on the details of the crime described in the preliminary hearing to find that the plea was based on a theory of murder liability that survives Senate Bill 1437. *Cooper* agreed that the trial court was permitted to consult the preliminary hearing transcript to determine the petitioner's eligibility for relief, but disagreed that the record was sufficiently clear as to the nature of the plea. (*Cooper*, *supra*, 54 Cal.App.5th at pp. 123-126.) Under *Lewis II*, as interpreted by *Perez*, the trial court should have limited its review of the record to examining the prosecution's theories of liability and the basis for the plea without weighing

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(…continued)

supra, 270 Cal.Rptr.3d at p. 364.) Some of this authority stems from cases in which the petitioner was represented by appointed counsel below and the petition was denied at step two (see *Allison*, *supra*, 55 Cal.App.5th at p. 455), whereas other authority involves summary denials at step one (see *Galvan*, *supra*, 52 Cal.App.5th at p. 1139). The results have been the same.

the facts of the crime. (*Perez*, *supra*, 54 Cal.App.5th at pp. 906-907.) Even assuming for the sake of argument that the trial court overstepped its authority in *Cooper*, its error was not based on the rules set forth in *Lewis II* and its progeny. In any event, even if counsel had been appointed in the trial court and raised the same points later made by the appellate court in *Cooper*, he or she would not have had any authority to rely upon at that time. Thus, it is very likely the trial court would have reached the same conclusion and denied the petition, and the issue would have been presented to the court of appeal in any event. Since that is precisely what ultimately occurred, the non-appointment of counsel did not ultimately result in any injustice.[21]

The focus on cases where the denials of petitions have been reversed is also misleading because it fails to consider those cases in the context of section 1170.95 litigation as a whole. CACJ does not mention the numerous cases where meritless and even frivolous petitions have been correctly denied without the need to appoint counsel. "[T]he mere existence of summary denials is not evidence of error; . . . it has not been the case that only defendants convicted of qualifying crimes under qualifying

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[21] CACJ's reliance on *People v. Garcia* (2020) 46 Cal.App.5th 123, makes little sense. (CACJ 19.) The defendant there did not file a section 1170.95 petition at all, meaning no such petition was denied, nor was any such denial reversed on appeal. The defendant instead chose to seek relief under Senate Bill 1437 on direct appeal from his conviction, which was denied pursuant to *People v. Martinez* (2019) 31 Cal.App.5th 719, 724-729. (*Garcia*, *supra*, 46 Cal.App.5th at pp. 181-182.)

theories have petitioned." (*Tarkington*, *supra*, 49 Cal.App.5th at pp. 909-910; see also, *supra*, footnotes 5-7 [authority affirming denials based on ineligibility as a matter of law]; ABM 22-26, 44.) The statute properly strikes a balance between allowing courts to dismiss a heavy volume of plainly meritless cases at the threshold without appointing counsel and the possibility that some few errors that might have been averted by the appointment of counsel will have to be corrected on appeal. That balance is entirely reasonable.

Moreover, as a matter of policy, *Daniel*, *supra*, 271 Cal.Rptr.3d 591, undermines the arguments of JCI and CACJ that the *Lewis II* framework is inequitable. As noted, *Daniel* agreed with *Cooper* that the statutory language of section 1170.95 requires that counsel be appointed for all petitioners. But *Daniel* held that the failure to do so is harmless if the record of conviction—including the jury instructions—shows that the petitioner is "categorically ineligible for relief" because he was not convicted under a theory of liability affected by Senate Bill 1437. (*Id*. at pp. 599, 601, citing *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal unwarranted if it is not reasonably probable that defendant would have obtained a more favorable result but for the error].) Even assuming a petitioner could offer new evidence casting doubt on the still-valid basis for his or her original murder conviction—which, for example, might be a proper subject of a habeas petition—*Daniel* held the petitioner still could not obtain an order to show cause under section 1170.95. The fact

that a jury convicted the petitioner on a proper basis necessarily precludes relief. (*Daniel*, *supra*, 271 Cal.Rptr.3d at p. 601.)

Daniel's reference to a petitioner being "categorically ineligible for relief" is simply another way to say ineligibility as a matter of law. *Daniel*'s use of that phrase shows why requiring petitioners to satisfy a step one screening before obtaining appointed counsel is sensible. Jury instructions are one of the key documents in the record that a court following *Lewis II* will rely upon to summarily deny a petition. (See, e.g., *People v. Edwards* (2020) 48 Cal.App.5th 666, 674-675, review granted July 8, 2020, S262481.) By relying on the instructions to show that failure to appoint counsel was harmless, *Daniel* is in accord with *Tarkington*'s holding that if the record indicates a petitioner is ineligible as a matter of law, then the involvement of counsel is futile. (*Tarkington*, *supra*, 49 Cal.App.5th at p. 910 [nothing could "change the fact" that the petitioner was convicted under a theory unaffected by Senate Bill 1437].) Although JCI and CACJ insist counsel must always be appointed to avoid injustice, *Daniel* demonstrates why that is not so.[22]

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[22] *Daniel* also casts doubt on that same court's earlier conclusion in *Cooper* that the *Lewis II* framework "results in an anomalous procedure . . . ." (*Cooper*, *supra*, 54 Cal.App.5th at p. 119.) The two-step procedure is not anomalous. To the contrary, the anomalous result is that of the *Cooper-Daniel* framework, which requires the appointment of counsel in virtually every case, yet finds the failure to do so harmless under the most common circumstances.

Finally, a holding in this case contrary to *Lewis II* would have a profound unsettling effect on a large number of cases that have already been decided under that framework without the appointment of counsel. In the absence of any demonstrable injustice, that result should be disfavored. When there has been broad reliance on a judicial interpretation of a statute, a court should carefully consider what "undesirable consequences" may flow from reversing that interpretation. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1213-1214.) Courts have followed *Lewis II* to summarily deny numerous clearly meritless petitions. (See *Tarkington*, *supra*, 49 Cal.App.5th at pp. 909-910.) And where the trial courts have prematurely denied a petition without appointing counsel, these errors have been corrected on appeal. (See *Offley*, *supra*, 48 Cal.App.5th at p. 598.) Relitigating these many cases would elevate form over substance and place unwarranted additional burdens on the trial courts of this State.

IV. CDAA IS CORRECT THAT SECTION 1170.95 PERMITS SUMMARY DENIAL OF A PETITION, BUT ITS THEORY IMPROPERLY EXPANDS THE CIRCUMSTANCES WHERE THAT MAY OCCUR

CDAA agrees with respondent's position in the Answer Brief that a section 1170.95 petition may be summarily denied before the appointment of counsel if the record of conviction shows the petitioner is ineligible for relief as a matter of law. (CDAA 5-16.) There is one aspect of CDAA's argument, however, that incorrectly contradicts *Verdugo* and *Drayton*, even as CDAA

favorably cites those cases.[23] While CDAA agrees that a court is not permitted to conduct factfinding outside the record of conviction at the prima facie stages, it implies that the court may summarily deny a petition if the facts presented at trial showed the petitioner *could* be convicted of murder under the amended law. CDAA bases this theory on section 1170.95, subdivision (a)(3), which states that one criterion for relief is that "[t]he petitioner could not be convicted of . . . murder because of changes" Senate Bill 1437 made to sections 188 and 189. (CDAA 12-13.) However, to deny a petition based on the theory that a petitioner *could* be convicted under the amended law, when that was not necessarily the basis for the conviction, would require impermissible factfinding prior to the evidentiary hearing stage. Therefore, this aspect of CDAA's position is incorrect.

Verdugo explained that summary denial is appropriate only if the record of conviction demonstrates ineligibility as a matter of law, and it gave several examples of how the record could reveal that fact. For example, a petition may be summarily denied if the petitioner was not convicted of murder at all, or was the sole assailant in a murder with an enhancement for personal

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[23] Respondent recognizes that *Verdugo* and *Drayton* expanded upon *Lewis II* in ways that may technically exceed the scope of the questions presented here. The analyses in these decisions are interdependent, however, and should be read together as setting out an integrated, coherent interpretation of section 1170.95, subdivision (c). As discussed below, because CDAA's position is inconsistent with *Verdugo* and *Drayton*, it is, by extension, inconsistent with *Lewis II* as well.

discharge of a firearm. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330.) But if the jury was never asked (or did not necessarily have to decide) whether a certain fact was true, then the court may not determine that fact for itself without issuing an order to show cause. (*Drayton*, *supra*, 47 Cal.App.5th at p. 982.) To do so would exceed scope of the matter-of-law determination. *Drayton*, unlike *Verdugo*, was concerned with the second prima facie step, after the appointment of counsel.[24] However, reading *Drayton* and *Verdugo* in harmony means that any limitation on the power of courts to deny a petition during the prima facie process *after* the appointment of counsel must also apply *before* the appointment of counsel. Otherwise, it would place a greater burden on unrepresented petitioners at step one than on represented petitioners at step two. Thus, the legal analysis in both steps is the same, even though the involvement of counsel at step two may be helpful for practical reasons. (See *Verdugo*, *supra*, 44 Cal.App.5th at p. 330, fn. 9.)

Setting aside the question of harmonizing *Drayton* and *Verdugo*, the text of section 1170.95, subdivision (c), itself also indicates that the legal analysis in steps one and two is the same, and that the only difference is procedural. Both sentences discussing the prima facie steps ask whether the petitioner has

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[24] In *Drayton*, the petitioner had counsel, so step one was not implicated, and the court focused only on the requirements to obtain an order to show cause. (*Drayton*, *supra*, 47 Cal.App.5th at p. 976, fn. 6.) But reading *Drayton* and *Verdugo* together covers the proper procedures at both steps one and two.

made a "prima facie showing," so there is no textual basis to set a different bar for petitioners after the appointment of counsel than before. Also, both prima facie steps must be materially distinguishable from the evidentiary hearing stage in subdivision (d)(3), where new evidence may be presented and weighed. That suggests that neither prima facie step permits the weighing of facts and evidence, or it would render the subdivision (d)(3) stage surplusage.

Therefore, when CDAA contends that summary denial may be based merely on the theory that a petitioner *could* be liable under the amended law, it necessarily diverges from the statutory text as well as the reasoning of *Verdugo* and *Drayton*. To find that a petitioner could be liable under a theory not necessarily encompassed by the original conviction requires impermissible factfinding. That is because any theory of liability—e.g., whether the petitioner acted with intent to kill, or was a major participant in the underlying felony—is predicated on weighing facts. And if factfinding were permitted at either prima facie step, then it must be permitted in both, which means unrepresented petitioners would be expected to make complex arguments involving factfinding at step one without the aid of counsel. Respondent does not endorse this view.

CDAA is correct that section 1170.95, subdivision (a)(3), asks whether a petitioner "could not be" convicted of murder under the amended law—which suggests that a petitioner is ineligible if he or she *could* be so convicted. But, before issuance of an order to show cause, this question must be viewed in the proper context of

the subdivision (c) prima facie analysis. There, all factual inferences are drawn in the petitioner's favor. (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) This prima facie bar was intentionally and correctly set very low. If there is an unresolved question about whether a petitioner could be convicted under the amended law, but it is unclear whether he or she actually was so convicted given the original trial or plea, then that issue may only be resolved after an order to show cause issues—either by the prosecution's concession or at a contested evidentiary hearing under subdivision (d)(3).

CDAA's position is analogous to that of *Garcia*, *supra*, 271 Cal.Rptr.3d at pp. 215-218, which expressly disagreed with *Drayton* and was decided several weeks after CDAA filed its amicus curiae brief. *Garcia* similarly relied on the phrase "could not be convicted" in section 1170.95, subdivision (a)(3), holding that the phrase indicates a petition may be denied at the prima facie stages if there is substantial evidence of liability under a still-valid theory. (*Garcia*, *supra*, 271 Cal.Rptr.3d at p. 217.) *Garcia* reasoned that such a dismissal does not require factfinding or a weighing of facts and evidence, and characterized it instead as a purely legal analysis akin to substantial evidence review of a conviction on appeal. (*Ibid*., citing *People v. Stanley* (1995) 10 Cal.4th 764, 792.) Respondent does not agree. All arguable inferences must be drawn in the petitioner's favor during the prima facie review in subdivision (c) if it is to be meaningfully different from the evidentiary hearing under subdivision (d)(3). To do otherwise—i.e., to permit denial of a

petition at the prima facie stage based on a theory not necessarily encompassed by the conviction—would inherently involve novel consideration of whether the facts support a valid theory of liability. In contrast, in a traditional substantial evidence analysis, where the record is viewed "in the light most favorable" to the prior factfinder's conclusions, such weighing does not occur. (*Stanley*, *supra*, 10 Cal.4th at p. 792.)

CONCLUSION

The views of amici, to the extent they differ from those in the Answer Brief, are not persuasive. The judgment in *Lewis II* should be affirmed.

Respectfully submitted,

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January 15, 2021

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER TO BRIEFS OF AMICI CURIAE** uses a 13 point Century Schoolbook font and contains 10,945 words.

XAVIER BECERRA
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January 15, 2021

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. Vince E. Lewis***

No.: **S260598**

I declare:

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SOUTH CENTRAL DISTRICT
COMPTON COURTHOUSE
200 WEST COMPTON BOULEVARD
DEPARTMENT J
COMPTON, CA 90220

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: ***People v. Vince E. Lewis***

No.: **S260598**

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 15, 2021**, at Los Angeles, California.

S-Farr	/s/
Declarant	Signature

II:sf
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STATE OF CALIFORNIA
Supreme Court of California

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Ivri, Idan (260354)

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